37

THE DIGEST

OF

ENGLISH CASE LAW.

THE DIGEST

OF

ENGLISH CASE LAW

CONTAINING THE

REPORTED DECISIONS

OF THE

SUPERIOR COURTS,

AND

A SELECTION FROM THOSE OF THE IRISH COURTS,

TO THE END OF

1897.

UNDER THE GENERAL EDITORSHIP OF

JOHN MEWS,

BARRISTER-AT-LAW.

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OF THE NAMES OF THE

PRINCIPAL REPORTS CITED.

[1891] A. C.	Law Reports, Appeal Cases (1891 onwards).
A. & E.	Adolphus and Ellis. Q. B.
Addams Ecc.	Addams. Ecclesiastical.
Aleyn	Aleyn. K. B.
Amb.	Ambler. Ch.
Anderson	Anderson. C. P.
Andrews	Andrews. K. B.
Anst.	Anstruther. Ex.
App. Cas.	Law Reports, Appeal Cases (1876—1890).
Arn.	Arnold. C. P.
Arn. & H.	Arnold and Hodges. Q. B.
Asp. M. C.	Aspinall. Maritime Cases.
Atk.	Atkyns. Ch.
B. & Ad.	Barnewall and Adolphus. K. B.
B. & Ald.	Barnewall and Alderson. K. B.
B. & C.	Barnewall and Cresswell. K. B.
B. & S.	Best and Smith. Q. B.
B. C. C.	Lowndes and Maxwell. Bail Court.
B. C. Rep.	Saunders and Cole. Bail Court.
Ball & B.	Ball and Beatty. Ch. (Ireland).
Bar. & Arn.	Barron and Arnold. Election.
Bar. & Au.	Barron and Austin. Election.
Barnard. Ch.	Barnardiston. Ch.
Barnard. K. B.	Barnardiston. K. B.
Batty	Batty. K. B. (Ireland).
Beat.	Beatty. Ch. (Ireland).
Beav.	Beavan. Rolls Court.
Bell, C. C.	Bell. Crown Cases.
Bing.	Bingham. C. P.
Bing (N.C.)	Bingham. New Cases. C. P.
Bligh	Bligh. H. L.
Bos. & P.	Bosanquet and Puller. C. P.
Bos. & P. (N.R.)	Bosanquet and Puller. New Reports. C. P.
Bott P. L.	Bott's Poor Laws.
Br. & B.	Broderip and Bingham. C. P.
Br. & Lush.	Browning and Lushington. Adm.
Bro. C. C.	Brown. Ch.
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Buck	Buck. Bky.
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Hodges	Hodges. C. P.
Hog.	Hogan. Rolls (Ireland).
Holt	Holt. K B.
Holt, Eq.	Holt. Eq.
Holt, N. P.	Holt. Nisi Prius.
Hopw. & C.	Hopwood and Coltman. Registration.
Hopw. & P.	Hopwood and Philbrick. Registration.
Hurl. & W.	Hurlstone and Walmsley. Ex.
Ir. C. L. R.	Irish Com. Law (1850—1866).
Ir. Ch. R.	Irish Chancery (1850—1866).
Ir. Eq. R.	Irish Equity Reports.
[1894] Ir. R.	Irish Law Reports (1894 onwards).
Ir. R. C. L.	Irish Com. Law (1866—1878).
Ir. R. Eq.	Irish Equity (1866—1878).
J. & H.	Johnson and Hemming. Ch.
J. & W.	Jacob and Walker. Ch.
J. Kelyng	Sir J. Kelyng. Crown Cases.
J. P.	The Justice of the Peace.
Jacob	Jacob. Ch.
Jenk.	Jenkins. Ex.
Jo. & Lat.	Jones and Latouche. Ch. (Ireland).
Johns.	Johnson. Ch.
Jones	Jones. Ex. (Ireland).
Jones & C.	Jones and Carey. Ex. (Ireland).
Jur.	The Jurist.
K. & G.	Keane and Grant. Registration.
K. & J.	Kay and Johnson. Ch.
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Keb.	Keble. K. B.
Keen	Keen. Rolls Court.
Keilw.	Keilway. K. B.
Kel.	Kelyng, Sir John. K. B.
Ken.	Kenyon. K. B.
Knapp	Knapp. P. C.
Knapp & O.	Knapp and Ombler. Election.
L. & C.	Leigh and Cave. Crown Cases.
L. & M.	Lowndes and Maxwell. Bail Court.
L. M. & P.	Lowndes, Maxwell, and Pollock. Bail Court.
L. T.	Law Times, New Series.
L. J. (o.s.) Ch. K.B. etc.	Law Journal Reports, 1822 to 1831.
L. J. Ch.	Chancery.
,, Bk.	Bankruptcy.
,, C. P.	Common Pleas.
,, Ex.	Exchequer.
,, M. C.	Magistrates' Cases.
,, Q. B.	Queen's Bench.
,, P. C.	Privy Council.
,, P. & M.	Probate and Matrimonial.
,, P.	Probate, Divorce, and Admiralty.
,, Adm.	Admiralty.
,, Ecc.	Ecclesiastical.

From 1831 onwards.

L. R. H. L.	Law Reports, 1866 to 1875 inclusive.
L. R. P. C.	
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L. R. H. L. Sc.	
L. R. Ir.	Irish Law Reports (1879—1893).
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Ld. Raym.	Lord Raymond. K. B.
Lev.	Levinz. K. B.
Lewin, C. C.	Lewin. Crown Cases.
Lit. Rep.	Littleton. C. P.
Ll. & G.	Lloyd and Goold. Ch. (Ireland).
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Longf. & T.	Longfield and Townsend. Ex. (Ireland).
Lush.	Lushington. Adm.
Lutw.	Lutwyche. C. P.
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M. & M.	Moody and Malkin. Nisi Prius.
M. & P.	Moore and Payne. C. P.
M. & Rob.	Moody and Robinson. Nisi Prius.
M. & S.	Maule and Selwyn. K. B.
M. & Sc.	Moore and Scott. C. P.
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Mac. & G.	Macnaghten and Gordon. Ch.
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Macq. H. L.	Macqueen. H. L.
Madd.	Maddock. Ch.
Man. & G.	Manning and Granger. C. P.
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Manson	Manson. Bky. and Winding-up.
Marshall	Marshall. C. P.
Meg.	Megone. Company Cases.
Mer.	Merivale. Ch.
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Moll.	Molloy. Ch. (Ireland).
Mont.	Montagu. Bky.
Mont. & Ayr.	Montagu and Ayrton. Bky.
Mont. & B.	Montagu and Bligh. Bky.
Mont. & C.	Montagu and Chitty. Bky.
Mont & M'Ar.	Montagu and M'Arthur. Bky.
Mont. D. & D.	Montagu, Deacon, and De Gex. Bky.
Moore	Moore. C. P.
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Morrell	Morrell. Bky.
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Ph. .....Phillips. Ch.
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Tyrw. & G. .....Tyrwhitt and Granger. Ex.

Vent. .....Ventris. K. B.
Vern. .....Vernon. Ch.
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Ves. sen.....Vesey, sen. Ch.
Ves.....Vesey, jun. Ch.
V. & B. .....Vesey and Beames. Ch.

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W. Jones .....Sir W. Jones. K. B.
W. Kelynge ..... Sir W. Kelynge. Ch.
W. R. .....Weekly Reporter.
W. W. & D. .....Wilmore, Wollaston and Davison. K. B.
W. W. & H. .....Wilmore, Wollaston and Hodges. K. B.
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The Digest

OF

ENGLISH CASE LAW.

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[By R. G. MARSDEN.]

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A. LIFE.

I. CONTRACT.

Nature of.]—The contract of life assurance is a contract to pay a certain sum of money upon the death of a person in consideration of the due payment of certain annual premiums during his life. *Dalby* v. *India and London Life Assurance Co.*, 15 C. B. 365; 3 C. L. R. 61; 24 L. J., C. P. 2; 18 Jur. 1024; 3 W. R. 116—Ex. Ch. And see *India and London Life Assurance Co.* v. *Dalby*, 4 De G. & Sm. 462.

It is not a contract of indemnity. *Ib.*

Validity.]—A condition that policies effected on persons' own lives, who should die by duelling or by their own hands or by the hands of justice, would become void so far as regards the personal representatives of the person so dying, but would remain in force only to the extent of any bonâ fide interest which might have been acquired by any other person under assignment by deed for consideration or by way of security or indemnity, or by virtue of any legal or equitable lien as a security for money, upon proof of the extent of such interest, does not render such policies void on the ground that it holds out an inducement to the assured to commit suicide. *Moore* v. *Woolsey*, 4 El. & Bl. 243; 3 C. L. R. 207; 24 L. J., Q. B. 40; 1 Jur. (N.S.) 468; 3 W. R. 66.

Powers, Appointment, &c., of Directors.]—A person who effects a policy with a life assurance company in the ordinary course of business is not bound to inquire whether the persons signing the policy as directors have been legally appointed directors, or are empowered to use the seal of the company. It is sufficient if the policy appears on the face of it to be consistent with the articles of association of the company, and the acts of parliament under which it is incorporated. *County Life Assurance Co., In re*, 39 L. J., Ch. 471; L. R. 5 Ch. 288; 22 L. T. 537; 18 W. R. 390.

—— **By Friendly Societies.**] — A society inrolled under 10 Geo. 4, c. 56, and 4 & 5 Will. 4, c. 40, cannot legally grant assurances on lives, notwithstanding rules authorising them to do so have been certified and allowed. *Kelsall* v. *Tyler*, 11 Ex. 513; 25 L. J., Ex. 153.

A person under 10 Geo. 4, c. 56, and 4 & 5 Will. 4, c. 40, effected a policy on his life in 499*l.* 19*s.*, payable on his decease to his widow; and if none, to his executors, administrators, or assigns. All previous acts relating to friendly societies were repealed and consolidated by 13 & 14 Vict. c. 115, s. 2, and assurances, in favour of relations, were limited to 100*l.*, but the rights of parties under former acts were preserved. The assured paid the premiums till his decease, and died indebted, leaving his widow surviving:—Held, that the policy was good, though it exceeded 100*l.*, and that the widow was entitled to the sum assured. *Owen, In re*, 31 Beav. 285; 31 L. J., Ch. 825; 8 Jur. (N.S.) 1117; 6 L. T. 802; 10 W. R. 770.

Indisputable Policies.]—Where an assurance company holds out to the public that its policies shall be indisputable, and a policy is effected upon the faith of that representation, the company is barred in equity from saying that the proposal for the particular policy stipulated that if it contained any untrue statement the policy should be void, and that it did contain an untrue statement. *Wood* v. *Dwarris*, 11 Ex. 493; 25 L. J., Ex. 129; 4 W. R. 262.

To a count on a policy of assurance, in which, after reciting that the plaintiffs, being interested in the life of J., had caused to be delivered to the company, with whom the policy was made, a proposal for assurance, whereby it was declared that J. had not had any fit since childhood. Plea, that the declaration in the policy, that J. had not had any fit since childhood, was untrue. There was a replication, on equitable grounds, to the plea, that before the policy was entered into, the company circulated a prospectus, whereby they undertook that their policies should be unquestionable except on the ground of fraud, and that the plaintiffs were induced to enter into the policy on the faith thereof. On the trial, it appeared that such a prospectus was issued, but no express proof was given that the plaintiffs saw it, or were induced by it to make the policy. The jury found for the plaintiffs:—Held, that there was no sufficient evidence to warrant this finding. On this part of the judgment the Exchequer Chamber pronounced no opinion. *Wheelton* v. *Hardisty*, 8 El. & Bl. 232; 26 L. J., Q. B. 265; 5 W. R. 784.

Reference to Foreign Law—Effect of.]—A reference to foreign law in an English contract does not incorporate the foreign law, but merely affects the interpretation of the contract. *Dever, Ex parte, Suse, In re*, 56 L. J., Q. B. 552; 18 Q. B. D. 660—C. A.

Construction of.]—Where there is ambiguity in the terms of a policy of insurance, the maxim "Verba chartarum fortius accipiuntur contra proferentum" applies as a rule of construction. *Notman* v. *Anchor Assurance Co.*, 4 C. B. (N.S.) 476; 27 L. J., C. P. 275; 4 Jur. (N.S.) 712; 6 W. R. 688.

As to Right of Assignee.]—See *Cook* v. *Black*, infra, col. 55.

Construction of Suicide Clause—Assignment.]—See *City Bank* v. *Sovereign Life Assurance Co.*, infra, col. 48.

Benefit Society—Payment of Death Allowance—Right of Administrator to Recover.]—The deceased, a member of an unregistered friendly society, had, upon making his application for admission to the society, signed a declaration

agreeing to be bound by the rules of the society, and authorising the deduction from his wages of the sum specified in the rules for securing to himself, or to his representatives in case of his death, the benefits of the society. The rule relating to the payment of death allowances empowered and authorised the committee to pay the allowance to such person or persons as in their discretion they might think fit; and it further provided that the allowance should be paid to certain specified relatives in such proportions as the committee should determine, unless otherwise bequeathed by will, when it was to be paid to the person to whom it had been bequeathed; that, where there were no surviving relatives and no special bequests, only the funeral expenses should be defrayed by the society, and that where the allowance had been once paid, neither the committee nor the society should be liable to any further claim in respect of it. Upon the death of the member intestate the society paid the amount of the death allowance to the defendant, his sister. The plaintiff, an administrator of the deceased, having brought an action against the defendant, to recover the money so paid to her:—Held, that the rule constituted the contract between the member and the society as to the payment of the money; that the death allowance was not the property of the member during his life, and in the absence of a bequest by will was not assets for the payment of his debts, and that therefore the plaintiff could not recover. *Ashby* v. *Costin*, 57 L. J., Q. B. 491; 21 Q. B. D. 401; 59 L. T. 224; 37 W. R. 140; 53 J. P. 69.

Time within which Notice to be given.]—See *Gamble* v. *Accident Assurance Co.*, Ir. R. 4 C. L. 204, infra, col. 82.

—— **Notice of Accident within Seven Days—Omission to give.**]—A policy was made subject to a condition that in case of fatal accident notice thereof must be given to the insurers within seven days. It was impossible to give notice within the seven days:—Held, that notice was not a condition precedent to the right to recover. *Stoneham* v. *Ocean, Railway and General Accident Insurance Co.*, infra.

—— **Notice of Death — Medical Report—Instantaneous Death.**]—A policy of insurance against accident was made subject to the condition inter alia that in the event of any accident to the assured he, or his representatives, should give notice thereof in writing to the company within ten days after its occurrence, stating the number of the policy, nature and date of the injuries, place where, and manner in which they were received, extent of disablement, and name, address, and occupation of the person injured, and also within fourteen days of the accident, forward to the head office a written report from the assured's medical attendant, who should be a duly qualified and registered medical practitioner, of the facts of the case, and nature and extent of the injuries received and the condition, provided, that unless it were complied with, as to time and otherwise (time being of the essence of the contract) no person should be entitled to claim under the contract:—Held, that the omission to give notice of death within the prescribed time, even when death was instantaneously caused by an accident, was an answer to a claim made upon the policy. *Gamble* v. *Accident Assurance Co.* (supra) followed. *Patton* v. *Employers' Liability Assurance Co.*, 20 L. R., Ir. 93.

Held, also, that it was not necessary that the notice should be given by the legal personal representatives of the assured, but might be effectually given by any person appointed by the assured for the purpose, or (per Murphy, J.) by any person acting on behalf of the persons interested in the policy. *Ib.*

Held, also, that any excuse for not forwarding the medical report as, e.g., that there was no one in medical attendance on the assured, should be specially pleaded and proved, when the company rely on the condition. *Ib.*

Conditions—Onus Probandi—Duty of Insurance Agent—Payment by Notes.]—The conditions of policies of life assurance were—first, that a policy should not be in force until the first premium was paid; and secondly, that if a note were taken for a premium, and such note were not paid when due, the policy should become void at and from default. A proposal was received by the appellants, and notes given to an agent for premiums. The agent indorsed the notes, and appended his personal guarantee, waiving protest. The notes were discounted by the agent, but dishonoured at maturity. The agent wrote to the appellants' manager that he had mailed a note for these and other premiums, and the manager acknowledged the letter, stating that he would hold the note as requested. The company subsequently cancelled the policies, and refused to register assignments to the respondent, on the ground that the policies were not in force. The agent deposed that, according to the usual course of business, his note sent to the manager was not in discharge of premiums, but evidence that the premiums were due. On the death of the assured the respondent sued the appellants for the policy-moneys:—Held, that though the notes were accepted by the agent in payment of the premiums, the condition applied on their non-payment and the policies became void; that the onus of proof that the notes were placed in the hands of the agent, as agent for the assured, to raise money by negotiating them, lay with the respondent and had not been discharged; and that, according to the principle of *Acey* v. *Fernie* (10 L. J., Ex. 9; 7 M. & W. 151), the dealings between the company and their agent as regarded the assured were res inter alios, and afforded no presumption of an intention to treat the agent as acting not for his true principles, but as representing the assured. *London and Lancashire Life Assurance Co.* v. *Fleming*, 66 L. J., P. C. 116; [1897] A. C. 499—P. C.

Condition against Assignment.]—See *Turcan, In re*, infra, col. 51.

—— **Suicide Clause—Assignment.**]—See *City Bank* v. *Sovereign Life Assurance Co.*, post, col. 48.

See also VI. REPRESENTATIONS AND DECLARATIONS.

II. POLICY.

Nature of.]—Policies of insurance are securities for money within 1 & 2 Vict. c. 110, s. 12. *Stokoe* v. *Cowan*, 29 Beav. 637; 30 L. J., Ch. 882; 7 Jur. (N.S.) 901; 4 L. T. 695; 9 W. R. 801.

Authority to Effect.]—B. and S. having been directed by the defendant to effect an insurance

on his life in his own name or in the names of B. and S., to whom he was indebted, effected an insurance in the names of B., S. and a third person, whom they had taken into partnership :—Held, that they had no authority for effecting the insurance in the three names; and the defendant having never acknowledged the transaction, that they could not recover from him the amount of the premiums paid on the policy. *Barron* v. *Fitzgerald*, 6 Bing. (N.C.) 201; 8 Scott, 460; 9 L. J., C. P. 153; 4 Jur. 88.

Mistake.]—If upon a proposal and an agreement for a life insurance, a policy is drawn up by the insurance office in a form which differs from the terms of the agreement, and varies the rights of the parties assured, equity will interfere, and deal with the case on the footing of the agreement, and not on that of the policy. *Collett* v. *Morrison*, 9 Hare, 162; 21 L. J., Ch. 878.

An erroneous statement was made to a company by or through their agent, as to A.'s interest in his son's life: upon which the company granted a policy to A. After the son's death the company discovered the error, and refused to pay the sum insured. A bill filed in equity by A. to have the mistake rectified was dismissed, because the evidence did not shew distinctly whether the mistake arose from the agent's inadvertence, or from his having been misinformed by A. *Parsons* v. *Bignold*, 13 Sim. 518; 15 L. J., Ch. 379; 7 Jur. 591.

—— **Repayment of Premiums.**]—R. and K. entered into negotiations with C., the London agent of a Scottish company, for effecting a policy on the life of H., a merchant; and it was verbally agreed between R. and K. and C. that the policy should be granted, authorising the assured to make voyages to the ports of Morocco and other ports in the Mediterranean, Africa and Asia. A written proposal, in the handwriting of one of the partners R. and K., was communicated by C. to the company in the following terms, differing by mistake, as R. and K. alleged, from the agreement they had previously made with C.: "H. to be at liberty to visit on business Tangiers, or any other port within the Mediterranean, without subjecting himself to any extra premium, or having to apply for a licence; but it is understood that he is not to reside out of Europe, at any place in the Mediterranean, beyond the period of three months, or to go to the interior of Asia and Africa; the above memorandum to be indorsed on the policy." A policy was accordingly granted, whereby 2,000*l*. was assured to R. and K. after the death of H., with a proviso that in case H. should depart beyond the limits of Europe the policy should be void. A memorandum was indorsed on the policy to the effect that, notwithstanding the restriction contained in it, H. should enjoy such liberty as mentioned in the proposal. H., in the course of his business, visited Casa Blanca, on the Atlantic coast of Morocco, south of Tangiers, and died there before he had resided three months. The court refused to rectify the policy as against the company, so as to express the true agreement between R. and K. and C., but declared the policy to be not binding on either R. and K. or the company, and ordered the premiums which they had paid to be refunded, as having been paid by mistake, and the policy to be delivered up to the company. *Fowler* v. *Scottish Equitable Life Insurance Society*, 28 L. J., Ch. 225; 4 Jur. (N.S.) 1169; 7 W. R. 5. *And see* VII. PREMIUMS, infra, col. 30.

Delivery up of—No Interest.]—*See* infra, IV. col. 8, INTEREST.

III. RE-INSURANCE.

Life dropping before Policy completed.]—An insurance company offered to another, by way of re-insurance, a part of a larger policy, stating that another part would be retained. The offer was accepted by the second company without investigation into the life, but before the re-insurance was completed the first company had parted with all the remainder of the policy. The life fell soon afterwards:—Held, that the first company would be relieved in equity against the re-insurance. *Trail* v. *Baring*, infra, col. 21.

Payment of Premiums on.]—See *Prince of Wales Assurance Co.* v. *Harding*, El., Bl. & El. 183; 27 L. J., Q. B. 297, infra, col. 32.

Interest—First Policy cancelled.]—A director of the A. assurance company effected on behalf of that company a cross insurance with the B. company on a life as an indemnity against one effected with the A. company. Afterwards, the policy with the A. company was cancelled, but the director continued to keep up the other until the life dropped:—Held, that a bill filed by the B. company to have the policy effected with that company delivered up, and to stay an action upon the policy, was not demurrable. *India and London Life Assurance Co.* v. *Dalby*, 4 De G. & Sm. 462; 15 Jur. 982.

Custom as to Representations on Re-Insurance.]—See *Foster* v. *Mentor Life Assurance Co.*, infra, VI. REPRESENTATIONS AND DECLARATIONS, col. 20.

IV. INTEREST.

Name of Parties.]—By 14 Geo. 3, c. 48, s. 2, a life policy in which there is or are not inserted the name or names of the person or persons interested therein, or for whose use, benefit, or on whose account the policy is made, is unlawful. A husband, whose wife was a minor and entitled to a sum of money on attaining her majority, applied to her trustees for an advance, which they agreed to make upon having the repayment of it secured by J. in the event of the wife dying before attaining twenty-one. J. having consented to become security upon condition that an insurance was effected on the life of the wife, a policy was executed by an insurance company which was expressed to be made between them and the wife, who was described as a married woman. Neither the name of the husband nor that of any other person besides the wife was inserted in the policy as being interested in it:—Held, that the policy was void, as not containing the name of the husband or other person interested in it. *Evans* v. *Bignold*, 38 L. J., Q. B. 293; L. R. 4 Q. B. 622; 20 L. T. 659; 17 W. R. 882.

The 14 Geo. 3, c. 48, does not prohibit a policy from being granted to one person in trust for another, where the names of both persons appear upon the face of the instrument; nor does the effecting of such an insurance in any

way contravene the policy of the statute. *Collett* v. *Morrison*, 9 Hare, 162 ; 21 L. J., Ch. 878.

Under 14 Geo. 3, c. 48, s. 2, in every policy on the life of another, whether bonâ fide, or a gaming or a wager policy, the name of the person interested in such policy must be inserted therein at the time of making, as that of the person interested ; otherwise the policy is void. *Hodson* v. *Observer Life Assurance Society*, 8 El. & Bl. 40 ; 26 L. J., Q. B. 303 ; 3 Jur. (N.S.) 1125 ; 5 W. R. 712.

What is Sufficient.]—Every man is presumed to have an interest in his own life, and in every part of it ; therefore an executor suing on a policy effected by his testator on two years of his life, is not bound to shew that such testator had any special reason for making such limited insurance. *Wainwright* v. *Bland*, 1 M. & Rob. 481 ; 1 Tyrw. & G. 417 ; 1 Gale, 406 ; 1 M. & W. 32 ; 5 L. J., Ex. 147.

Where A., having no interest in the life of B., induces him to cause a policy to be effected in his (B.'s) name ; A. finding the funds for the premiums, and intending, by assignment or otherwise, to get the benefit of the policy himself, so that it is substantially the policy of A., such policy is void, as a fraudulent evasion of the statute. *Ib.*

To an action by the executrix of J. S., on a policy, by which a company agreed with him to pay to his executors 2,000*l.* on his death, a plea that the policy was made by T. S. in the name of J. S., but for the use and benefit of T. S. and not for the use or on account of J. S. ; that T. S. had not any interest in the life of J. S. ; and that the policy was a wagering policy, whereby the policy was void, is a good plea. *Shilling* v. *Accidental Death Insurance Co.*, 2 H. & N. 42 ; 26 L. J., Ex. 266 ; 5 W. R. 567.

Although where an insurance is really effected by the party insured, the mere circumstance that another party pays the premiums may not be conclusive, or even per se sufficient evidence to warrant a jury in finding that the interest was not in the insured ; yet where the insurance is effected by the party nominally insured, at the instance and for the benefit of another who is to pay the premiums, and in pursuance of an arrangement between them, under which he immediately secures the sole benefit of it (by assignment or bequest), the evidence will be so conclusive that the interest is really in the third party (so that the policy is void for not having been in his name), that the court will set aside a verdict for the plaintiff in an action by him or his representatives upon it. *Shilling* v. *Accidental Death Insurance Co.*, 27 L. J., Ex. 16.

An insurance against death by accident is within the statute as to interest. *Shilling* v. *Accidental Death Insurance Co.*, post, col. 82.

A wife making an insurance on her husband's life, need not prove that she was interested therein. *Reed* v. *Royal Exchange Assurance Co.*, Peake's Ad. Cas. 70.

Policy on Life of Husband—Trust for Wife and Family.]—*See cases* infra, col. 62.

By Father on Son.]—A father effected a policy in the name and on the life of his son, in which he had no insurable interest, under circumstances which satisfied the court that he intended it for his own benefit. The son died intestate and the father took out administration to his estate, and the insurance company paid the money assured by the policy to him :—Held, that although as between the insurer and the company the policy was illegal and void under 14 Geo. 3, c. 48, yet, as between the father and the estate of the son, the father was entitled to retain the money for his own benefit. *Worthington* v. *Curtis*, 45 L. J., Ch. 259; 1 Ch. D. 419; 33 L. T. 828; 24 W. R. 221—C. A.

In order to render a policy valid within the meaning of the act, a party for whose benefit it is effected must have a pecuniary interest in the life or event insured ; and therefore a policy effected by a father on the life of his son, he not having any pecuniary interest therein, is void. *Halford* v. *Kymer*, 10 B. & C. 724 ; 8 L. J. (O.S.) K. B. 311.

Debtor and Creditor.]—A creditor may insure the life of his debtor to the extent of his debt. *Godsall* v. *Boldero*, 9 East, 72.

But where a policy effected by a creditor on the life of his debtor is valid at the time it is entered into, the circumstance of the interest of the assured in such life ceasing before the death happens does not invalidate it, by reason of the provisions of the 14 Geo. 3, c. 48. *Dalby* v. *India and London Life Assurance Co.*, 15 C. B. 365 ; 3 C. L. R. 61 ; 24 L. J., C. P. 2 ; 18 Jur. 1024 ; 3 W. R. 116—Ex. Ch.

A. being entitled to stock contingent upon his attaining thirty, assigned his interest to B., who proposed to effect a policy with a mutual assurance company upon the life of A., then in his twenty-ninth year, at the same time declaring that his object was to insure against a twenty months' contingency. The company advised a policy for two years as sufficient to cover the risk, to which B. assenting, a policy for this period was granted, and the premium paid. A. attained thirty, and died within the two years :—Held, that the policy was not void within 14 Geo. 3, c. 48. *Law* v. *London Indisputable Life Policy Co.*, 3 Eq. R. 338 ; 1 Kay & J. 223 ; 24 L. J., Ch. 196 ; 1 Jur. (N.S.) 178 ; 3 W. R. 154.

An army agent, to whom an officer was largely indebted on the balance of their account, effected in his own name policies on the life of the officer, and in the books kept by the army agent the account of the officer was charged with the premiums paid and with interest on the balances, including the premiums. The officer was aware that the policies had been effected, but there was no evidence that the account had ever been shewn to him, or that he knew that he was in the account charged with the premiums :—Held, that the army agent was, under the circumstances, entitled to retain the sums received upon the policies after the death of the officer, and was not liable to account for them to his representatives. *Bruce* v. *Garden*, 39 L. J., Ch. 334 ; L. R. 5 Ch. 32 ; 22 L. T. 895 ; 18 W. R. 384.

—— **Option of Debtor to Purchase.**]—A debtor arranged with his creditors for payment of his debts by instalments, to be further secured by a policy on his life to be effected by the creditors, who were to pay the premiums and to assign the policy to the debtor on payment of their debts and all premiums paid with interest. All the instalments except the last having been paid, and another premium on the policy being about to become due, the creditors offered to assign it to the debtor on being repaid the premiums paid by them with interest, but the offer was declined, and the creditors paid the premium, and the

debtor paid the last instalment of his debts. Shortly afterwards the debtor died, and his executrix filed a bill claiming to be entitled to the sum assured on payment to the creditors of the money paid by them for premiums with interest. A demurrer for want of equity was overruled by Malins, V.-C., but allowed on appeal. *Lewis* v. *King*, 44 L. J., Ch. 259; 31 L. T. 571—L JJ.

—— **Amount of Interest.**]—A promise by a creditor to a debtor that payment of the debt shall not be enforced during his (the creditor's) lifetime, is not sufficient (without any consideration or circumstance to make such promise binding) to confer upon the debtor an insurable interest in the life of the creditor. *Hebden* v. *West*, 3 B. & S. 579; 32 L. J., Q. B. 85; 9 Jur. (N.S.) 747; 7 L. T. 854; 11 W. R. 422.

A contract between a master and a servant for seven years' service, at a fixed salary, is sufficient to create such an interest, but to the extent only of so much of the period of seven years as remained at the time of the effecting of the policy. *Ib.*

Where a person, having an insurable interest in the life of another, insured such life to the full extent of his interest in more than one company, from one of which, at the falling of the life insured, he received payment of the amount for which the policy was effected:—Held, that he was precluded by the terms of s. 3 of 14 Geo. 3, c. 48, from recovering or receiving more from the others. *Ib.*

If A., being indebted to B., dies, and C. agrees to pay the debt by instalments in five years, A. has an insurable interest in the life of C. for those five years. *Von Lindenau* v. *Desborough*, 3 C. & P. 353; 8 B. & C. 586; 3 M. & Ry. 45; 7 L. J. (O.S.) K. B. 42.

—— **Debtor's Wife.**]—A debtor and wife joined in an assignment of a chose in action of the wife to a creditor of the husband to secure 300*l.*, owing by the husband. The creditor afterwards insured the life of the wife for 200*l.* The chose in action was not reduced into possession in the lifetime of the wife. The wife died, and the creditor received from the insurance office the 200*l.*:—Held, that, if the creditor had no insurable interest in the life of the debtor's wife, the debtor could have no claim to the application of the sum assured towards the payment of his debt; that here the creditor had such insurable interest, but the risk ceased at the death of the wife, and that the money afterwards paid by the insurance office, being paid in their own wrong, the debtor was not entitled to have it applied in reduction of his debt. *Henson* v. *Blackwell*, 4 Hare, 434; 14 L. J., Ch. 329.

—— **Executor.**]—An executor has a sufficient interest to enable him to make assurance in his own name, on the life of a person who has granted an annuity to the testator. *Tidswell* v. *Ankerstein*, Peake, 151.

—— **Step-sister—Maintenance.**]—In an action to recover the amount of a policy of insurance upon the life of a child, the plaintiff's step-sister, evidence was given of promise made by the plaintiff to the mother of the child to take care of the child and help to maintain it. No objection was taken on behalf of the defendants that the plaintiff had not in fact incurred any expenditure in respect of the child:—Held, that the plaintiff had an insurable interest in the child's life, and was entitled, in the absence of any objection as to the amount in fact expended by her, to recover the amount of the policy. *Barnes* v. *London, Edinburgh and Glasgow Assurance Co.*, [1892] 1 Q. B. 864.

Grantee of Annuity.]—The grantee of an annuity, covenanted to be paid to him in consideration of a sum of money advanced by him to the grantor, insured in his own name the life of the grantor, the annuity having apparently been calculated so as to cover the amount of premium for such insurance if effected. The grantor, in pursuance of the contract, duly repurchased the annuity, and extinguished by payment all his obligations to the grantee:—Held, that the policy effected on the life of the grantor, and the bonuses thereon, were the property of the grantee of the annuity. *Knox* v. *Turner*, 39 L. J., Ch. 750; L. R. 5 Ch. 515; 23 L. T. 227; 18 W. R. 873.

The grant of an annuity with a right of repurchase on payment of the consideration-money and all arrears of the annuity, does not create the relation of debtor and creditor so as to give the grantor, upon repurchase of the annuity, the right to a policy effected by the grantee on the life of the grantor as a security or indemnity; or, after the death of the grantor, to entitle his representatives to the surplus proceeds of the policy after satisfaction of the consideration-money, and all arrears of the annuity. *Preston* v. *Neele*, 12 Ch. D. 760; 40 L. T. 303; 27 W. R. 642.

In 1822, in consideration of 600*l.*, A. and B., his wife, granted to C. an annuity of 64*l.* 7*s.* 6*d.* for ninety-nine years if B. should so long live. By the same deed the rents of copyhold property to which B. was entitled, were granted during her life to C., with a covenant to surrender from and after B.'s death to the use of C., and power to C. to sell in case the annuity should be in arrear. The deed contained provisions that any extra premiums to become payable at the office where B.'s life should be insured, should be paid by A., and a power to A. to repurchase the annuity at any time after three years on payment to C. of 600*l.* and all arrears of the annuity. On the day before the date of the deed by which the annuity was granted, C. insured B.'s life for 600*l.* at an annual premium of 16*l.* 7*s.* 6*d.* The copyholds were surrendered, and C. by himself or his representatives since his death, had been in possession since 1828. A. died in 1858, and B. in 1869:—Held, as between the representatives of C. and B., that the surplus proceeds of the policy effected by C. on B.'s life after satisfaction of the 600*l.* and all arrears of the annuity, belonged to the representatives of C. and not of B. *Ib.*

Trustee.]—An equitable interest is insurable; and both the trustee and the cestui que trust have an insurable interest, the former in respect of his legal interest, and the latter in respect of the equitable interest. *Houghton, Ex parte*, 17 Ves. 258; 11 R. R. 73.

Surety on Co-Surety.]—A. and B. jointly executed a bond as a collateral security for the repayment of 300*l.* and interest. A. effected a policy of insurance on B.'s life:—Held, that the policy was not void within 14 Geo. 3, c. 48, B. being, for the purposes of the policy, A.'s debtor to the extent of half the debt secured

by the bond. *Branford* v. *Saunders*, 25 W. R. 650.

Loan by Insurance Company.]—To an action against a surety on a bond, he pleaded that the obligees were members of an insurance company, and that it was agreed between them and the principal in the bond, that the former should advance 350*l.*, the moneys of the company, to be repaid by instalments, with interest and costs; and that the latter should effect a policy on his own life in the company, in 800*l.* at the annual premium of 26*l.* 2*s.* 8*d.*, to be payable thereon, being for the benefit of the company; the 800*l.* being greater by 200*l.* than was necessary for securing to the obligees, as trustees for themselves and the other members of the company, the repayment of the 350*l.*, and should deposit the policy with the obligees as a collateral security for the repayment of the 350*l.*, and that the party borrowing, with his sureties, should enter into the bond to the obligees, as trustees for themselves and the company, in the penalty of 700*l.*, subject to a proviso limiting the amount ultimately recoverable thereon to 500*l.*:—Held, that the policy was not a wagering policy within 14 Geo. 3, c. 48. *Downes* v. *Green*, 12 M. & W. 481; 13 L. J., Ex. 159; 8 Jur. 899.

Benefit of Wife and Children—Appointment of Trustee—Title of Petition.] — A petition (presented since the coming into operation of the Married Women's Property Act, 1882), for the appointment of trustees of the proceeds of a life policy effected by a husband under the provisions of the Married Women's Property Act, 1870, for the benefit of his wife and children, ought to be entitled in the matter of the act of 1882. *Soutar's Policy Trust, In re*, 54 L. J., Ch. 256; 26 Ch. D. 236; 32 W. R. 701.

—— **Appointment of Trustees—Direction to Trustee to exchange Policy.**]—The defendant effected a policy on his life for the benefit of his wife and children under s. 10 of the Married Women's Property Act, 1870. He became bankrupt and mentally deranged, and was unable to pay the premiums. By the rules of the insurance society the policy could be exchanged for a fully paid-up policy of smaller value, and thus preserved from lapsing. The wife and only child of the defendant brought this action, claiming the appointment of a trustee of the policy, and that such trustee might be authorised to exchange the policy for one fully paid-up:—Held, that the court under its general jurisdiction had power to appoint two trustees; and judgment was given to that effect, and otherwise as claimed. *Schultze* v. *Schultze*, 56 L. J., Ch. 356; 56 L. T. 231.

Ireland—29 & 30 Vict. c. 42.]—Before the 29 & 30 Vict. c. 42, it was not necessary for a party insuring in Ireland to have any interest in the life assured. See *British Assurance Co.* v. *Magee*, Cooke & Alcock, 182. S. P., *Anon.*, 3 Law Rec. (N.S.) 108.

Creditor Insuring Life of Debtor—Right of Debtor's Representatives.]—If A. effects a policy of assurance upon the life of B., to cover a debt due to him from B., or if A. effects a policy in the name of B., in whose life he has no interest, the representatives of B.'s estate can have no claim upon it. *Lea* v. *Hinton*, 19 Beav. 324.

But where there is a presumption, from the dealings and transactions between the parties, that the policy was effected with the privity and concurrence, and on account of B., for the purpose of securing a debt due by B. to a third party for which A. is security, the onus is thrown upon A. of rebutting that presumption. *Ib.*

One of the makers of a joint and several promissory note, who was a surety for the other, effected an insurance on the life of the latter, with his privity and concurrence, for an amount equal to that secured by the note. The principal died, having appointed the surety his executor, and the surety received the insurance money:—Held, that to the extent to which it was not required for indemnifying the surety it ought to be applied in payment of the debt. *S. C.*, on appeal, 5 De G. M. & G. 823.

Satisfaction of Debt—Policy Moneys.]—Payment to a creditor by an assurance company of the amount of a policy on the life of the debtor, is not pro tanto, a satisfaction of the debt of the latter. *Humphrey* v. *Arabin*, Ll. & G. 318.

Re-insurance — Original Policy Cancelled.]—See *India and London Life Assurance Co.* v. *Dalby*, ante, col. 8.

Friendly Society—Insurance by one having no Interest.]—See *Brown* v. *Freeman*, 4 De G. & Sm. 444.

Delivery up of Policy—No Interest—Equitable Jurisdiction.]—Semble, that a court of equity will not entertain a bill for the delivery up of a policy of insurance on the ground of want of insurable interest. *Desborough* v. *Curlewis*, 3 Y. & Coll. 175; 1 Jur. 740.

Proof in Bankruptcy—Deduction of Policy Moneys received.]—Contingent interest assigned to secure in part a debt exceeding the value of the interest. The assignee insures against the contingency; and upon its taking effect receives the sum insured:—Held, upon the bankruptcy of his debtor, that the sum so recovered must be deducted from his proof. *Andrews, Ex parte*, 2 Rose, 410; 1 Madd. 573; 16 R. R. 263.

Purchase—Contingent Title.] — Action on a deed for non-payment by the defendant, as surety, of certain annual premiums in respect of a policy effected on the life of G. F., and assigned by him to the plaintiff. Pleas, first, that before the assignment, and in the lifetime of G. S., it was, by an agreement in writing between G. F. and the plaintiff, after reciting that G. F. was in expectation of becoming devisee in fee-simple, under the will of G. S., of a messuage and premises, agreed that in consideration of 500*l.* then paid, and 1,500*l.* to be paid on the 11th of October then next, G. F. would within three calendar months after the decease of G. S., in case he should become the devisee of the messuage and premises, convey and assure the same to the plaintiff, his heirs, and assigns, subject only, &c., and in case G. F. should not become such devisee in fee simple, or should not be able to make out a sufficient title to the messuage and premises within three calendar months, the 2,000*l.* was to be repaid by G. F. without interest. That, as a further security for such repayment, the policy was

assigned to the plaintiff, subject to an agreement by the plaintiff to re-assign the same to G. F., in case the conveyance contracted for should be perfected; that G. F. further agreed to pay the premiums becoming due on the policy, and to procure the defendant and another to enter into a sufficient assurance for the payment of such premiums; that afterwards and in the lifetime of G. S. the defendant G. F. and another executed the assignment in the declaration mentioned, in pursuance and part performance of the agreement, whereby the agreement and deed in the declaration were void. The defendant's third plea stated an agreement and deed in the same terms as the first plea, and concluded by alleging that at the time of making the contract the defendant was not the heir-at-law of G. S., nor had he then or at any time any interest in the event, or in the life and death of G. S., whereby and by force of the 14 Geo. 3, c. 48, the agreement policy and assignments were each of them void:—Held that the pleas were bad. *Cooke* v. *Field*, 15 Q. B. 460; 19 L. J., Q. B. 441; 14 Jur. 951.

Wagering Policy—Return of Premiums.]—See *Howard* v. *Refuge Friendly Society*, infra, col. 41.

Insurance of Debtor's Life—Amount receivable under Policy.]—One who insures his debtor's life for his debt and pays the premiums, is not entitled to more than he expends, unless an intention to that effect is shewn. *Simpson* v. *Walker*, 2 L. J., Ch. 55.

V. RISK INSURED.

Period.]—On an insurance on a man's life for a year, if, some short time before the expiration of the term, he receives a mortal wound, of which he dies after the year, the insurer will not be liable. *Lockyer* v. *Offley*, 1 Term Rep. 260; 1 R. R. 194.

Capital Punishment—Liability of Insurers.]—See *Amicable Society* v. *Bolland*, infra, col. 75.

In the policies effected by the Amicable Society, there is no exception as to death by the hands of justice; a person insuring his life in that office, afterwards suffered death for a criminal offence, the policy was not thereby avoided. *Bolland* v. *Disney*, 3 Russ. 351.

"Effects of Injury caused by Accident."]—The assured under a policy granted by the defendant company against "death from the effects of injury caused by accident," fell and dislocated his shoulder. He was at once put to bed and died in less than a month from the date of the accident, having been all the time confined in his bedroom. In a case stated in a reference under the defendants' special act the umpire found that the assured died from pneumonia caused by cold, but that he would not have died as and when he did had it not been for the accident, that as a consequence of the accident he suffered from pain and was rendered restless, unable to wear his clothing, weak, and unusually susceptible to cold, and that his catching cold and the fatal effects of the cold were both due to the condition of health to which he had been reduced by the accident:—Held, that the death of the assured was due to the "effects of injury caused by accident" within the meaning of the policy. *Isitt* v. *Railway Passengers Assurance Co.*, 58 L. J., Q. B. 191; 22 Q. B. D. 504; 60 L. T. 297; 37 W. R. 477.

Exceptions—Accident caused by "Exposure of the Insured to Obvious Risk."]—See *Cornish* v. *Accident Insurance Co.*, 58 L. J., Q. B. 591; 23 Q. B. D. 453; 38 W. R. 139—C. A.; infra, col. 87.

Death occasioned by Poison taken Accidentally.]—By a policy of insurance the company agreed to pay 1,000*l.* to the representatives of the person insured if "the insured shall sustain any personal injury caused by accidental, external and visible means within the intention of this policy and provisions and conditions thereof, and the direct effects of such injury shall occasion the death of the insured within three calendar months from the happening of such injury." The policy also contained the following proviso: "The insured shall not be entitled to make any claim under this policy for any injury from any accident, unless such injury shall be caused by some outward and visible means. . . . And that this insurance shall not extend to death by suicide, whether felonious or otherwise, or to any injury caused by or arising from natural disease or weakness, or exhaustion consequent upon disease, or by any medical or surgical treatment, or operation rendered necessary by disease, although such death may have been accelerated by accident, or to any death or injury caused by duelling or fighting, or any other breach of the law on the part of the insured, or by poison or intentional self-injury." While the policy was in force the insured, by accident, drank some poison in mistake for medicine, which he was in the habit of taking, and died from the effects:—Held, that the accident came within the proviso, and that the representatives of the insured were not entitled to recover. *Cole* v. *Accident Insurance Co.*, 61 L. T. 227.

—— **"Within the United Kingdom."**] — A policy of insurance covered death caused by accident happening within the United Kingdom. The assured was accidentally drowned in Jersey. In an action on the policy:—Held, that the accident happened within the United Kingdom. *Stoneham* v. *Ocean, Railway, and General Accident Insurance Co.*, 19 Q. B. D. 237; 57 L. T. 236; 35 W. R. 716; 51 J. P. 422.

Suicide.]—A party covenanted "to do and perform all such acts, matters, and things as should be requisite for continuing and keeping on foot a policy":—Held, that this covenant could not be read negatively, as if he had covenanted to do no act whereby it would become void; and therefore, that the covenant was not broken by the suicide of the covenantor, whereby the policy became forfeited. *Dormay* v. *Borrodaile*, 10 Beav. 335. *S. C.*, 5 C. B. 380; 11 Jur. 231.

An office stipulated that the policy should be void, if the assured should "die on the seas or go beyond the limits of Europe, or enter into the naval or military service, or die *by his own hands*, or by the hand of justice, or by duelling." The insured had been observed for some time to be labouring under dejection of spirits, though he performed his various duties as usual. Without any apparently direct cause, he flung himself

from Vauxhall bridge into the Thames, and was drowned. The office refused to pay the policy which had attached; defending that the case came within the terms of the proviso which released them if the insured died by his own hands. The jury found specially these facts following:—First, the death under the circumstances; secondly, that the deceased leaped from the bridge voluntarily, knowing that the result of his act would be his death, and intending that result; but, thirdly, that, at the time he did so, he was not in a state of mind capable to distinguish good from evil:—Held, by Coltman, Erskine and Maule, JJ., that, if the deceased was labouring under no delusion as to the physical effect of the act which he was committing; if he knew that it was water into which he was about to throw himself, and that in so throwing himself off the bridge he would be drowned; and if he voluntarily threw himself into the river for the purpose of being drowned—then, the subsequent finding, that, at the time of the act committed, the deceased could not distinguish between good and evil, though it cleared the act from being felonious, yet did not take it out of the proviso which relieved the company from liability. *Borradaile* v. *Hunter*, 5 Scott (N.R.) 418; 5 Man. & G. 639; 12 L. J., C. P. 225; 7 Jur. 443.

Tindal, C.J., dissentiente, thought that the company was liable to pay the insurance, and that the act was taken out of the proviso by the finding of the jury, and covered by the policy itself: because, from the context with the other two kinds of death subsequently mentioned, this "dying by his own hands" meant an act of felonious self-destruction; and the jury had negatived any felony, by saying, that the deceased at the time was incapable of distinguishing between good and evil. *Ib.*

A. effected a policy on his own life, subject to the following conditions: that the policy should become void if the assured should die on the high seas, or should go beyond the limits of Europe, or enter the military or naval service, except with the permission of the assurers; and that every policy effected by a person on his or her own life should be void, if such person should commit suicide, or die by duelling or the hands of justice. He died in consequence of having voluntarily, and for the purpose of killing himself, taken sulphuric acid, but under circumstances tending to shew that he was at the time of unsound mind. In an action by his administratrix upon the policy, the company pleaded that A. did commit suicide, whereby the policy became void: and at the trial the judge directed the jury, "that in order to find the issue for the company, it was necessary that the jury should be satisfied that A. died by his own voluntary act, being then able to distinguish between right and wrong, and to appreciate the nature and quality of the act that he was doing, so as to be a responsible moral agent: that the burthen of the proof as to his dying by his own voluntary act was on the company, but, that being established, the jury must assume that he was of sane mind, and a responsible moral agent, unless the contrary should appear in evidence": — Held, that his direction was erroneous, for that the terms of the condition included all acts of voluntary self-destruction; and therefore, that, if A. voluntarily killed himself, it was immaterial whether he was or was not at the time a responsible moral agent. *Clift* v. *Schwabe*, 3 C. B. 437; 2 Car. & K. 134; 17 L. J., C. P. 2—Ex. Ch.

A policy contained a proviso, that if the insured should commit suicide the policy should be cancelled by the return of the premiums, except the policy should have been legally assigned:—Held that "commit suicide" was equivalent to "die by his own hand," without reference to the moral state of mind of the deceased. *Dufaur* v. *Professional Life Insurance Co.*, 25 Beav. 599; 27 L. J., Ch. 817; 4 Jur. (N.S.) 841.

A policy is not rendered void by the suicide of the insured while in a state of insanity. *Horn* v. *Anglo-Australian and Universal Family Life Insurance Co.*, 30 L. J., Ch. 511; 7 Jur. (N.S.) 673; 4 L. T. 142; 9 W. R. 359.

The condition avoiding a policy in the event of the assured dying by his own hand applies to all cases of self-destruction, and it is immaterial that at the time of committing the act the assured was of unsound mind. *White* v. *British Empire Mutual Life Assurance Co.*, 38 L. J., Ch. 53; L. R. 7 Eq. 394; 19 L. T. 306; 17 W. R. 26.

When there is a condition in a life policy that in the event of the assured dying by his own hand, the policy shall be void, except to the extent of any bonâ fide interest which, at the time of his death, shall be vested in any other person or persons for his or their own benefit, the exception applies as much when that interest is vested in the assurers themselves as when it is vested in a third party. *Ib.*

A condition that policies effected on persons' own lives, who should die by duelling or by their own hands, or by the hands of justice, would become void so far as regards the personal representatives of the persons so dying, but would remain in force only to the extent of any bonâ fide interest which might have been acquired by any other person under assignment by deed for consideration or by way of security or indemnity, or by virtue of any legal or equitable lien as a security for money, upon proof of the extent of such interest, does not render such policies void upon the ground that it holds out an inducement to the assured to commit suicide. *Moore* v. *Woolsey*, 4 El. & Bl. 243; 3 C. L. R. 207; 24 L. J., Q. B. 40; 1 Jur. (N.S.) 468; 3 W. R. 66.

Licence to go or reside Abroad.]—If a person insuring his life with a company, a condition of whose policies forbids the insured going beyond the limits of Europe without licence of the directors, pays, at the time of the execution of the policy, an extra premium for permission to proceed to and reside at B. (a place out of Europe), for a year, stating that he was then about to proceed to B., but does not proceed to B. for some years, and then goes there, and dies there within a year after his arrival, having never paid any extra premium except the above, but paying all the ordinary premiums down to his death, the company is liable for the sum insured. *Notman* v. *Anchor Assurance Co.*, 4 C. B. (N.S.) 476; 27 L. J., C. P. 275; 4 Jur. (N.S.) 712; 6 W. R. 688.

A declaration stated, that the defendant covenanted that he would at any time appear at an insurance office within London or the bills of mortality and answer questions respecting his age, &c., in order to enable the plaintiff to insure his life, and would not afterwards do any act whereby such insurance should be avoided or

prejudiced; and it then alleged that the defendant appeared at the office of the Rock Life Insurance Company, and did answer certain questions, and that the plaintiff insured the defendant's life with that company by a policy containing a proviso, that if he went beyond the limits of Europe, the policy should be null and void. Breach, that the defendant went beyond the limits of Europe, to wit, to Canada:—Held, that the declaration was bad for not averring that the defendant had notice that the policy was affected. *Vyse* v. *Wakefield*, 7 M. & W. 126; 8 D. P. C. 611—Ex. Ch. Affirming 9 L. J., Ex. 274.

External Cause—Suffocation whilst Insensible.]—A policy against any injury from accident or violence contained a proviso "that no claim should be payable in respect of death by accident unless the same should be occasioned by some external or material cause operating upon the insured person." The claim made by the executors of an insured, stated that he went to bathe, and, while in a pool one foot deep, he became insensible from some internal cause and fell with his face downwards; soon after he was so found, and water escaped from his lungs in such a manner as to prove that he had breathed after falling in the water. The immediate cause of death was suffocation by water, but such suffocation would not have taken place had he not been incapable of helping himself in consequence of the insensibility:—Held, that the death was caused by accident within the meaning of the policy. *Reynolds* v. *Accident Insurance Co.*, 22 L. T. 820; 18 W. R. 1141.

Death by Drowning while in an Epileptic Fit—Construction.]—W. effected an insurance with the defendants against accidental injury, and by the terms of the policy the defendants agreed to pay the amount insured to W.'s legal representatives, should he sustain "any personal injury caused by accidental, external and visible means," and the direct effect of such injury should occasion his death. The policy also contained a proviso that the insurance should not extend "to any injury caused by or arising from natural disease or weakness or exhaustion consequent upon disease." During the time the policy was in force, and whilst he was crossing and fording a stream, W. was seized with an epileptic fit and fell into the stream, and was there drowned whilst suffering from the fit, but he did not sustain any personal injury to occasion death other than drowning:—Held, that W.'s death was occasioned by an injury within the risk covered by the policy, and to which the proviso did not apply. *Winspear* v. *Accident Insurance Co.*, 50 L. J., Q. B. 292; 6 Q. B. D. 42; 43 L. T. 459; 29 W. R. 116; 45 J. P. 110—C. A.

Erysipelas from a Cut.]—See *Smith* v. *Accident Insurance Co.*, post, col. 84.

"Sole Cause of Death"—Fall from Platform upon Railway.]—See *Lawrence* v. *Accident Insurance Co.*, 50 L. J., Q. B. 522; 7 Q. B. D. 216; 45 L. T. 29; 29 W. R. 802; 45 J. P. 781, post, col. 85.

Under Influence of Drink at Time of Injury.]—In a policy of life assurance it was provided that the assurance should not extend to any death or injury happening while the assured was under the influence of intoxicating liquor, or occasioned by his wilfully exposing himself to any unnecessary danger or peril. The assured, while in such a condition that there was a conflict of evidence as to the fact of his being or not being, more or less, affected by the liquor he had taken, accosted a woman in the street, persisting in doing so in the face of remonstrances, and was knocked down by the man in whose company she was at the time, receiving injuries from which he died:—Held, that, to enable the company to take advantage of the above proviso, it was not necessary that the assured should be under the influence of intoxicating liquor at the time of his death, as well as at the time when the injury was sustained, but that it was sufficient to shew that he was under such influence when he met with the injury from which death afterwards resulted. *Mair* v. *Railway Passengers Assurance Co.*, 37 L. T. 356.

Under the influence of intoxicating liquor means under such influence as to disturb the quiet equable exercise of a man's intellectual faculties. *Ib.*

The latter part of the proviso, with regard to wilful exposure to peril, should be limited to dangers ejusdem generis with those recapitulated in the earlier part of the clause, and does not extend to the exceptional circumstances under which the assured met his death. *Ib.*

VI. REPRESENTATIONS AND DECLARATIONS.

a. GENERALLY.

Material Concealment, what is.]—In a proposal by M. to an assurance office for an assurance on his life, in answer to the question, "Has a proposal ever been made on your life at any other office or offices? If so, where? Was it accepted at the ordinary premium, or at an increased premium, or declined?"—his answer was, "Insured now in two offices for 16,000*l.* at ordinary rates. Policies effected last year." The proposal was accepted, but the office having subsequently ascertained that the life of M. had been declined by several offices:—Held, that there had been a material concealment, and that the office was entitled to have the contract set aside. *London Assurance* v. *Mansel*, 48 L. J., Ch. 331; 11 Ch. D. 363; 41 L. T. 225; 27 W. R. 444.

If the assured, at the time of effecting a policy, conceals anything material for the insurer to know, the policy is void; and it matters not whether or not the assured considered it material or not; and what amounts to a misrepresentation or to a material concealment is a question for the jury; the fact that, on a life policy, an unusually high premium was paid, is quite immaterial, and therefore not to be taken as a proof that the office considered the party to be a bad life. *Von Lindenau* v. *Desborough*, 3 M. & Ry. 45; 8 B. & C. 586; 3 Car. & P. 350; 7 L. J. (o.s.) K. B. 42.

Suppression of Facts.]—D. applied, through an insurance agent, to an office to insure an invalid life, informing them of the fact. The office wrote asking if the life had been refused by any office, and if so, to name it. There had been numerous refusals, and negotiations with other offices were pending, which afterwards

resulted in refusals. The agent replied that he had been and still was corresponding with other offices, as the amount to be insured was large. The office granted the policy :—Held, to be such an intentional suppression of the facts as to vitiate the contract. *General Provincial Life Assurance Co., In re, Daintree, Ex parte*, 18 W. R. 396.

A suppression or a false representation of facts material to be known by the insurers, vitiates a policy, although it is in answer to a parol inquiry, and the policy is, by the articles of the insurance office, to be void on false answers to be given to certain written inquiries. *Wainwright* v. *Bland*, 1 M. & W. 32 ; 1 Gale, 406 ; 1 M. & Rob. 481 ; 5 L. J., Ex. 147.

Fraud—Cancellation of Policy.]—A life assurance society re-assured a portion of its risk on one of its policies with a second society, stating that a third society had re-assured part of the risk, and that the remainder, beyond what it was proposed that the second society should take, would be retained by itself, the first society. This was the intention of the first society at the time, but in the interval between the proposal to the second society and the completion of the re-assurance with it, the first society, for reasons connected with its own business, but without the intervention of any new fact, or new information, or change of opinion as to the value of the life ultimately assured, changed its prior intention and re-assured the whole of the risk beyond what was to be taken by the second society with the third society. The first society, however, did not communicate its change of intention to the second society, but allowed them to complete their re-assurance. The life having dropped and the risk having become a claim, and the second society having learnt the above facts, and having declined to pay the amount of their own re-assurance, the first society brought an action against them on the policy. Upon a bill filed by the second society against the first, alleging, as by evidence was proved to be the fact, that the retention by the first society of a portion of the risk was a material element in inducing the second society to take a share in it without further investigation than they actually made, and praying to have it declared that the policy had been fraudulently obtained, and ought to be delivered up to be cancelled, and seeking an injunction to restrain the action and any other proceedings :—Held, first, that the second society was entitled to the relief sought. *Traill* v. *Baring*, 4 De G. J. & S. 318 ; 33 L. J., Ch. 521 ; 10 Jur. (N.S.) 377 ; 12 W. R. 678.

Held, secondly, that the case made by the bill was one for equitable relief, and that there was consequently jurisdiction in equity to deal with it, even if it might have been dealt with at law also. *Ib.*

Two actions were brought by the same plaintiff against an insurance company upon two policies. After issue had been joined an order was made staying one action until the other had been tried, on the terms of the defendants being bound in both by the result of the one which should be tried. But the plaintiff was not to be bound. The company, who resisted payment upon the allegation that the policies had been obtained by fraud, afterwards filed a bill in equity to restrain the actions, and to have the policies delivered up and cancelled. No injunction was moved for. An order was made in the suit staying the proceedings until after the decision of the action. Ultimately the action which was tried was decided in favour of the company, on the ground that the policy had been obtained by fraud. The plaintiff at law then delivered up both policies to the company. Upon the suit coming on for hearing :—Held, that a decree must be made for cancellation of both policies ; and that the defendants must pay the costs of the suit. *London and Provincial Marine Insurance Co.* v. *Seymour*, 43 L. J., Ch. 120 ; L. R. 17 Eq. 85 ; 29 L. T. 641 ; 22 W. R. 201.

A bill in equity will lie at the suit of a life assurance office to have a policy delivered up to be cancelled on the ground of fraud in effecting the insurance, where the instrument is not void on the face of it ; and in such case the plaintiffs have a better equity if they bring their bill in the lifetime of the assured, than if they wait till after his decease. *Fenn* v. *Craig*, 3 Y. & Coll. 216 ; 3 Jur. 22.

Policy of insurance for insuring a life gained by fraud set aside, with costs both at law and in equity, and the premium received on the policy to go in part payment of costs. *Whittingham* v. *Thornburgh and others*, 2 Vern. 206.

A life policy obtained for fraudulent purposes declared void, and the premium already paid to the insurance office applied in payment of the costs. *Prince of Wales Association Co.* v. *Palmer*, 25 Beav. 605.

—— **Bill for Discovery—Fraud.**]—Bill for discovery of fraud in a policy of insurance, to defend an action at law, and that the policy might be declared void, and be delivered up to be cancelled. Demurrer thereto overruled. *French* v. *Connelly*, 2 Anstr. 454.

Re-insurance—Custom as to Statements made to re-insuring Company.]—Declaration on a policy on the life of D., effected by the plaintiffs' office in the defendants' office. Plea, that the plaintiffs untruly stated that D. was in good health. The plaintiffs re-assured the life of D. in the office of the defendants for part of the sum for which they had previously assured his life. The clerk of the defendants filled in the answers to questions as to age, health, &c., and the others were included in a circumflex, opposite to which was written a memorandum signed by the resident director of the plaintiffs' office—"For these particulars, see copies of Britannia (the plaintiffs' office) papers attached." Neither the plaintiffs nor D. signed a declaration as to health, &c., which was submitted by the plaintiffs' office, and blanks were left in for the signatures. This document was returned to the defendants with copies of the papers delivered to the Britannia Office on the original assurance attached. The defendants forwarded to the plaintiffs a policy, which recited that the plaintiffs had delivered to the defendants a declaration signed by them, setting forth the age and state of health of the person on whose life the assurance was effected, which declaration was to be the basis of the contract ; and that it was provided that if anything averred in it was untrue the policy should be void. When the re-assurance was executed, D. was affected by a disease likely to shorten life, but this fact was not known to the plaintiffs or to the defendants.

It is the practice for an office re-assuring in another office to hand over to it the papers on which the original assurance was effected, as an answer to the questions in the proposal sent by the latter office, and for that office to accept or decline such re-assurance on the statements contained in those papers. The judge directed the jury to say upon the evidence and on inspection of the documents, whether the signature of the resident director of the plaintiffs' office was understood between the parties to apply to the declaration or only to the particular questions in the proposal to which it was attached. The jury gave a verdict for the plaintiffs :—Held, by Lord Campbell, C.J., Coleridge and Wightman, JJ., that it was a question for the jury whether a declaration as to the health of D. was intended to be, and was understood to have been, signed by the plaintiffs. And by Lord Campbell, C.J., evidence of the usage was admissible to shew that no such declaration was signed by the plaintiffs ; Coleridge, J., doubting, and Erle, J., dissenting. But held, by Erle, J., that the plaintiffs could not give parol evidence to contradict the statement contained in the policy, that the plaintiffs had delivered such declaration. *Foster* v. *Mentor Life Assurance Co.*, 3 El. & Bl. 48 ; 2 C. L. R. 1404 ; 23 L. J., Q. B. 145 ; 18 Jur. 827.

Held, also, by Lord Campbell, C.J., and Coleridge, J., that the direction to the jury was right, Erle, J., dissenting ; and held, by Wightman, J., that the circumstance of the plaintiffs having accepted the policy with the recital was not sufficiently pressed upon the attention of the jury. *Ib.*

Knowledge of Person Insuring.]—By a declaration and statement as to health, signed by the assured previously to effecting a policy on a life, it was agreed that if any untrue averment was contained therein, or if the facts required to be set forth in the proposal (annexed) were not truly stated, the premiums should be forfeited, and the assurance be absolutely null and void. The statement as to the health of the life was untrue in point of fact, but not to the knowledge of the party making it :—Held, that the premiums were forfeited, and could not be recovered back. *Duckett* v. *Williams*, 2 C. & M. 348 ; 4 Tyr. 240 ; 3 L. J., Ex. 141.

At the time of effecting a policy the insured signed a declaration in writing, which was to be the basis of the contract, and in which he stated that he had not had certain specified diseases, that he was in good health, and that he was not aware of any circumstance or disorder tending to shorten his life, or to render an insurance on his life more than ordinarily hazardous :—Held, that to make the declaration untrue, so as to vitiate the policy granted, the insured must not only have known, when he signed the declaration, that he had had some circumstance or disorder tending to shorten his life, or to render an insurance on his life more than ordinarily hazardous, but he must also have known that such circumstance or disorder was of a character to shorten his life, or to render an insurance on his life more than ordinarily hazardous. *Jones* v. *Provincial Insurance Co.*, 3 C. B. (N.S.) 65 ; 26 L. J., C. P. 272 ; 3 Jur. (N.S.) 1004 ; 5 W. R. 885.

A policy on the life of another person, who, at the time of the insurance, is in a good state of health, is not vitiated by the non-communication by such person of the fact of his having a few years before been afflicted with a disorder tending to shorten life, if it appears that the disorder was of such a character as to prevent the party from being conscious of what had happened to him while suffering under it. *Swete* v. *Fairlie*, 6 Car. & P. 1.

A policy of insurance was granted by a company to the plaintiff on the life of T., containing a proviso that "if the declaration under the hand of the plaintiff delivered at the company's office as the basis of the insurance is not in every respect true, and if there has been any misrepresentation, &c. . . . then the insurance shall be void" :—Held, that an inaccurate statement of a material fact contained in the declaration avoided the policy, though the statement was made bonâ fide, and was not untrue to the knowledge of the plaintiff. *Macdonald* v. *Law Union Fire and Life Insurance Co.*, 43 L. J., Q. B. 131 ; L. R. 9 Q. B. 328 ; 30 L. T. 545 ; 22 W. R. 530. S. P., *Thompson* v. *Lambert*, Ir. R. 2 Eq. 433 ; 17 W. R. 111.

Tendency of Disorder.]—It is not to be concluded that a disorder with which a person is afflicted before he effects an insurance on his life is a "disorder tending to shorten life," within the meaning of the declaration required by the Equitable Insurance Office, from the mere circumstance that he afterwards dies of it, if it is not a disorder which generally has that tendency. *Watson* v. *Mainwaring*, 4 Taunt. 763.

—— **Epileptic Fits.**]—Where a policy contains a warranty, that the assured "has not been affected nor subject to gout, vertigo, fits," &c., such warranty is not broken by the fact of the assured having had an epileptic fit in consequence of an accident. To vacate such policy, it must be shewn that the constitution of the assured was naturally liable to fits, or by accident or otherwise had become so liable. *Chattock* v. *Shawe*, 1 M. & Rob. 498.

—— **Blood-Spitting.**]—The expression in a policy, that the assured "has not had any spitting of blood," does not mean that he has, in fact, never spit blood, but that he has not spit blood either from unascertained causes or from a disease tending to shorten life. *Geach* v. *Ingall*, 14 M. & W. 95 ; 15 L. J., Ex. 37 ; 9 Jur. 691.

By a policy, it was stipulated that it should be void, if anything stated by the assured in his declaration to the directors should be untrue. In his declaration he stated, that he was at that time in good health, and not afflicted with any disorder, nor addicted to any habit tending to shorten life ; that he had not at any time been afflicted with insanity, rupture, gout, fits, &c. ; that he had not any spitting of blood, consumptive symptoms, asthma, cough, or other affection of the lungs ; and that W. was at the time his usual medical attendant. Four years before the policy, the assured had spit blood ; he had since evinced consumptive symptoms, and he ultimately died of consumption three years after the making of the policy. The judge directed the jury to say whether the assured, when he made his declaration, had such a spitting of blood, and such affection of the lungs and inflammatory cough, as tended to shorten his life : —Held, that this was a misdirection, as the assured was bound to state to the company the fact of a single spitting of blood, to enable them

to ascertain whether it proceeded from the disorder called by that name. *Ib.*

—— **Gout.**]—A person proposing to insure his life was asked, "Have you ever been afflicted with gout?" and answered "No"; and being asked, "Has your life been proposed at any other office, and if so, has it been accepted, and at what rate?" answered, "It has been proposed and accepted at the ordinary rate." The life had been proposed at one office and declined, and at another office, where he had been examined and approved by the medical man, but nothing further had been done. Before the proposal he had a slight attack of suppressed gout:—Held, that this answer was not untrue if he had not been sensibly afflicted with gout, but merely had some symptoms which a medical man could detect as denoting the presence of gout in the system. *Fowkes* v. *Manchester and London Life Insurance Co.*, 3 F. & F. 440.

Change of Health.]—In July, 1863, A. negotiated for the insurance of his life in an office, and in filling up the usual declaration as to his health and habits of life, stated that he could not remember when he was last ill, and that he was then and always had been enjoying good health. After examination by the medical officer of the company, he was accepted as a first-class life. In August preceding the completion of the contract, he became alarmed about his health, and went to consult a physician other than his ordinary medical attendant, who warned him that he was in a dangerous state of health, and prescribed for him. He never communicated this circumstance to the company. In September the premium was paid, and the policy effected. On the receipt for the premium was indorsed a condition that if any variation should have taken place in the health of the assured since the date of the medical examination, and before actual payment of the premium, the receipt should be void. Eight months after the assured died; it was not proved satisfactorily of what disease:—Held, that the non-communication to the company of his change in health and visit to the physician was fraudulent, and vitiated the policy. *British Equitable Insurance Co.* v. *G. W. Ry.*, 38 L. J., Ch. 314; 20 L. T. 422; 17 W. R. 561—L.JJ.

Description—Residence.]—In a proposal for insurance against accidents, the "name, residence, profession or occupation of the person whose life is proposed to be insured" were stated thus: "I. T. P., Esq., Saltley Hall, Warwickshire." The policy contained a proviso, "that if any statement or allegation contained in the proposal be untrue, or if this policy has been obtained through any misrepresentation, concealment or untrue averment whatsoever, this policy shall be void." I. T. P. was an ironmonger at D., but resided at Saltley Hall:—Held, that there was no untrue though an imperfect statement in the proposal within the meaning of the proviso. *Perrins* v. *Marine and General Travellers' Insurance Society*, 2 El. & El. 317; 29 L. J., Q. B. 242; 6 Jur. (N.S.) 627; 2 L. T. 633; 8 W. R. 563—Ex. Ch.

The conditions of an insurance required a declaration of the state of the health of the assured, and the policy was to be valid only if the statement was free from all misrepresentation and reservation; the declaration described the assured as resident at Fisherton Anger; she was then a prisoner in the county gaol there:—Held, that it was a question for the jury whether the imprisonment was a material fact, and ought to have been communicated. *Huguenin* v. *Rayley*, 6 Taunt. 186; 16 R. R. 599.

Medical Attendant.]—On an action on a policy, based upon answers by the assured to certain questions, as follows: "If of sober and temperate habits?" "If aware of any disorder or circumstance tending to shorten life?" "Is there any other and what information touching the past or present state of health which the company ought to be made acquainted with?" "Name and address of ordinary medical attendant." The assured had in the year preceding that in which the policy was effected, and in the very same year, been attended for the effects of severe drinking; on the last occasion (a month or two before the policy) for delirium tremens, of which he in two years' time died; and the medical man who had attended him for several years before the policy, and down to his death, was not mentioned as the ordinary medical attendant:—Held, that this justified a verdict for the company, even though the answer to the last question was bonâ fide. *Hutton* v. *Waterloo Life Assurance Co.*, 1 F. & F. 735.

In effecting a policy on the life of a party, the phrase, "usual medical attendant," means the person who is best acquainted by experience with the constitution of the individual; and, therefore, if a person has been attended by a medical man for several years in serious disorders, and afterwards takes another, who has only seen him once or twice, the giving the name of the latter as his usual medical attendant, without mentioning the circumstances under which he was attended by the other, is a wrong answer, and will vitiate the policy. *Huckman* v. *Fernie*, 3 M. & W. 505; 1 H. & H. 149; 7 L. J., Ex. 163; 2 Jur. 444.

Question for Jury—Materiality or Truth.]—F. applied to an insurance office to effect a policy on his life. He received a form of proposal containing questions requiring to be answered. Among these were the following: "Did any of the party's near relations die of consumption or any other pulmonary complaint?" and "Has the party's life been accepted or refused at any office?" To each of these questions F. answered "No." The answers were false. F. signed the proposal, and a declaration accompanying it, by which he agreed "that the particulars mentioned in the proposal should form the basis of the contract." The policy mentioned several things which were warranted by F. The subject of these two answers was not included in such warranty. The policy also contained a proviso, that "if anything so warranted shall not be true, or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or any false statements made to the company in or about the obtaining or effecting of this insurance," the policy should be void, and the premiums paid should be forfeited:—Held, that it was a misdirection to leave it to the jury to say whether the answers to the questions were material as well as false, and if not material, that the plaintiff was entitled to the verdict. The representation being part of the contract, its truth, and not its materiality, was the question. *Anderson* v. *Fitzgerald*, 4 H. L. Cas. 484; 17 Jur. 995.

It is a question of fact for the jury whether a fact not communicated was, under the circumstances, one which the assured ought to have communicated. *Rawlins* v. *Desborough*, 2 M. & Rob. 328.

—— **Intention to Deceive.**]—If a policy is granted on the life of A., subject to the condition that if any fraudulent or untrue statement is contained in any of the documents addressed to the insurers in relation to the insurance by A., then the policy to be void; and A. gives, in one of the documents required by the insurers, written answers to questions respecting his bodily health amounting to a negation of his ever having had any serious disorder requiring confinement, except one particularised as being of a week's duration, when, in fact, he had had, subsequently to this, another attack of illness, under which his life was in danger, he makes an untrue statement within the meaning of the condition, and so avoids the policy, although the jury finds that there was no intention to deceive, and no material information withheld. *Cazenove* v. *British Equitable Insurance Co.*, 29 L. J., C. P. 160; 6 Jur. (N.S.) 826; 1 L. T. 484; 8 W. R. 243—Ex. Ch. See *Foster* v. *Mentor Life Assurance Co.*, supra, col. 23.

Reading Policy and Declaration together.]—A policy was entered into with a company on the life of H. F., which was founded on a written declaration of the assured, agreed to be the basis of the contract between the parties, and contained a proviso that "if any statement in the declaration (which declaration should be considered as much a part of the policy as if the same had been actually set forth therein) was untrue, or if the assurance by the policy should have been effected by or through any wilful misrepresentation, concealment, or false averment whatsoever, or if the assured should go to any place beyond the limits of Europe, the policy should be void, and all moneys paid in respect thereof should be forfeited to the company." The proposal and declaration contained the usual particulars, and proceeded as follows: "I declare that the above written particulars are correct and true throughout, and I agree that this proposal and declaration shall be the basis of the contract between me and the Manchester and London Life Assurance Association, and if it shall hereafter appear that any fraudulent concealment or designedly untrue statement be contained therein, then all the money which shall have been paid on account of the assurance made in consequence shall be forfeited, and the policy granted in respect of such assurance shall be absolutely null and void":—Held, that the policy and declaration must be read together, and so reading them the policy was not avoided by an untrue statement in the declaration, unless designedly untrue. *Fowkes* v. *Manchester and London Assurance Association*, 3 B. & S. 917; 32 L. J., Q. B. 153; 8 L. T. 309; 11 W. R. 622.

Proposal and Acceptance—Alteration of Risk.]—A proposal was made to an insurance company for an insurance on the life of the proposer, who made, on a form issued by the company, statements as to his state of health and other matters, and a declaration that the statements were true, and were to be taken as the basis of the contract. The proposal was accepted at a specified premium, but upon the terms that no insurance should take effect till the premium was paid. Before tender of the premium there was a material alteration in the state of the health of the proposer, and the company refused to accept the premium or to issue a policy:—Held, that the nature of the risk having been altered at the time of the tender of the premium, there was no contract binding the company to issue a policy. *Canning* v. *Farquhar*, 55 L. J., Q. B. 225; 16 Q. B. D. 727; 54 L. T. 350; 34 W. R. 423—C. A.

Quære, whether, if there had been no alteration in the risk, the company would have been legally entitled to refuse to accept the premium, and to issue a policy. *Ib.*

Form of Proposal—"Residence."]—In a form of proposal to an assurance office for a policy of life insurance, the residence of the proposer was stated to be "191, Great Ancots Street, Manchester." The proposer was at the time temporarily staying at the address given, and really resided in Ireland, whither he returned three months afterwards. The proposer agreed that if anything contrary to the truth were stated in the proposal, the policy to be granted in pursuance thereof should be absolutely void:—Held, in an action on a policy issued in accordance with the proposal, that the declaration of the assured as to residence was not, according to the true construction of the word in the form of proposal, untrue so as to render the policy void. *Grogan* v. *London and Manchester Industrial Assurance Co.*, 53 L. T. 761; 50 J. P. 134.

Bill to Rectify—Mistake or Misrepresentation.]—See *Parsons* v. *Bignold*, supra, col. 7.

Warranty of Truth of Answers—"Strictly Temperate."]—A. applied to an insurance office to effect a policy on his life. He received a printed form of proposal containing questions. Among these was the following: Question 7 (a). Are you temperate in your habits? (b) and have you always been strictly so? A. answered, (a) "Temperate"; (b) "Yes." Subjoined to the printed questions was a declaration, which A. signed, to the effect that the foregoing statements were true, and that the assured agreed that this declaration should be the basis of the contract, and that if any untrue averment, &c., was made the policy was to be absolutely void, and all moneys received as premium forfeited. The policy recited the above declaration as the basis of the contract. After A.'s decease the insurance company refused payment of the policy on the ground that the above-mentioned answer was false in fact. In an action on the policy:—Held, that the declaration of A., taken in connection with the policy, constituted an express warranty that the answer to question 7 was true in fact; and as the evidence clearly proved that A.'s averment as to his temperance was untrue, the policy was absolutely null and void. *Thomson* v. *Weems*, 9 App. Cas. 671—H. L. (Sc.)

—— **Consideration of Contract.**]—In the proposal to an insurance company for an insurance on his life, the assured had made certain statements as to his health and previous applications for insurance, and had also agreed that these statements were by him "warranted to be true, and were offered to the company as a consideration of the contract." A policy was afterwards issued by the company in consideration

of the application for the policy, which was thereby made a part of the contract, and of the payment of the premium. In an action upon the policy by the administrator of the assured :—Held, that, by the agreement in the proposal, the truth of the statements, therein warranted, was a condition precedent, and that, the statements being in fact untrue, the defendants were not liable under the policy. *Hambrough* v. *Mutual Life Insurance Co. of New York*, 72 L. T. 140—C. A.

Conditions Precedent binding on Representative.]—A policy of assurance against injury and death by accident after reciting that A., thereinafter called the assured, was desirous of effecting an assurance, witnessed that the insurers accepted the risk, subject nevertheless to the several provisions thereinafter contained, and to the conditions and stipulations indorsed thereon which were to be conditions precedent to the right of the assured to sue or recover thereunder :—Held, that the conditions were conditions precedent to the right not only of the assured but of his legal personal representatives, to recover thereunder. *Cawley* v. *National Employers' Assurance Association*, 1 Cab. & E. 597.

Death accelerated by Disease or Infirmity.]—One of the conditions provided that no claim should be made under the policy in respect of any injury, unless the same should be occasioned directly or solely by external or material causes visibly operating upon the person of the assured, whereof proof satisfactory to the insurers should be furnished, and that the policy did not insure against death, &c., accelerated or promoted by any disease or bodily infirmity, or any natural cause arising within the system of the assured, whether accelerated by accident or not. A. met with an accident, upon which death ensued, but death would not have ensued had he not at the time of the accident been suffering from gallstones : — Held, that the insurers were not liable. *Ib.*

b. Agents and Referees.

Fraud of Referees.]—Acting upon a policy sealed by the defendants, which recited that the plaintiff had made a proposal, whereby it was declared that J. had not had any disease tending to shorten life, and that they "had thereupon undertaken the proposed insurance, subject to the terms and conditions therein and thereunder expressed." The conditions contained no further warranty than the above declaration. Pleas alleged that the policy was obtained by fraud, false statements, and false concealment of material facts. A fourth plea, that the declaration in the policy, "that J. had not had any disease tending to shorten life," was not true. On the trial it appeared that the proposal referred to the answers of J. and two referees, rendered to another insurance company, and that it concluded with a declaration, "that we believe the above particulars and statements are true." The jury found that the statements made by J. and the referees were false, and that there was fraud on their part against the defendants, but no fraud on the part of the plaintiff :—Held, that the life insured and the referees were not the agents of the person effecting the insurance so as to make their fraud that of the person effecting the insurance. *Wheelton* v. *Hardisty*, 8 El. & Bl. 232 ; 27 L. J., Q. B. 241 ; 5 Jur. (N.S.) 14 ; 6 W. R. 539—Ex. Ch.

Held, also, that the fourth plea referred to the statement recited in the policy, and was proved. *Ib.*

Held, also, that there was no warranty of the truth of the matters recited in the policy to have been declared in the proposal, nor anything in the nature of a contract, shewing an intention that the truth of those matters should be the basis of the contract. *Ib.*

Representation of Medical Man.]—A female upon whose life it was proposed to effect an insurance was represented to the insurers, in December, 1822, by A., a medical man, as enjoying ordinarily a good state of health. The representation was repeated by A. in March, and the insurance was effected in April, 1823. Between December, 1822, and March, 1823, she had been ill with a pulmonary attack, and was attended by B. ; but no disclosure of these circumstances was made to the insurers. In April, 1824, she died of a pulmonary disease :—Held, on motion for a new trial, that the jury ought to have been called on to consider whether the illness in 1823, and the attendance of B., ought to have been disclosed to the insurers ; and that it was not sufficient to direct them generally to consider whether or not there had been any misrepresentation. *Morrison* v. *Muspratt*, 4 Bing. 60 ; 12 Moore, 231 ; 5 L. J. (O.S.) C. P. 63.

Life of A. insured for Benefit of B.—Representations by A.]—A party whose life is insured is not the general agent for the assured ; and, therefore, the policy is not void by reason that such party failed to communicate a material fact, as to which he was not interrogated by the insurers, unless he was aware of the materiality of the fact, and studiously concealed it. *Rawlins* v. *Desborough*, 2 M. & Rob. 328.

Where an insurance was effected on the life of A. for the benefit of B., and the insurance office acted upon A.'s own representation as to the state of his health, and it turned out that he was not an insurable life :—Held, that B. could not maintain an action on the policy although he was not privy to the representation. *Maynard* v. *Rhodes*, 5 D. & R. 266 ; 1 Car. & P. 360.

In an insurance upon the life of another, the life insured, if applied to for information, is, in giving such information, impliedly the agent of the party insuring who is bound by his statements, and must suffer if they are false, although he is unacquainted with the life insured, and the servant of the insurance office undertakes to do all that is required by his office. *Everett* v. *Desborough*, 5 Bing. 503 ; 3 M. & P. 190 ; 7 L. J. (O.S.) C. P. 223 ; 30 R. R. 709.

VII. PREMIUMS.

a. Stipulations as to Payment.

Time for.]—Where one, as a member of a life insurance society for the benefit of widows and female relations, entered into a policy with the society for an annuity to his widow after his death, in consideration of a quarterly premium to be paid to the society during his life ; and the society covenanted with him and his executors, that if he should pay to their clerk the quarterly premiums on the quarter-days during his life,

and if he should also pay his proportion of contributions, which the members of the society should, during his life, be called on to make, in order to supply any deficiencies in their funds; then, on due proof of his death, the society engaged to pay the annuity to his widow: and by the rules of the society, if any member neglected to pay up the quarterly premiums for fifteen days after they were due, the policy was declared to be void, unless the member (continuing in as good health as when the policy expired) paid up the arrears within six months, and five shillings per month extra:—Held, that a member insuring, having died, leaving a quarterly payment overdue at the time of his death, the policy expired; and that a tender of the sum by the executor, though made within fifteen days after it became due, did not satisfy the requisition of the policy and the rules of the society, which required such payment to be made by the member in his lifetime, continuing in as good health as when the policy expired. *Want* v. *Blunt*, 12 East, 183; 11 R. R. 340.

—— **Continuance—From Year to Year.**]—A policy was headed, "The annual premium 33*l.* whole term, payable by quarterly instalments of 8*l.* 5*s.* each." The policy was dated the 2nd of August, 1856, and recited a payment up to the 2nd of November of that year, and declared that if the life insured should die "before the expiration of twelve calendar months from the date hereof," and the assured should "on or before that period, or on or before the expiration of every succeeding twelve calendar months, pay the annual amount of premium," the insurance office should be liable. If the life should die before the whole of the quarterly payments were payable, the directors might deduct from the sum insured what would be sufficient to satisfy the whole of the premiums for that year. If the life died before having been assured fifteen months and made two annual payments, the policy was to be void. The life died within twelve months after the third quarterly payment became due, but before it was paid:—Held, that the policy must be construed to have become void on nonpayment of any quarterly premium, the payment of all the quarterly instalments being a condition precedent to the continuance of the policy for the current year. *Phœnix Life Assurance Co.* v. *Sheridan*, 8 H. L. Cas. 745; 31 L. J., Q. B. 91; 7 Jur. (N.S.) 174; 3 L. T. 564. Cf. *Stobell* v. *Heywood*, col. 89.

—— **Option to Refuse. — Estoppel.**] — See *Simpson* v. *Accidental Death Assurance Co.*, 2 C. B. (N.S.) 257; 26 L. J., C. P. 289; 3 Jur. (N.S.) 1079; 5 W. R. 307, infra, col. 82.

—— **Receipt after Death.**]—By a policy on the life of J., the sum insured was to be paid after his death if the plaintiff should, "on or before the 13th October in every succeeding year during the natural life" of J., pay to the company a certain annual premium; and the insurance was subject to conditions on the back of the policy, by which the policy was to be void if the premiums were not paid within certain limited times after they became due, viz. yearly premiums within thirty days; but the policy might be revived within three months on proof of the health of the party on whose life the insurance was made, and the payment of a fine. After the thirty days from the last 13th October when the premium became due, but within the three months, the plaintiff paid the premium, which was received by the company, for the revival of the policy to the next ensuing 13th October. At the time such premium was paid J. was dead, but neither the plaintiff nor the company was then aware of such death:—Held, that it was essential to the revival of the policy that J. should be alive at the time of such revival, and that the company had not waived this by the receipt of the premium in ignorance of his death. *Pritchard* v. *Merchants' and Tradesmen's Mutual Life Insurance Society*, 3 C. B. (N.S.) 622; 27 L. J., C. P. 169; 4 Jur. (N.S.) 307; 6 W. R. 340.

—— **Re-Insurance — Accounts.**]—Two life assurance companies, P. and A., were in the habit of re-assuring to each other in respect of policies granted to third persons by the re-assured. By the course of business, as any premium became due from one company to the other, the company entitled to the premium gave to the company owing it a receipt for the amount: on periodical settlements of account between P. and A. the premiums due on each side were taken into account, and the balance struck and paid by the party against whom it stood. No other payments passed between P. and A. A premium being due from P. to A., A. gave P. a receipt for the amount. At this time A. was indebted to P.; the amount of the premium went into the account in the usual course of business, and at the next settlement a balance was due from and paid by A. to P.:—Held, that the premium was paid at the time when the receipt was given. *Prince of Wales Assurance Co.* v. *Harding*, El. Bl. & El. 183; 27 L. J., Q. B. 297; 4 Jur. (N.S.) 851.

—— **Nonpayment of Premiums — Dropping of Policy — Renewal.**]—One of the conditions indorsed on a policy was, that no insurance would be held in force until the premium was paid, nor would any policy be valid beyond fifteen days after the expiration of any year unless the premium for its renewal was paid. Insurances might be renewed within three months on satisfactory proof of the health of the life insured. In the directions of the company to their agents every policy was to be renewed within fifteen days after the premium became due; and if any policy was not renewed within fifteen days the agent was to give notice thereof to the secretary, and the policy could not afterwards be renewed without a fine and subject to the conditions of the company; and all receipts for premiums for the renewal of policies not paid within a month from the expiration of the policies were to be returned at the end of that period. A policy was effected with an agent, who took bills for the amount of the premiums, debiting himself with the amount of the premiums without communicating the transaction to the company. The bills not having been paid, he took a security for them. A subsequent premium having accrued due in December, 1846, the usual receipt in blank for the premium was forwarded to the agent. The premium was not paid, nor did the agent at the time it was due debit himself with the premium by any entry in a book or account; but in his next quarterly account, in March, 1847, he debited himself therewith, and shortly afterwards paid the account at the request of the treasurer without communicating to the company. Similar transactions took place in

1847 and 1848; the life died in 1849. The receipts for the premiums still in blank were handed back to the company. Shortly afterwards a correspondence took place between the secretary and the agent, the agent claiming the amount of the policy; but as he had no assignment nor possession of the policy the company declined to pay unless the insurer joined in the receipt for the amount; and a report was prepared by the solicitor of the company and sent to the agent, suggesting that he or that the agent should proceed against the insurer to ascertain their rights. The insurer having declined to join in the receipt, the company refused to give credit for the amount of the insurance against the balance by the agent, for which they brought an action, and recovered a verdict without giving credit for the three premiums of the disputed policy paid by the agent. The amount was demanded and paid by the agent to the company:—Held, first, that the policy had dropped:—Held, secondly, that the forfeiture of the policy was not waived by the report and correspondence relating to it:—Held, thirdly, that supposing the policy to be set up by retention of the premiums, the agent had a lien on the policy enforceable in equity for the amount of them. *Busted* v. *West of England Fire and Life Assurance Co.*, 5 Ir. Ch. R. 553.

Creditor and Debtor.]—A creditor by bond cannot stand his own insurer, and charge the premium to his debtor. *Hutchinson* v. *Wilson*, 4 Bro. C. C. 488.

Deduction of Premiums—Income Tax.]—*See* post, REVENUE.

b. PARTIES.

Discount, to whom belonging.]—The 10 per cent. discount usually allowed by insurance companies on punctual payment of the premiums belongs, in the absence of an agreement to the contrary, not to the insurance agent, but to his principal. *Spain (Queen)* v. *Parr*, 39 L. J., Ch. 73; 21 L. T. 555; 18 W. R. 110.

The plaintiff mortgaged her life interest in a fund to the defendants, it being part of the agreement that a policy should be effected on her life, and the premiums be secured on the mortgaged property. In an action for redemption the chief clerk found that 173*l.* 19*s.* 1*d.*, "premiums paid on policies," was due from the plaintiff to the defendants. L., a solicitor and agent to all the parties, paid the premiums to the insurance offices, receiving from them 5 per cent. commission. On summons to vary the chief clerk's certificate by the amount of the commission, on the ground that the "premiums paid on policies" only amounted to 165*l.* 5*s.*:—Held, that after the premiums had been paid to the insurance offices, the mortgagor had no interest in them. The insurance offices received the premiums, and paid the commission out of them to their own agent. *Leete* v. *Wallace*, 58 L. T. 577.

On Winding-up of Company.]—When there is a covenant to pay the premiums on a policy of assurance in an assurance company, and the company has been ordered to be wound up since the date of the covenant, the covenantee has no equity to sustain a bill praying that the amount of the premiums may in future be paid to him. *Garniss* v. *Heinke*, 40 L. J., Ch. 306.

Bankrupt.]—The mortgagor of a policy became bankrupt, but, notwithstanding his bankruptcy, continued to pay the premiums on the policy:—Held, that the premiums so paid were in the nature of salvage moneys, and ought to be repaid with interest at 4 per cent. out of the policy moneys. *Shearman* v. *British Empire Mutual Life Assurance Co.*, 41 L. J., Ch. 466; L. R. 14 Eq. 4; 26 L. T. 570; 20 W. R. 620.

Mortgagees.]—A policy on the life of G. granted to a trustee for her, was assigned to trustees, to invest the proceeds at her death for the benefit of C. for life, for her separate use, without power of anticipation, and after her death upon trusts as she should appoint, and in default of appointment for the persons who would be entitled to her personal estate. The trustees had power to pay the premiums. Notice was given to the assurance company of the assignment. C. subsequently, by a deed to which G. was a party, appointed the policy and the moneys to become due thereon to the plaintiffs to secure the repayment of moneys with interest at 5 per cent. advanced to G. for the benefit of herself and C. and children. Notice was given to the surviving trustee of the settlement and to the assurance company. The plaintiffs had, in consequence of the trustee and others interested in the policy refusing to pay them, paid the premiums and kept the policy on foot. On the death of G. the assurance company paid the policy moneys to the trustees, who refused to pay the plaintiffs the sums due to them. The policy moneys were afterwards paid into court. On a bill filed by the plaintiffs:—Held, that they were entitled to be repaid at once the moneys which they had advanced for the payment of the premiums with interest at 4 per cent., and 1 per cent. more on the death of C. *Gill* v. *Downing*, L. R. 17 Eq. 316; 30 L. T. 157; 22 W. R. 360.

When a policy was deposited to secure a simple contract debt, without any agreement as to interest, and the creditor paid the premiums down to the death of the debtor:—Held, that the policy was charged not only with the original debt and the amount of the premiums, but also with interest on both sums at 4*l.* per cent. *Kerr, In re*, 38 L. J., Ch. 539; 17 W. R. 989.

Mortgagees of a policy receiving after the death of a mortgagor a sum exceeding the amount due to them for principal and interest in respect of the mortgage debt, held entitled to retain the balance in respect of other unsecured debts due to them from the mortgagor. *Hazelfoot, In re, Chauntler's Claim*, 41 L. J., Ch. 286; L. R. 13 Eq. 327; 26 L. T. 146. *And see* sub tit. ASSIGNMENT OF POLICY, infra.

Where a decree in a foreclosure and redemption suit directed an account of principal, interest and costs, including premiums paid on a life policy, which had been delivered to a trustee for the mortgagee as a further security, and proceeded in a common form, "on the plaintiff paying what shall be found due for principal, interest and costs":—Held, that the mortgagee was entitled to charge interest at 4*l.* per cent. on the premiums so paid by him or his trustee, within six years before the certificate. *Bellamy* v. *Brickenden*, 2 John. & H. 137.

A policy was charged with two debts pari passu. One of the mortgagees paid the premiums to keep it up till his death, after which his legal personal representative continued to pay them

till the policy fell in :—Held, that the premiums paid by the legal personal representative, together with interest (but not those paid by the mortgagee himself), must be repaid out of the policy moneys in priority to the debts secured. *Norris* v. *Caledonian Insurance Co.*, 38 L. J., Ch. 721 ; L. R. 8 Eq. 127 ; 17 W. R. 954 ; 20 L. T. 939.

P., being tenant for life of real estate, with remainder to his first and other sons by his then wife in tail male, remainder to himself in fee, applied to a life insurance company for a loan of 12,500*l.* ; and the company having agreed to lend the same, a mortgage was entered into between P. and four persons, who were the trustees of the company. The trustees were not so named in the mortgage, which recited that there was no probability of the mortgagor having issue by his then wife ; that a policy had been effected with the company, whereby the company insured to the four trustees 13,900*l.* in case of the death of P., leaving male issue by his then wife, and in case he should keep up the annual premiums. The indenture then witnessed, that in consideration of 12,500*l.*, the life estate, and also the reversion in fee, of P. were conveyed to the four trustees by way of mortgage ; and that in case P. should neglect to pay the premiums, it should be lawful for the mortgagees to pay them, and that all such sums so paid by them should be charged on the hereditaments conveyed. Subsequently another mortgage was entered into between the same parties by way of further charge, accompanied by a similar policy. P. paid the premiums on the policies for four years ; the directors then, at his request, reduced the amount of the premiums, and he continued to pay the reduced amounts for three years longer. P. then ceased to pay the premiums. The company debited his account with the annual amounts, and added them to their mortgage debt. P. died without leaving issue male, and, on taking the accounts in a mortgagee's suit against the estate, the chief clerk disallowed to the company the amounts with which they had debited the estate on account of the premiums ; but the court, on motion to vary the chief clerk's certificate, held that the company was to be allowed the sums with which they had so debited P.'s estate. *Fitzwilliam* (*Earl*) v. *Price*, 4 Jur. (N.S.) 889.

A mortgage was executed of a reversionary interest in land to secure money alleged to be due by the mortgagor, with a covenant by the mortgagor to keep up policies on his own life, which were assigned by way of collateral security. The mortgagor did not pay the premiums, but they were paid by the mortgagee, who subsequently let some of the policies drop, and others he sold. A bill was filed by the assignees of the mortgagor to set aside the deed, and a decree was made setting it aside as fraudulent and void, upon the terms of the repayment of the money actually advanced, with interest, with a direction, inserted at the instance of the plaintiff, that an account should be taken of the payments and receipts in respect of the policies of insurance, and that if it should be found that the creditor had received more than he had paid, he should pay over the balance to the plaintiff ; and if it should be found that the contrary was the case, he should be paid the difference. Upon taking the accounts it was found that the payments in respect of the policies were in excess of the receipts. Upon a petition of rehearing to amend the decree :—Held, that the direction as to the policies had been erroneously inserted, and ought to be struck out ; that the deed having been set aside as fraudulent and void, the covenant for the payment of the premiums was consequently void also ; and therefore that the creditor was not entitled to be credited for any payments which he had made in excess of the receipts. *Pennell* v. *Millar*, 23 Beav. 172 ; 26 L. J., Ch. 699 ; 3 Jur. (N.S.) 850 ; 5 W. R. 215.

Tenant for Life.]—The tenant for life of an estate, the investments of which the trustees had power to continue, paid the premiums for thirty-three years on a policy which was included in the estate. Soon after the insured life fell in the tenant for life died :—Held, that the policy money must be paid to the trust estate, the tenant for life having no lien. *Waugh's Trusts, In re*, 46 L. J., Ch. 629 ; 25 W. R. 555.

Trustees.]—When funds were given to trustees of a marriage settlement upon trust to pay premiums on a policy on the life of the husband if the latter did not observe his covenant to pay them, and the trustees paid premiums accordingly, and on the husband's death received the sum secured by the policy :—Held, that they were entitled to receive from the insolvent husband's estate, out of a dividend which had been declared, the amount of the premiums paid by them, together with banker's interest and costs. *Miller, In re, Wardley, Ex parte*, 6 Ch. D. 790 ; 37 L. T. 38 ; 25 W. R. 881.

Held, also, that proof by the trustees in respect of the estimated value of the husband's covenant at the date of the liquidation was not impeachable on the ground that the receipt by the trustees of the policy moneys, coupled with the proof, would cause them to receive more than 20*s.* in the pound. *Ib.*

Trustees of a settlement of a policy being without funds to pay the premiums, assigned the policy to a creditor, and afterwards assigned the trust property to new trustees appointed in their room ; but the policy was not mentioned in the assignment to the new trustees :—Held, that the new trustees were not entitled to the policy as against the creditor. *Johnson* v. *Swire*, 3 Giff. 194 ; 7 Jur. (N.S.) 670 ; 4 L. T. 677.

Executors.]—An executor, without a special authority, applied the testator's assets for several years in insuring the life of a debtor to the estate. He then dropped the policy, without consulting the parties beneficially interested, and without applying for the direction of the court in a suit for administration of the estate then pending :—Held, that he was liable for the whole sum which would have been recovered if he had kept up the policy. *Garner* v. *Moore*, 3 Drew. 277 ; 24 L. J., Ch. 687 ; 3 W. R. 497.

—— **Payment of Debt.**]—Where the relation of debtor and creditor subsists, and a policy is effected by the creditor directly or indirectly at the expense of the debtor, under circumstances which shew that it was intended as a security or an indemnity to the creditor, he is bound, on payment of the debt, to deliver up the policy. *Courtnay* v. *Wright*, 2 Giff. 337 ; 6 Jur. (N.S.) 1283 ; 3 L. T. 433 ; 9 W. R. 153.

A tradesman insured the life of his debtor, in his own name ; he charged the debtor with the premiums, but they were never paid by him. On the death of the debtor :—Held, that his representatives were entitled to the produce of the policy after payment of the debt and premiums.

Morland v. *Isaacs*, 20 Beav. 389; 24 L. J., Ch. 753; 1 Jur. (N.S.) 989; 3 W. R. 397.

Where a policy has been effected on the life of a debtor, as a security to the lender of money, and the lender charges the premiums to the account of the debtor, who pays them, if the principal is afterwards paid, the debtor or his representative is entitled to the policy. *Holland* v. *Smith*, 6 Esp. 11; 9 R. R. 801.

A money-lender agreed to advance a sum at 8*l*. per cent. per annum, and the premiums on the insurance of the borrower's life. The borrower executed a bond with sureties, conditioned for payment of an annuity during his life equal to the above aggregate sums, and any increase in premiums by reason of the grantor being abroad; and the condition provided for the cessor of the annuity on notice and payment of the original sum advanced, and all arrears of the annuity up to that time, but said nothing as to the policy:—Held, that, on redemption, the borrower had no equity to have the policy delivered to him. *Gottlieb* v. *Cranch*, 4 De G. M. & G. 440; 22 L. J., Ch. 912; 17 Jur. 704.

Principal and Surety.]—A debtor deposited a policy with his creditor as a security. Afterwards the debtor, with a surety who did not know of the deposit, covenanted with the creditor for payment of the debt, and contemporaneously the debtor executed a deed of counter-security to the surety, neither deed referring to the deposit of the policy. Subsequently the debtor assigned the policy to the creditor as a security:—Held, that the surety, on paying the debt, was entitled to the policy. *Lake* v. *Bratton*, 8 De G. M. & G. 440.

A debtor and a surety entered into a bond to secure payment by instalments of a debt, and the expenses of effecting a policy on the debtor's life in the creditor's name as a collateral security. The policy was effected, but after a time neither the debtor nor his surety paid the premiums on the policy, though required to do so by the creditor, who paid them himself:—Held, on the death of the debtor, that he and his surety had not abandoned the policy, but that it was redeemable by the surety on repayment of the premiums paid by the debtor. *Drysdale* v. *Piggott*, 8 De G. M. & G. 546; 25 L. J., Ch. 878; 2 Jur. (N.S.) 1078; 4 W. R. 773.

One of the makers of a joint and several promissory note, who was a surety for the other, effected an insurance on the life of the latter, with his privity and concurrence, for an amount equal to that secured by the note. The principal died, having appointed the surety his executor, and the surety received the insurance money:—Held, that to the extent to which it was not required for indemnifying the surety, it ought to be applied in payment of the debt. *Lea* v. *Hinton*, 5 De G. M. & G. 823—L.JJ.

Voluntary Payment.]—The voluntary payment of premiums on a policy confers on the payer no interest in the policy. *Burridge* v. *Row*, 13 L. J., Ch. 173; 9 Jur. 299.

Lien—Salvage.]—When a person, not the sole beneficial owner, pays the premiums to keep up a policy of life insurance, he is entitled to a lien on the policy of its proceeds in the following cases: (1) By contract with the beneficial owner; (2) By reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation; (3) By subrogation to their right of some person who, at the request of trustees, has advanced money for the preservation of the property; (4) By reason of the right of a mortgagee to add to his charge any money paid by him to preserve the property. In no other cases can a lien on a policy for premiums paid be acquired either by a stranger or by a part owner of the policy. *Tharp, In re* (2 Sm. & Giff. 578, n.), *Swan* v. *Swan* (8 Price, 518; 22 R. R. 770), and *Hamilton* v. *Denny* (1 Br. & B. 199; 12 R. R. 14), commented on. *Leslie, In re, Leslie* v. *French*, 52 L. J., Ch. 762; 23 Ch. D. 552; 48 L. T. 564; 31 W. R. 561.

Proof of Interest.]—Where A. effects a policy, in his own name, upon the life of B., declaring he is interested in B.'s life, such policy, primâ facie, belongs to A., and the mere proof that some of the premiums were paid by B. does not rebut that presumption. *Triston* v. *Hardey*, 14 Beav. 232.

Where A. pays the premiums upon a policy on his life, but the benefit of it is claimed by B., the onus of proof lies on the latter, though the policy is in his name. *Pfleger* v. *Browne*, 28 Beav. 391.

A. being unable to pay the premiums of policies effected by him on his own life, gave B. a post-obit bond for 14,000*l*., payable on the death of A.'s father, if A. survived him, and if B. had in the meantime kept up the policies. In paying that sum, regard was had not only to the amount of premiums required to keep the policies on foot, but also to the amount of premiums to be paid for keeping the life of A. insured in 14,000*l*., to be paid in the event of his dying in his father's lifetime. This was known to A., who knew also that B. intended to effect this latter insurance, but there was not any agreement that B. should do so. B. did effect the insurance. A. died in his father's lifetime, appointing B. one of his executors:—Held, that no contract for B. to insure being proved, he, and not the estate of A., was entitled to the benefit of the policy which A. had effected. *Freme* v. *Brade*, 2 De G. & J. 582; 27 L. J., Ch. 697; 4 Jur. (N.S.) 748; 6 W. R. 739.

Held, also, that if the transactions as to the post-obit bond were a fraud upon A., then B. had no insurable interest in A.'s life, the insurance office was not liable on the policy, and the sum insured could not, if paid by the office, be claimed by A.'s estate. *Ib.*

Payment of Premiums by Stranger—Lien.]—A., the owner of land, and also of a policy of life assurance on his own life in the office of the B. company, mortgaged both these properties to the B. company. It was provided that the mortgage debt should be reduced by instalments, and the mortgage deed contained a covenant by A. to pay the premiums on the policy, and a power of sale was given to the mortgagees (inter alia), if there should be a breach of the covenant, to keep up the policy. A. sold the land subject to the mortgage to C., but retained the policy, and agreed to pay the premiums. He afterwards failed to pay the premiums. The B. company thereupon called upon C. to pay the premiums, and threatened to call in the mortgage and exercise their power of sale if he failed to do so. C. accordingly paid the premiums, and claimed to have it declared that he was entitled to a lien on the policy for the premiums so paid:—Held, that C. was not under the circumstances entitled to any lien on the policy. Held further (per Lindley, L.J.), that C. might have been entitled

to a lien if the terms of the agreement between him and A. had not by implication excluded it, and that the list of persons in *Leslie, In re* (23 Ch. D. 552), who may obtain a lien on a policy is not exhaustive. *Strutt* v. *Tippett*, 62 L. T. 475—C. A.

A., the owner of land and also of a policy of life assurance for 5,000*l.* in the office of the B. company, mortgaged both those properties to the B. company. The mortgage deed contained a covenant that the B. company should not call in the mortgage on the land so long (amongst other things) as the premiums on the policy were being duly paid, and also a covenant that if the premiums were not regularly paid by A. they might be paid by the B. company, and added to their security. A. sold the land subject to the mortgage to C., but retained the policy, and afterwards failed to pay the premiums. Thereupon the B. company gave notice to C. that, unless he paid the premiums, they would at once call in the mortgage deed. C. accordingly paid the premiums, and, in an action brought by him against A., sought to have it declared that he was entitled to a lien on the policy for the sums he had so paid:—Held, that C. was under these circumstances not entitled to any lien. *Leslie, In re, Leslie* v. *French* (23 Ch. D. 552), considered. *Ib.*

Under the provisions of a private estate act the trustee of a term of years in certain settled estates of which W. had been tenant for life, was bound to apply the rents of the estates, first, in the payment from time to time of the interest upon certain incumbrances existing before the passing of the act, and subject thereto in the payment from time to time of the interest on sums to be raised by W. by mortgages created under the powers conferred by the act, and of the premiums on policies of life assurance, constituting the collateral security for the repayment of those sums, the equity of redemption being reserved to W. The rents having become insufficient, the trustee, in order to save one of the policies from lapsing, paid a premium out of his own moneys. He did this without any request from the mortgagee or from the owner of the equity of redemption of the policy. The life insured having dropped, and the proceeds of the policy having been received by the mortgagee:—Held, that the trustee was not entitled to any lien on the proceeds in respect of the premiums which he had paid, he not being a trustee of the policy. *Winchilsea (Earl) Policy Trusts, In re*, 58 L. J., Ch. 20; 39 Ch. D. 168; 59 L. T. 167; 37 W. R. 77.

By a deed, A. agreed that B. should insure her life, and that the costs of such insurance, and the payments for keeping the same on foot, should be paid out of the property charged, and she directed the trustees to make the necessary payments for effecting and keeping on foot the policies. The trustees did not make the payments, but the policy was kept on foot by B.:—Held, that he was entitled to interest thereon, at 4 per cent. *Hodgson* v. *Hodgson*, 2 Keen, 704; 7 L. J., Ch. 5.

A testator, by his will, bequeathed "one half of the property he left to his executrix, to be disposed of at her death to his nearest relation in law, provided he or she professed the established religion," and appointed his widow his executrix, and bequeathed to her all his worldly substance of, what nature and kind soever, except such part as was before devised for her own sole use and purpose. At his death, a part of the testator's property consisted of two annuities and two policies of insurances, effected by him on the lives of the cestui qui vies named in the deeds of annuity. The executrix having regularly received the annuities, and paid the premiums on the policies, on the dropping of the lives received from the insurance offices the sums insured on each life:—Held, on a bill filed after the decease of the executrix and tenant for life of the property of the testator, by the testator's nearest relation in law, and a professing Protestant, to recover the moiety of the property so bequeathed, that the tenant for life being a specific legatee of those annuities, which were freehold, was not bound to keep up the insurances, but that having done so she was entitled to be repaid out of the plaintiff's share a moiety of the sums so advanced, with interest; and as the moiety to which the plaintiff would be otherwise entitled was thereby exhausted, that the bill should be dismissed, and from the manner in which the cause had been conducted by the plaintiff, with costs. *Money* v. *Gibbs*, 1 Dr. & Wal. 394.

Payment by Person not sole Beneficial Owner—Lien—Salvage.]—E. mortgaged a policy of life assurance to F., and afterwards filed a petition for liquidation. Resolutions of the creditors were passed, under which E.'s friends were to pay 2*s.* in the pound on the unsecured debts, and the trustee was to assign to a nominee of the friends all E.'s property except the equities of redemption in the securities held by secured creditors. The terms of these resolutions were carried out, and E. obtained his discharge. Shortly after this, in 1883, E. agreed with D., who professed to be F.'s agent, for the purchase of F.'s interest in the policy, but no such purchase was ever carried out. Shortly after this agreement D. informed E. that none of the incumbrancers would pay the premium for that year, and E. paid it on the faith, as he deposed, of his interest under the agreement. There was no evidence that D. had any authority to enter into any agreement on behalf of F., or that F. had any knowledge of the contract, or of the payment by E. F.'s representative, Mrs. F., brought action to enforce her security, and the policy was sold for much less than the amount of the mortgage debt:—Held, that E. was entitled to be repaid out of the proceeds of sale the premiums for 1883 which he had paid, and that the residue must be paid to Mrs. F. But held, on appeal, that E.'s payment of a premium in his character of owner of the equity of redemption could not give him a lien in priority to the mortgage debt; that E.'s belief that he had a valid contract for purchase, when he had not, could not give him any advantage as regarded the premium, there being nothing to shew that F. knew of the alleged contract or of the payment of the premium; that, in the state of the evidence, no request from F. to pay the premium could be inferred, and no equity could be held to have arisen against F. on the ground of acquiescence or lying by; and that the fact that the policy had been preserved by E.'s payment did not give him a right to have the premium repaid nor give him a lien on the policy for it; and that, therefore, the whole proceeds of sale must be paid to Mrs. F. without deducting the premium. Semble, the maritime doctrine of salvage has no application to the payment of premiums on a policy. *West* v. *Reid* (2 Hare, 249); *Burridge* v. *Row*

(1 Y. & C. Ch. 183); *Shearman* v. *British Empire Mutual Life Assurance Co.*, L. R. 14 Eq. 4); *Gill* v. *Downing*, L. R. 17 Eq. 316); and *Aylwyn* v. *Witty* (30 L. J., Ch. 860), considered. *Falcke* v. *Scottish Imperial Insurance Co.*, 56 L. J., Ch. 707; 34 Ch. D. 234; 56 L. T. 220; 35 W. R. 143—C. A.

Return of—Purchase of Reversion set aside.]—The purchaser of a contingent reversionary interest insured the life of the vendor and paid premiums for some years. The sale was subsequently set aside as an unconscionable bargain:—Held, that the purchaser was not entitled to repayment of the premiums. *Fry* v. *Lane*, 58 L. J., Ch. 113; 40 Ch. D. 312; 60 L. T. 12; 37 W. R. 135.

—— **Wagering Policies.**]—J. H. effected with the defendant company two policies of insurance on the life of his father, J. H., in which he had no insurable interest. According to the policies the premiums were to be paid weekly. J. H., the son, continued to make these weekly payments for some years. J. H., the father, had at first no knowledge of the insurances effected on his life; but when he became aware of them he objected to their being continued, and gave notice to that effect to the company. J. H., the son, then gave notice to the defendants that the policies were at an end, and claimed the return of the amount of the premiums. The defendants refused to pay, and J. H., the son, brought his action for their recovery, and the county court judge gave judgment for the plaintiff:—Held, that under the circumstances of the case the policies were wagering policies, and consequently the premiums paid in respect of them could not be recovered. *Howard* v. *Refuge Friendly Society*, 54 L. T. 644.

Trustee of Policy unable to pay Premiums.]—A husband, by his marriage settlement, covenanted to keep up policies on his life for the benefit of himself, wife, and children. He became wholly unable to pay the premiums. The court authorised the trustees to surrender the policies. *Beresford* v. *Beresford*, 23 Beav. 222.

And, in another case, under similar circumstances, the court authorised the trustees to sell the policy, and accumulate the produce. *Hill* v. *Trenery*, 23 Beav. 16.

Where a trustee is or ought to be in possession of funds to pay the premiums of a policy of insurance, he cannot give a lien on the policy to another party for money advanced by such party to pay the premiums. *Clack* v. *Holland*, 19 Beav. 262; 24 L. J., Ch. 13; 18 Jur. 1007; 2 W. R. 402.

Where there is a declaration of the trusts of a policy, notice to the office is not necessary to complete the title. *Ib.*

Renewable Leaseholds — Charge of Personal Estate with Premiums on Policies on Lives.]—See *Meller* v. *Stanley*, infra, col. 68.

Life Policy—Settlor unable to pay Premiums—Power to Surrender.]—See *Steen* v. *Peebles*, 25 L. R. Ir. 544.

c. Covenants to Pay.

Absolute or Conditional Breach—Damages.]—By a Scotch marriage settlement dated the 18th of August, 1873, the husband assigned to trustees two policies on his life for 5,000*l.* each, expiring respectively on the 2nd and 3rd of July, 1875; and he covenanted "on or before the 2nd of July, 1875," to insure his life in the names of the trustees in the sum of 10,000*l.*; the existing and future policies to be held upon trusts for his wife and children. The husband took no steps towards effecting a new policy until the 1st of July, 1875, shortly before which date his health, which had previously been good, had become so bad that he was unable to effect an insurance, and in September following he died:—Held, that the life having become uninsurable on the 1st of July, 1875, did not relieve the husband from the obligation to insure or pay damages, and that accordingly his estate was answerable in damages to the trustees of the settlement. *Arthur, In re, Arthur* v. *Wynne*, 49 L. J., Ch. 556; 14 Ch. D. 603; 43 L. T. 46; 28 W. R. 972.

The defendant assigned to the trustees of an assurance society, and as collateral security for a mortgage for advances made by the office, a policy in the society, and covenanted with the trustees to keep it alive; and in case he should not do so, that it should be lawful for them to pay the premiums and keep it alive, and that all sums so paid by them should be charged on the land in the same way as the original mortgage money; but there was no covenant on the part of the defendant to repay any such sums to the trustees. The defendant made default in paying the premium for several years, and such premiums were placed to the credit of the company in their books, in an account kept by them for that purpose, and were yearly debited by them to the mortgage account of the defendant, all which was according to the usual practice of the office. The trustees then sued the defendant for a breach of covenant, and he paid into court 1*s.*:—Held, that assuming the facts to shew that the trustees had paid the annual premiums to the office, they were not entitled to recover more than nominal damages. *Brown* v. *Price*, 4 C. B. (N.S.) 598; 27 L. J., C. P. 290; 4 Jur. (N.S.) 882; 6 W. R. 721.

The plaintiff lent to the defendant 600*l.* on the security of a deed, whereby two policies were charged with the payment of the principal and interest. The deed contained a covenant by the defendant to pay the premiums of the policies. By their terms the policies only remained in force provided the premiums were paid every year. The defendant paid the first year's premium only, and the plaintiff having sued him on his covenant for non-payment of the three subsequent years' premiums:—Held, that as it did not appear that the plaintiff had sustained any loss by the defendant's neglect to keep up the policies the measure of damage was not the amount of the three years' premiums, but the plaintiff was entitled to nominal damages only. *National Assurance Co.* v. *Best*, 2 H. & N. 605; 27 L. J., Ex. 19; 6 W. R. 78.

—— **Forfeiture.**]—A debtor having assigned to his creditors a policy on his own life, and covenanted to pay the annual premiums, and not to do anything by which the policy should be forfeited, caused a forfeiture of it by going beyond the limits of Europe without the licence of the assurers, contrary to a condition in the policy:—Held, that the measure of damages for such a breach of covenant was the present value of the policy at the time of forfeiture, taking into consideration that the debtor had covenanted to pay, and taking it as if he would have paid

the annual premiums. *Hawkins* v. *Coulthurst*, 5 B. & S. 343; 33 L. J., Q. B. 192; 10 Jur. (N.S.) 876; 12 W. R. 825.

Satisfaction.]—D. and P. joined in a covenant in a mortgage deed (as sureties) to pay the premiums on life policies, forming part of the security, and by a contemporaneous instrument, to which they were not parties, the equity of redemption was assigned for the benefit of the creditors of the mortgagor. D., who signed the trust deed as a creditor, being called upon to pay the premium on one policy, applied to B. to do so for him, and assigned to B. the policy; and B. covenanted to pay future premiums. The mortgage was paid off; B. paid the premiums, and the policy was sold by the trustee of the creditors' deed, under a power contained in it. A creditors' suit being instituted, on the question whether D. and P. were entitled as against the other creditors to a lien upon the produce of the policy:—Held, that as between D. and B., and B. and the creditors, such creditors were not entitled to take the money, without making payment in satisfaction of the premiums paid by B. *Aylwin* v. *Witty*, 30 L. J., Ch. 860; 9 W. R. 720.

Covenant to Pay — Bankruptcy — Proof — Value.]—Where, in an arrangement matter, a creditor held policies of insurance which the arranging debtor had covenanted to keep up:—Held, that the value of the creditor's interest in the covenant was the sum which the insurance company would accept as a present payment, by way of commutation of the annual premiums, to keep the policies subsisting. *Bank of Ireland, Ex parte, S., In re*, 17 L. R., Ir. 507.

Action on.]—A deed of assignment of a life policy contained a covenant by the assignor, that he would pay to the company, with whom it was effected, the annual premium and other moneys which should be required to keep the policy on foot, when and as the same should become due and payable; and that, if he should neglect or refuse to pay the annual premium within seven days after the 5th June in every year, it should be lawful for the plaintiff to pay the annual premium, and sue for and recover the same from the defendant in an action, as for money paid by him to and for the use of the defendant, and at his request:—Held, that an action of debt lay on the deed, to recover an annual premium paid by the plaintiff upon default of the defendant in paying the same. *Barber* v. *Butcher*, 8 Q. B. 863; 15 L. J., Q. B. 289; 10 Jur. 814.

A loan was granted by an insurance company upon a bond with sureties, and a policy on the life of the borrower, as a collateral security. The premiums were not paid within the days of grace, but were demanded by the company, who brought actions against the sureties of the bond; they refused to pay, and pleaded non est factum and payment. Upon a suit instituted in equity to restrain such actions, and it being contended that the demand by the company, after the policy was actually void, had revived it:—Held, that such revival was neutralised by the fact of refusal to pay, and the bill was dismissed with costs. *Edge* v. *Duke*, 18 L. J., Ch. 183.

Pleading.]—A declaration stated, that by deed between the plaintiffs and defendant, reciting that he had effected with the plaintiffs an insurance on his life, he paying the annual premium of 49*l*. 8*s*. 4*d*. on or before the 24th of June in each year, the defendant covenanted with the plaintiffs to pay them the premiums and all other sums of money that should become due in respect of the policy, at the proper times for that purpose, and to do every other matter or thing which would be necessary for keeping on foot the policy. First breach, that the defendant did not pay the premiums which became due in respect of the policy, according to his covenant; but on the contrary, although afterwards, to wit, on the 24th June, 1847, a premium of 49*l*. 8*s*. 4*d*. became due, yet the defendant did not then, or at any other time, pay it. Second breach, that the defendant did not do all such matters and things as were necessary for keeping on foot the policy, but on the contrary, although afterwards, to wit, on the 24th June, 1847, it was necessary in order to keep the policy on foot, that an annual premium should be paid within twenty-one days from that day, yet the defendant did not, within that period, or any other time, pay it:—Held, that both breaches were bad. *North British Insurance Co.* v. *Riky*, 2 Ex. 687.

Return of Premiums.]—See *Fowler* v. *Scottish Equitable Life Insurance Society*, supra, col. 7.

d. Receipts by Agents.

Authority.]—Upon a policy on the life of A., the premium became due on the 15th March, but was not paid until the 12th April, when the country agent of the company, through whom the insurance had been effected, gave a receipt for the amount of the premium. The instructions given by the company to the agent were, that the premium on every life policy must be received within fifteen days from the time of its becoming due; if not paid within that time, that he was to give immediate notice to the office of that fact, and in the event of his omitting to do so, that his account would be debited for the amount, after the fifteen days had expired. No notice was given to the company of the nonpayment of the premium within the fifteen days; it was therefore entered in their books as paid on the 15th March, and the agent was debited for the amount:—Held, first, that the mere debiting the agent with the premium could not be considered as a payment to the company by the assured; and secondly, that as the agent had no authority to contract for the company, the fact of his receiving the money after the expiration of the fifteen days, and the entry in the company's books debiting him with the amount, were no evidence of a new agreement between the company and the assured. *Acey* v. *Fernie*, 7 M. & W. 151; 10 L. J., Ex. 9.

—— **After Forfeiture.**]—Indorsed upon a policy was a condition that it should be void, and the money secured thereby forfeited to the use of the company, if the insured should go beyond the limits of Europe without the licence of the directors. The condition was infringed by the insured going to reside in Canada, where he died; but, after the breach, the local agent of the company at the place where the policy had been effected continued to receive the usual premiums upon the policy, with notice of the breach of the condition, which he represented as not invalidating the policy, provided the premiums were regularly paid:—Held, that the notice of the

breach of the condition given to the agent of the company was constructive notice to the company; and that the latter, whether they had express notice of the breach or not, were precluded by the conduct of their agent from insisting upon the forfeiture upon the death of the insured. *Wing* v. *Harvey*, 5 De G. M. & G. 265; 2 Eq. R. 533; 23 L. J., Ch. 511; 18 Jur. 394; 2 W. R. 370.

e. EXTRA OR ADDITIONAL.

Liability.]—An insurance company purchased an annuity, and took as a security an assignment of the whole equitable interest of the grantor in a trust fund, which produced much more than enough to pay the annuity, with a proviso that in case the company should insure any sum not exceeding the price of the annuity, and should pay an additional rate of insurance by reason of the grantor going beyond sea, all sums so paid for additional premiums should be returned out of the life interest and the surplus be held on trust for the grantor. No policy of assurance was, in fact, effected, except that the company became their own insurers by making a policy in a separate branch of their own company:—Held, that though the grantor did in fact go beyond sea for several years, the company was not entitled to charge the premiums for extra risk which had in fact been incurred, no additional premiums having in fact been paid. *Grey* v. *Ellison*, 1 Giff. 438; 25 L. J., Ch. 666; 2 Jur. (N.S.) 511; 4 W. R. 497.

—— **Enforcing Reduction.**]—If an assurance society takes an extra premium upon an increased risk, and promises to reduce it upon being satisfied that the risk has ceased, such promise is not an agreement which a court of equity can carry into effect. *Manby* v. *Gresham Life Assurance Co.*, 29 Beav. 439; 31 L. J., Ch. 94; 7 Jur. (N.S.) 383; 4 L. T. 397; 9 W. R. 547.

Where, therefore, the directors of a society, upon re-examination of a life assured, and upon medical evidence subsequently sent to them, "considered the risk existing," and declined to reduce an extra premium:—Held, that they were sole judges of the fact, and that the court could not interfere with their discretion. *Ib.*

VIII. MORTGAGE, ASSIGNMENT AND SALE.

a. VALIDITY GENERALLY.

Stamp.]—An assignment of a policy of insurance to secure a debt, is an assignment by way of mortgage within 55 Geo. 3, c. 184, and requires an ad valorem stamp as such. *Caldwell* v. *Dawson*, 5 Ex. 1; 14 Jur. 163.

Voluntary Assignment.]—A debtor, during his last illness, assigned two policies on his life, for 500*l.* and 300*l.*, to a creditor, in consideration of a debt of 174*l.* 3*s.* 6*d.* He died within a month afterwards intestate. The policies were paid to the assignee:—Held that the policies were securities for money within 1 & 2 Vict. c. 110, s. 12, that the assignment was voluntary, and void under 13 Eliz. c. 5, and that the deed could only stand as a security for the debt due to the party who obtained the assignment. *Stokoe* v. *Cowan*, 29 Beav. 637; 30 L. J., Ch. 882; 7 Jur. (N.S.) 901; 4 L. T. 69; 9 W. R. 801.

—— **Subsequent Mortgage.**]—A. voluntarily assigned a policy on his life to trustees for his infant son, if he attained twenty-five; but if he died under that age, and A. should think proper to keep up the policy, upon trust for B. A. covenanted to pay the premiums during the life of his son only; and in the event of A. ceasing to pay the premiums, he should be at liberty to sell the policy and retain the money. The son died under twenty-five, and A. mortgaged the policy, covenanting to pay the premiums, which he did:—Held, on the death of A., that the produce of the policy belonged to the mortgagees, and not to B. *Pedder* v. *Mosely*, 31 Beav. 159; 7 L. T. 205.

Lien — Bankruptcy, Abroad—Assignment in England.]—In 1833, A., domiciled in Jersey, deposited with B., domiciled in England, a policy effected in Jersey, upon A.'s life, for 499*l.* as security for 210*l.* advanced by B. to him. This transaction took place in England; no notice of the deposit was given to the office, who afterwards, upon a false representation of the loss of the policy, delivered to A. a duplicate of the policy, which, in 1853, he by deed assigned to his wife (from whom he had obtained a judicial sentence of separation de biens), in consideration of 400*l.* alleged to have been paid by her to him; notice of this assignment was given to the office. A., or his wife, paid the premiums till his death. In 1838 A. became insolvent, and made a cessio bonorum of his property, but no proof of B.'s debt was registered by him under A.'s insolvency. On an action brought in Jersey by A.'s wife against the insurance office to recover the amount of the policy, B. intervened and claimed a lien under the deposit with him by A. of the original policy:—Held, first, that as B.'s domicil was English, and the contract made in England, B. had by the English law a lien upon the policy. *Le Feuvre* v. *Sullivan*, 10 Moore, P. C. 1.

Held, secondly, that the cessio bonorum made by A. in Jersey did not affect such lien. *Ib.*

Bond — Intended Assignment.]—Declaration by executors, on a policy containing conditions—first, that policies effected by persons on their own lives, who should die by their own hands, would become void, so far as regarded the executors or administrators of the person so dying, but would remain in force only to the extent of any bonâ fide interest which might have been acquired by any other person under an actual assignment by deed for a valuable consideration in money, or by way of security or indemnity, or by virtue of any legal or equitable lien as a security for money, upon proof of the extent of such interest being given to the directors to their satisfaction; and, secondly, if a person who should have been insured on his own life for at least five years, or should have paid a sum equivalent to at least five years' premiums, should die by his own hands, the directors should be at liberty, if they thought proper so to do, but not otherwise, to pay for the benefit of the family. Plea, that the insured died by his own hand. Replications, first that before the death of the insured, K. acquired a bonâ fide interest in the policy by actual assignment by way of security for money within the meaning of the conditions, and proof of the extent of such interest was before action given to the directors to their satisfaction; and, secondly, that before the death, K. acquired a bonâ fide

interest in the policy by virtue of an equitable lien as a security for money, and proof of the extent of such interest was before action given to the directors to their satisfaction :—Held, that the first replication was bad for not shewing that the alleged assignment was by deed. *Moore* v. *Woolsey*, 4 El. & Bl. 243 ; 3 C. L. R. 207 ; 24 L. J., Q. B. 40 ; 1 Jur. (N.S.) 468 ; 3 W. R. 66.

Held, that the second replication was proved by evidence that the insured had before marriage given a bond conditioned to secure 5,000*l*. to his intended wife, and that subsequently, not being able to do so, an agreement was made among different members of the family, by which the insured was to insure his life for the benefit of his wife, and she was to keep up the premiums out of her private income ; and that in pursuance of such agreement he did insure, and handed over the policy to K. as trustee for the wife, intending to assign regularly, but that he did not so assign, but died by his own hands, which facts were made known to the directors. *Ib.*

Held, also, that such evidence was sufficient to shew that the policy was in the hands of K. an equitable lien, and that the directors ought to be satisfied, it not being necessary to shew that they were, in fact, satisfied. *Ib.*

Second Pledge—Negligence.]—In detinue by the executor of N. against M., a banker, for a policy on the life of S., M. pleaded that the policy was not the property of N., and also that N. fraudulently permitted S. to hold the policy, and represent that he was entitled to the money secured by it. Replication, denying the fraudulent permission. S. insured his own life in 1831, and by deed assigned the policy to N. in 1832, who gave notice of the assignment to the office, and paid all the premiums afterwards. S. retained the policy till he deposited it with M. on a loan of money in 1843 :—Held, first, that the property in the policy passed to N. by the deed of 1831, although he had no possession of the policy. *Neale* v. *Molineux*, 2 Car. & K. 672.

Held, secondly, that though N. had been guilty of negligence in allowing S. to retain the policy, the defendant had not proved his plea, unless the jury was satisfied that N. intended that S. should borrow money of some one, and left the policy in S.'s hands, in order that he might cheat some one by borrowing money on it. *Ib.*

Felony — Consideration.] — A clerk having robbed his employers of money, gave them, upon the discovery of his frauds and before his prosecution, an equitable security on policies on his life and lands for the amount. He was afterwards prosecuted and convicted :—Held, that the debt was a good consideration for the securities, and that they were valid. *Chowne* v. *Baylis*, 31 Beav. 351 ; 31 L. J., Ch. 757 ; 8 Jur. (N.S.) 1028 ; 8 L. T. 39 ; 11 W. R. 5.

Suicide after Assignment.]—A man insured his life, and afterwards mortgaged the policy and other property. He afterwards committed suicide. The policy contained a provision that if the insured should die by his own act the policy should become void, except to the extent of any interest acquired by assignment :—Held, that the office was bound to pay to the mortgagee the sum insured, and could not come upon the other property mortgaged either for repayment or for contribution. *Solicitors' and General Life Insurance Society* v. *Lamb*, 2 De G. J. & S. 251 ; 33 L. J., Ch. 426 ; 10 Jur. (N.S.) 739 ; 10 L. T. 792 ; 12 W. R. 941.

—— **Collateral Security—Marshalling.**] — A policy of assurance contained a condition that, if the assured should die by his own hand the policy should become void, and all moneys paid in respect thereof should be forfeited to the company. But in case the beneficial interest in the policy had been vested in any other person for a valuable and pecuniary consideration, the policy should remain valid to the extent of the interest of such person, subject to a specified notice in writing having been given of the transaction transferring the interest. The assured deposited the policy with the plaintiffs to secure a debt owing from his firm and further advances, the deposit being accompanied by a memorandum stating that the policy was deposited by way of equitable mortgage as collateral security. The required notice was given to the assurance company, and the assured subsequently committed suicide, the plaintiffs holding at the time of his death other securities for the debt besides the policy :—Held, that the suicide clause was undistinguishable from that which was under decision in *Solicitors' and General Life Assurance Co.* v. *Lamb* (supra), and that the plaintiffs were entitled to be paid out of the policy moneys the amount of the debt due to them at the date of the death of S. Held, further, that notwithstanding that the estate of the assured might thereby be benefited, the assurance company were not entitled to have the debt paid, either primarily or ratably, out of the other securities held by the plaintiffs. *City Bank* v. *Sovereign Life Assurance Co.*, 50 L. T. 565 ; 32 W. R. 658.

An assurance company advanced money to W. on a mortgage of real security, and on his effecting a policy on his life in their office for the amount of the loan, which was deposited with the company as collateral security. The policy contained a condition that if the assured died by his own hands, by the hands of justice, or by duelling, the policy should be void, except to the extent of any bonâ fide interest therein which at the time of such death should be vested in any other person or persons for a sufficient pecuniary or other consideration. The assured committed suicide under temporary insanity while the policy was in the hands of the company :—Held, that the company and the assured stood in the same position as if the policy had been mortgaged to any third person ; that the company came within the exception in the condition ; and therefore that the policy was valid to the extent of the mortgage debt due to them at the death of the insured. *White* v. *British Empire Mutual Life Assurance Co.*, 38 L. J., Ch. 53 ; L. R. 7 Eq. 394 ; 19 L. T. 306 ; 17 W. R. 26.

—— **After Bankruptcy.**]—A policy contained a condition that it should be void if the life insured died by suicide ; but if any third party had acquired a bonâ fide interest therein by assignment, or by legal or equitable lien for a valuable consideration or as security for money, the policy should, to the extent of such interest, be valid. On the 9th July the life insured, who was a merchant at Valparaiso, became bankrupt according to the law there, and all his estate and effects became vested, by operation of law, in the escribano, or notary officially attached to the court. On the 14th July he committed suicide. On the 15th a meeting of creditors was held, and

assignees were appointed :—Held, that the assignment by operation of law was not within the exception in the policy, and therefore the assignees were not entitled to recover. *Jackson* v. *Forster*, 1 El. & El. 463 ; 29 L. J., Q. B. 8 ; 5 Jur. (N.S.) 1247 ; 7 W. R. 578—Ex. Ch.

Equitable Assignment by Letter.]—A letter expressed to be a binding assignment upon trusts by way of voluntary settlement of certain policies of life assurance (before such policies were at law assignable) and accompanied with delivery of those of the policies which were in the assignor's possession :—Held, to be an effectual equitable assignment, although the writer expressed his intention of subsequently executing a deed to vest the policies in the assignee jointly with another person not yet selected as trustees, and although some of the policies (being in mortgage to the office) were not handed over, and no notice of the assignment was given to the office. *King's Estate, In re, Sewell* v. *King*, 49 L. J., Ch. 73 ; 14 Ch. D. 179 ; 28 W. R. 344.

It was the duty of the assignee, not of the assignor, to give notice to the office. The letter contained an undertaking by the assignor (which was not performed) to discharge the mortgage : —Held, that the assignment could be given effect to independently of this undertaking. *Ib.*

One of the conditions of a policy was, that it should be void if the assured died by his own hand, except it should have been assigned to other parties, for valuable consideration, six months before his death :—Held, that a letter to A., charging it with a floating balance due to him, and made three years previously to the death of the assured by his own hand, was within the exception. *Jones* v. *Consolidated Investment Assurance Co.*, 26 Beav. 256 ; 28 L. J., Ch. 66 ; 5 Jur. (N.S.) 214.

A., having assured his life, wrote to the company, "Please to take notice that I wish to transfer my interest in the policies to B." The letter was delivered to the company and noted in their books :—Held, that this was a good equitable assignment, as against a subsequent assignee of the policies, who had, in addition, obtained possession of them. *Chowne* v. *Baylis*, 31 Beav. 351 ; 31 L. J., Ch. 757 ; 8 Jur. (N.S.) 1028 ; 8 L. T. 739 ; 11 W. R. 5.

Assignment by Deposit.]—A policy was to become void in certain cases, except it should have been legally assigned :—Held, that this meant "validly and effectually assigned" ; that an equitable charge by mere deposit came within the exception, and that notice of it to the office was unnecessary. *Dufaur* v. *Professional Life Assurance Co.*, 25 Beav. 599 ; 27 L. J., Ch. 817 ; 4 Jur. (N.S.) 841.

Where a husband gave a policy on his life to his wife on condition that she paid the premiums but made no assignment in writing :—Held, that the policy-moneys passed under a subsequent will to the executrix and sole devisee. *Howes* v. *Prudential Assurance Co.*, 49 L. T. 133.

A. being indebted to C., placed in his hands a policy of insurance upon his (A.'s) life. No written document accompanied the deposit, but it was understood between them to be as a collateral security for the debt then due, and for any further advances from C. to A. A. died, having received further advances, and being still in debt to C. :—Held, that the equitable deposit of the policy, and the circumstances attending it, would be sufficiently proved by an affidavit of C. *Maugham* v. *Ridley*, 8 L. T. 309.

—— **Payment to Equitable Owner—Interest.**] —In 1847 A. deposited a policy on his own life with B. as security for an advance of money, and died in 1874 insolvent, and no administration was taken out to his estate. In 1875 B. proved A.'s death to the satisfaction of the assurance company, and demanded payment of the policy-moneys, which were insufficient to pay his debt, but the company refused to pay him without the consent of the legal personal representative of A. In 1878 B. died, and on action brought by his executors against the company claiming a declaration that they were entitled to the policy-moneys, and payment with interest from the time when the demand of payment was made, Jessel, M.R., held (1) that the company was justified in refusing to pay over the policy-moneys without the consent of A.'s legal personal representative ; (2) dispensed with the legal personal representative of A. under the Chancery Amendment Act, 1852, s. 44 ; and (3) ordered payment of the policy-moneys, with interest at 4 per cent. from the date when demand of payment was made. On appeal on the question of interest :—Held, that as the default or delay in payment of the policy-moneys had been caused, not by the company, but by B.'s neglect to clothe himself with a legal title to the money, interest did not commence to run till the order for payment of the principal was made. *Crossley* v. *City of Glasgow Life Assurance Co.* (4 Ch. D. 421) overruled on this point. *Webster* v. *British Empire Mutual Life Assurance Co.*, 49 L. J., Ch. 769 ; 15 Ch. D. 169 ; 43 L. T. 229 ; 28 W. R. 818—C. A.

It was the duty of the assignee, not of the assignor, to give notice to the office. The letter contained an undertaking by the assignor (which was not performed) to discharge the mortgage : —Held, that the assignment could be given effect to independently of this undertaking. *Ib.* See also *Curtius* v. *Caledonian Assurance Co.* (19 Ch. D. 534), post, col. 74.

S. having effected two policies on his life for the purpose, as he expressly informed the assurance company, of enabling him to give C. a security for a debt which exceeded the amount of the policies, deposited them with C., at the same time asking him by letter to instruct his, C.'s, solicitor, to prepare the necessary assignment. C., however, never took any assignment. S. died insolvent, having made a will appointing executors, but no representation was taken out to his estate. C. then gave the company notice in writing of the death, and that he held the policies as security for his debt, and the company acknowledged the receipt of the notice in the terms of the Policies of Assurance Act, 1867, s. 6. Proper evidence of S.'s death having been subsequently produced to the company, they wrote to C. that the claim under the policies would be paid at the expiration of three months, but that the assent of S.'s legal personal representative would be required before settlement. After the expiration of the three months C., being unable to obtain payment of the policy-moneys (although his debt was admitted by S.'s executors, and he offered the company an indemnity), brought an action for that purpose against the company, insisting that S.'s deposit and letter constituted an equitable assignment of the policies within the Policies of Assurance

Act, 1867, and therefore enabled him to give a valid discharge for the moneys:—Held, that there had been no equitable assignment of the policies within the act, and that the company was justified in refusing to pay him in the absence of S.'s legal personal representative. *Crossley* v. *City of Glasgow Life Assurance Co.*, 46 L. J., Ch. 65; 4 Ch. D. 421; 36 L. T. 285; 25 W. R. 264. *But see* supra.

Held, also, that the court had power to order payment without a legal personal representative of the deceased, under the Chancery Procedure Act, 1852 (15 & 16 Vict. c. 86), s. 44, and that the plaintiff was entitled to interest at 4 per cent. on the sum assured under 3 & 4 Will. 4. c. 42. *Ib.*

Condition against Assignment — Beneficial Interest.]—A policy was subject to a condition that it should "not be assignable in any case whatever," and there was a separate proviso that the insurance company should not be bound to recognise any equitable dealings with the policy:—Held, that the effect of the condition against assignment was merely to make the policy which was subject to it non-assignable at law as it would have been prior to the Policies of Assurance Act, 1867, and did not prevent a policy-holder dealing with the beneficial interest in it (e.g. by a declaration of trust), or a court of equity from enforcing such a transaction. *Turcan, In re*, 58 L. J., Ch. 101; 40 Ch. D. 5; 59 L. T. 712; 37 W. R. 70—C. A.

Customs Annuity and Benevolent Fund—Power to Bequeath.]—The Customs Annuity and Benevolent Fund was established for the benefit of the widows, children, or other relatives of officers of the Customs, by act of parliament, which gave power to frame rules for its management. By the rules it was provided that the fund should be raised by subscriptions on the principle of life insurance, and should form a fund for the benefit of widows, children, relatives, and nominees of the subscribers. It was provided that the admission of a nominee by the directors should take place during the life of the subscriber; that the capital money forthcoming at a subscriber's death under his insurance should, subject to the regulations thereinafter contained, be appropriated according to the directions contained in his will or in any instrument deposited with the directors; that the widow's share should not be less than one-third, or a life interest in two-thirds, and that the remainder should be applied according to the directions of the subscriber for the benefit of his widow, children, blood relations, or his nominees who had been duly admitted by the directors; that if the widow was otherwise provided for the whole money should be subject to the directions of the subscriber in favour of his widow, children, blood relations, or nominees; that if the widow received the income of two-thirds, the capital of the two-thirds should be held, subject to the directions of the subscriber, to take effect at the death of the widow, and the remaining capital, subject to the directions of the subscriber, to take effect at his own death; that if the widow was provided for, or if there was no widow, then the whole capital should be "subject to the directions of the subscriber as aforesaid"; that if a subscriber died leaving issue without having by will or other instrument directed the application of the capital placed at his disposal, it should go to his children and the issue of deceased children, and if none, to his next of kin. A subscriber died a widower, leaving children. No nominee had been accepted by the directors in his lifetime. By his will he bequeathed the fund coming from his insurance to a stranger in blood:—Held, by Bacon, V.-C., that the legatee was entitled; but held by the Court of Appeal that the subscriber had no property in the fund, but only a limited power of appointment over it, and that this power could only be exercised in favour of his widow, children, blood relations, and nominees admitted by the directors in his lifetime; that he had no power to bequeath the fund to a stranger in blood who had not in his lifetime been accepted by the directors as a nominee, and that the fund therefore belonged to the children. *Phillips' Insurance, In re*, 52 L. J., Ch. 441; 23 Ch. D. 235; 48 L. T. 81; 31 W. R. 511—C. A.

Mortgage or Assignment—Right to Redeem—Terms of Redemption.]—The plaintiff entitled to an annuity of 200*l.* a year for life out of L.'s estate, being a prisoner in the Fleet, sold to R. three-quarters of the annuity for 1,050*l.*, and in the deed there was a proviso that if the plaintiff should at any time desire to purchase back the said three-fourths, and give six months' notice in writing to R., his executors, &c., and pay the 1,050*l.*, then R., his executors, &c., should re-assign to the plaintiff. At the time the parties met for the execution of this deed, R. insisted upon an indorsement on the back of it, signed by the plaintiff, that if the plaintiff should re-purchase or redeem the three-fourths of the annuity, it should be upon the payment of 1,050*l.* and 75*l.*, and all arrears. The plaintiff being in perfect health and under the age of twenty-two years when he executed the assignment, brought his bill to be relieved, and, upon payment of what shall be due for principal and interest, the defendant may be decreed to re-assign the annuity. Lord Hardwicke was of opinion that the plaintiff was entitled to a redemption, and that the annuity he granted ought to be re-conveyed on his payment of 1,050*l.* with legal interest, to be computed from the 1st of June, 1737, the date of the deed, but directed, if any sums were advanced for the insurance of the plaintiff's life, they should be added to the 1,000*l.*, and carry 5 per cent. interest from the respective times of paying the same. *Lawley* v. *Hooper*, 3 Atk. 278.

Annuity secured by bond and a trust of rents and dividends being void, the memorial omitting a clause of redemption and the trust, and stating the consideration untruly, a general account was decreed of the purchase-money from the actual payment, which was subsequent to the date of the deeds and of the premiums paid by the grantee for insuring the grantee's life, and an account of all sums received under the annuity with interest respectively, on payment of the balance and the costs by the plaintiff, the securities to be delivered up, &c., the bill offering to pay principal and interest, and by any other fair and reasonable demands. A letter from the grantor, written prior to the grant, in the course of another negotiation between the parties, which did not take place, was admitted as evidence (but no farther) that he had upon that occasion proposed the insurance of his life as a reasonable term. *Hoffman* v. *Cooke*, 5 Ves. 623.

An annuity being void, the memorial not containing a clause of re-purchase, the grantee

was not allowed in the account the premiums of insurance of the life of the grantor and costs incurred in supporting the annuity. *Shaw, Ex parte*, 5 Ves. 620.

A., for an expressed consideration of 144*l.*, by deed of assignment, absolute in its form, assigned to B. a life-policy of assurance for 999*l.* This deed did not contain any clause authorising B. to sue upon the policy, which was of doubtful validity, in the name of A. Contemporaneously with the assignment A. executed to B. a bond, conditioned for the payment of the sum of 144*l.* with interest. The actual consideration of the assignment and bond was the same sum of 144*l.*, and consisted partly of a prior debt due by A. to B. in respect of some bills of exchange discounted for A. by B., amounting to a sum of nearly 119*l.*, and the residue consisted of 25*l.* cash, of which 20*l.* were repaid by B. to A., and the remaining 5*l.* were retained by B., and handed by him in payment of the costs of the assignment and bond to the person who prepared the same. From the time of the assignment, B. paid the premiums on the policy into a savings' bank, with notice thereof to the company, who had refused to receive them when tendered by B. On the death of the insured, B., with the consent of A., sued the company in his (A.'s) name, and eventually compromised the action on payment of 600*l.* to himself (B.):—Held, on a bill by A. against B., that the assignment of the policy operated by way of mortgage, and not absolutely, and that, therefore, A. was entitled to an account in respect of the proceeds, but that B. should have his costs as in an ordinary redemption suit, and also the costs of the proceedings against the company. *Murphy* v. *Taylor*, 1 Ir. Ch. R. 92.

—— **Advances or Costs—Subsequent Assignment for Advances only.**]—A solicitor took a deposit of a policy from his client, under a parol agreement that it was to secure his then existing costs. Afterwards he made advances, and took an assignment of the policy to secure them, the deed saying nothing about the costs:—Held, that the deed expressing no agreement that it was to include the costs, the possession under it merged the possession under the deposit, and the policy was only a security for the advances. *Vaughan* v. *Vandersteyen*, 2 Drew. 289; 2 W. R. 293.

Substituted Policy—Right to Redeem.]—A mortgage comprised two policies on the life of the mortgagor, which the mortgagee was authorised but not compelled to keep on foot. The mortgagor sold his equity of redemption at an undervalue, and an assignee of the purchaser substituted for them another policy on the mortgagor's life in lieu of the original ones, which were dropped, and assigned the same to the mortgagee. The assignee of the purchaser paid off the mortgage, and continued to pay the premiums. The sale of the equity of redemption was afterwards set aside at the instance of the executors of the mortgagor:—Held, that the substituted policy formed part of the equity of redemption, and that the executor of the mortgagor was entitled to redeem such substituted policy in the same way that he could have redeemed the original policies. *Nesbitt* v. *Berridge*, 4 De G. J. & S. 45; 10 Jur. (N.S.) 53; 9 L. T. 588; 12 W. R. 283.

Agreement for Mortgage—Rectification.]—A. being the holder of several policies of insurance on the life of B., and being unable to keep them up, entered into an agreement with C. for the purpose of C. keeping them up. The agreement consisted of three instruments: first, a letter, by which it was stated that he was to pay the premiums, and to have his advances and interest secured by a deposit of the policies, a bond, and an equitable mortgage of certain estates. No time was specified for the payment of the advances and interest. Secondly, a bond for 6,000*l.*, referring to the letter for repaying the advances and interest, at the expiration of six months from the death of B. Thirdly, an agreement, also referring to the letter and to the deposit of the policies, to secure the payment of the advances and interest, at the expiration of six calendar months from the death of B., by which agreement the advances and interest were secured, to be paid at six months after the death of B., upon certain estates. A. died, during the life of B., leaving a considerable amount of advances and interest unpaid, having, before his death, assigned the policies to trustees for his creditors. C. now filed his bill, claiming to have all his advances and interest paid, and that the agreement might be varied and made to conform to the letter; and that, if necessary, the policies might be sold:—Held, first, that upon the true construction of the three instruments, C. had no security on the policies available till after the expiration of six months from the death of B.; secondly, that the agreement could not be rectified, there being nothing to rectify it by except the letter itself, the letter and agreement being incorporated in effect into one instrument, and the letter not specifically pointing out the time when the security was to be available. *Brougham* v. *Squire*, 1 Drew. 151.

Agreement to execute Mortgage—Assignment.]—An agreement in writing to execute on request an effectual mortgage of a policy of insurance deposited at the time of the agreement as security for a loan, is not an assignment of such policy within the meaning of the Policies of Assurance Act, 1867. *Spencer* v. *Clarke*, 47 L. J., Ch. 692; 9 Ch. D. 137; 27 W. R. 133.

Payment—Receipt of Assignor's Representative.]—Payment of policy refused by insurance office to assignee without the signature of executor of deceased:—Held, bound to pay. *Ottley* v. *Gray*, 16 L. J., Ch. 512.

An assignment of a policy to A. contained no declaration that A.'s receipt would be a sufficient discharge to the office:—Held, no reason for refusing payment to A.'s executor. *Glynn* v. *Locke*, 2 Con. & L. 21; 3 Dr. & War. 11; 5 Ir. Eq. R. 61.

The circumstance that a mortgage assignment of a policy did not contain a clause making the receipt of the mortgagee a good discharge for the sum assured, but did contain the ordinary power of attorney to sue in the name of the mortgagor, did not entitle the assurance office to call for the insolvent assignee of the mortgagor to join in the receipt. *Desborough* v. *Harris*, 5 De G. M. & G. 439; 1 Jur. (N.S.) 986; 3 Eq. R. 1058; 4 W. R. 2.

Authority to Mortgage—Power of Attorney.]—A. gave to B. a power of attorney to receive A.'s rents and official salary, and to act generally in his affairs as fully as he himself could:—Held, that this power, taken together with a certain correspondence, authorised a mortgage of policies. *Parry* v. *Holt*, 6 Jur. (N.S.) 661; 8 W. R. 578.

Agreement to Assign.]—Where a policy was effected, with a condition that if assigned bonâ fide the assignee should have the benefit of it, notwithstanding the assured should commit suicide, and the assured did afterwards deposit it with a creditor as a security, together with a letter binding himself to assign it when requested, and he afterwards did commit suicide:—Held, that this was a sufficient assignment as against the assurers, within the terms of the condition. *Cook* v. *Black*, 1 Hare, 390; 11 L. J., Ch. 268; 6 Jur. 164.

Assignment of Policy Abroad—Lex Loci.]—The plaintiff sued the trustees of an English life assurance company as assignee from her husband of a policy of life insurance granted by the company. The assignment to the plaintiff was made in Cape Colony, the assignor being then domiciled in that colony, where he remained till his death. By the law of Cape Colony, such an assignment was void by reason of the alleged assignee being the wife of the assignor:—Held, that the law of Cape Colony applied to the assignment of the policy, and therefore that the defendants were entitled to judgment. *Lee* v. *Abdy*, 17 Q. B. D. 309; 55 L. T. 297; 34 W. R. 653.

Debtor and Creditor—Nomination—Surplus Policy-Moneys.]—A debtor, at the request and expense of his creditor, insured his life for 400*l*., being less than he then owed the creditor, in a benefit insurance society, and nominated his creditor as the person to receive the amount. The debt was reduced to 314*l*.: the debtor died and the creditor received the 400*l*.:—Held, that the debtor's administrator was not entitled to recover the balance beyond the 314*l*. from the creditor. A claim for this purpose was dismissed, and (on an undertaking by the defendant not to enforce his debt against the debtor's estate) with costs. *Brown* v. *Freeman*, 4 De G. & Sm. 444.

Redemption—Right to Assignment of Policy.]—B., in consideration of 2,275*l*., assigned an annuity upon her own life charged upon the estates of X. to A., and covenanted for the payment of it. The deed contained a clause empowering B. to determine and revoke the assignment upon repayment of the principal sum of 2,275*l*., and discharge of all arrears of the annuity, "and all proportion of such annual and increased premium as after-mentioned to be paid by A. to the Hope Assurance Company, if any shall be so paid": provided that whereas A. had assured or agreed to assure the life of B. for the sum of 2,275*l*., the annual premium for which was payable in advance at the beginning of each year, it was agreed that if that above-mentioned redemption should take place at any time after the premium should have been paid for in the current year, then B. would repay to A. at the time of such redemption the full proportion of such premium, which should belong to such part of the current year as should be then unexpired, whether B. should require the policy of assurance to be assigned to her or not; and B. covenanted to repay A. all extraordinary expenses of insurance occasioned by her going beyond Europe. A. effected a policy of assurance on the life of B., for 2,275*l*.:—Held, that B. was entitled upon re-purchase of the annuity to an assignment of the policy. *Williams* v. *Atkyns*, 2 Jo. & Lat. 603.

b. NOTICE.

Priorities.]—A policy effected by A. on his life was mortgaged in 1860 without notice to the office. He became bankrupt in 1862, and in 1868 joined in a transfer of the mortgage to B., who had no notice of the bankruptcy. After the death of A., B.'s solicitor gave notice to the office that this and other policies were mortgaged, and that he acted for the mortgagees, not naming them. Subsequently notice of the bankruptcy was given at the office:—Held, that this was sufficient to give priority to B. over the creditors in the bankruptcy of the assured. *Russell's Policy Trusts, In re*, L. R. 15 Eq. 26; 27 L. T. 706; 21 W. R. 97.

Effect of—Bankruptcy—Order and Disposition.]—A policy on the life of A. was assigned to B. in 1845; and in 1858, before the passing of 30 & 31 Vict. c. 144, s. 3 (which requires notice to the insurance company of assignment of a policy made after that act to be in writing), B.'s attorney wrote to N., who was secretary of the insurance company liable under the policy, stating that as he would have occasion to call on him on a day then named to pay the premium on this policy, the number of which he gave, he would take that opportunity of conferring with him on the subject of a loan from the company to a local board of health, in which he was interested. He accordingly called on that day, and paid the premium, when, during his interview with N., he informed him of the policy having been assigned to B. In 1862, A., the assured, became bankrupt:—Held, that there was sufficient notice to the insurance office of the assignment of the policy to take the policy out of the order and disposition of the bankrupt. *Alletson* v. *Chichester*, 44 L. J., C. P. 153; L. R. 10 C. P. 319; 32 L. T. 151; 23 W. R. 393.

On the 28th June, 1873, M. H. by deed agreed to assign for value a policy, effected with the Reliance Assurance Society on his own life, to his father, who, on the same day, by a separate deed assigned it to D. by way of equitable mortgage to secure a present loan and future advances. The parties were all resident in Ireland, and a memorandum at foot of the policy which had been issued from the Dublin branch office, directed that notice of assignment should be given at the head office in London. Immediately upon the execution of the deeds of the 28th June, D. prepared a formal notice of the assignment to the father, in whose name and at whose request it was signed by him and addressed and posted in Dublin to B., the society's secretary at the London office. M. H., the son, was adjudicated a bankrupt in January, 1874, and died in the following August, when his assignees in bankruptcy gave notice to the London office, and claimed the proceeds of the policy as having been in his order or disposition at the time of his adjudication, B. desposing that D.'s notice had never reached the London office:—Held, per Ball, C., that the notice having been duly posted, must be presumed to have reached its destination; and per Christian, L.J., that, irrespectively of the question whether the notice was actually received at the office, the mere posting of it was effectual to prevent the policy from being in the order or disposition of the bankrupt at the date of his bankruptcy by the consent and permission of the true owner within the meaning of the Irish Bankrupt and Insolvent

Act, 1857 (20 & 21 Vict. c. 60), s. 313. *Hickey, In re*, Ir. R. 10 Eq. 117—C. A.

Assignees of a policy gave no notice to the insurance offices till after the bankruptcy and subsequent death of the assignor, whose life the policy insured. The assignee in bankruptcy had not then given notice:—Held, that the policy belonged to the estate of the bankrupt. *Currie, In re, Caldwell, Ex parte*, 41 L. J., Bk. 55; L. R. 13 Eq. 188; 20 W. R. 363.

The provisions of 30 & 31 Vict. c. 144, s. 3, to the effect that on the assignment of a policy of insurance a prescribed notice shall be given, and the date on which such notice shall be received shall regulate the priority of all claims under the assignment, relate only to the liabilities of the insurance office to the assignees, and not to the rights inter se of persons claiming to be interested in the policy-moneys. *Newman* v. *Newman*, 54 L. J., Ch. 598; 28 Ch. D. 674; 52 L. T. 422; 33 W. R. 505.

Bankruptcy—Mortgage—Subsequent Assignment—No Notice of Bankruptcy.]—A person insured his life, mortgaged the policy, and became bankrupt, but never entered the policy in his schedule, and paid the premiums and received bonuses. Shortly after his death his mortgagee gave notice to the insurance office of the assignment, but the assignee in bankruptcy gave no notice to the office of the bankruptcy, and the commissioner in bankruptcy ordered a sale of the policy. The office paid the proceeds into court under the Trustee Act:—Held, that the assignee in bankruptcy was entitled. *Webb, In re*, 36 L. J., Ch. 341; 16 L. T. 89; 15 W. R. 529.

Definiteness of Notice — Action Pending — Maintenance.] — Policy-holders, whose claims for payment were disputed by the insurance company, deposited the policy as a security. The depositees brought an action, in the name of the depositors, against the company, and, pending the action, sub-mortgaged the policy with other securities. Afterwards the depositees gave notice to the sub-mortgagee to hold at the disposal of a bank any balances which might be due from the sub-mortgagee to the depositees, and the bank at the same time wrote a letter to the sub-mortgagee, who sent an answer, and both the letter and the answer referred to the policy-moneys as being part of the balances mentioned in the notice:—Held, that the notice created a valid security on the insurance money in favour of the bank, being, with the letters, sufficiently definite, and the pendency of the action not creating any objection on the ground of maintenance. *Myers* v. *United Guarantee and Life Assurance Co.*, 7 De G. M. & G. 112.

—— **Verbal.**]—A verbal notice to an insurance company of an assignment of a policy is sufficient to give priority over subsequent assignees. *North British Insurance Co.* v. *Hallett*, 7 Jur. (N.S.) 1263; 9 W. R. 880.

Where verbal notice was given by the assignor of a policy to the resident director of the company as such, the priorities of the parties will not be affected by the fact of his having made no entry of it in the books, or any communication respecting the notice to the company. *Ib.* See also *King's Estate, In re*, ante, col. 49.

—— **Agreement to Execute Mortgage.**]—An agreement in writing to execute on request an effectual mortgage of a policy of assurance deposited at the time of the agreement as security for a loan, is not an assignment of such policy within the meaning of the Policies of Assurance Act, 1867. Therefore, notice to the assurance company of such an agreement does not give under that act any priority over a prior equitable mortgagee who has given no notice, but has possession of the policy. *Spencer* v. *Clarke*, 47 L. J., Ch. 692; 9 Ch. D. 137; 27 W. R. 133.

Constructive Notice of Existence of Prior Assignment.]—The holder of a policy of assurance on his own life deposited it with A. by way of equitable mortgage to secure a loan. A. retained the policy, but gave no notice to the company. B. afterwards, in ignorance of this prior mortgage, agreed to lend money to the policy-holder upon a deposit of the same policy, and the policy-holder, alleging that he had left the policy at home by mistake, and promising forthwith to deliver it to B., took the loan and signed a memorandum that he had deposited the policy with B. and that he undertook on request to execute to B. an effectual mortgage of it. B. gave to the company notice of his loan and memorandum of deposit, and frequently applied to the policy-holder for the policy, but the policy-holder made various excuses for not handing it over, and died leaving it in the possession of A.:—Held, that the circumstances of the case were such as to put B. on inquiry at the time of the loan, and to fix him with constructive notice of A.'s security, and that the title of A., as in possession of the policy, must prevail over that of B., although B. did and A. did not give notice to the company. *Ib.*

Solicitor's Lien.]—The general rule that the assignee of a chose in action takes subject to all the equities is in no way altered by the Policies of Assurance Act, 1867, or by the Judicature Act, 1873. It is not necessary for a solicitor who has a lien for costs on a policy of assurance to give notice of it to the insurance company in order to preserve his lien against subsequent mortgagees of the policy who give such notice. *West of England Bank* v. *Batchelor*, 51 L. J., Ch. 199; 46 L. T. 132; 30 W. R. 364.

Mortgagee without Notice—Mortgagor holding Policy without Title.]—A sale by auction of a policy of insurance by a client to his solicitor, in whose possession the policy was, was set aside; but the claim of a mortgagee without notice, with whom the policy had been deposited by that solicitor to secure the payment of money, was established. *Lawrence* v. *Galsworthy*, 3 Jur. (N.S.) 1049.

Administration—Estate of Assignor Insolvent.]—L., at the time of his decease, was indebted to H., to whom and to another he had assigned a policy of insurance, the proceeds of which were received by H., and in part applied in liquidation of his debt. In administering the estate of L., which was insolvent, H. claimed to retain the money which he had received, but the chief clerk refused to allow the claim. On application to vary his certificate, the court declared that the sum received by H., and applied in liquidation of his debt, was assets for the benefit of all the creditors. *Law, In re, Beyer* v. *Adams*, 3 Jur. (N.S.) 710; 5 W. R. 795.

By Solicitor—Bankruptcy—Order and Disposition.]—In 1816 D. assigned a policy of insurance on his life to a trustee to secure a sum of money owing to W., and, soon afterwards, the solicitor of W. caused a memorandum to be entered in the office of the insurance company, directing that all letters were to be sent to such solicitor, and the premiums were thenceforth paid by W., through the hands of such solicitor; but the insurance company were not informed on whose behalf the solicitor acted. In 1826 D. became bankrupt, and his assignees declined to interfere respecting the policy. The premiums continued to be paid by W. through his solicitor during his life, and by the executors of W. through their bankers after his death. D. died in 1839:—Held, that the policy was in the order and disposition of the bankrupt, and that there was not any notice given to the insurance office of the assignment of the policy to take it out of such order and disposition, and that the conduct of the assignees did not amount to an abandonment of any right which they had to the benefit of the policy. *West* v. *Reid*, 2 Hare, 249; 12 L. J., Ch. 245; 7 Jur. 147.

—— **To Local Agent of Insurers.**]—A trader who was local agent of a Scotch insurance company, having their principal place of business in Edinburgh, and having an agent in Dublin for all Ireland, by whom the local agents were appointed, and with whom they communicated, effected an insurance with the company upon his own life, and assigned it to a bank, to secure a debt due by him. The agent of the bank formally required him to take notice of the assignment, to which he replied that he would, and that no written notice was necessary. No further notice of the assignment was given to the insurance company, and he subsequently became a bankrupt, and died. There was nothing on the face of the policy to shew where or through whom it had been effected:—Held, that as there was nothing to shew that the insurance was a local transaction, there was not sufficient notice of the assignment of the policy, and the assignee of the bankrupt was entitled to the money. *Hennessey, In re*, 5 Ir. Eq. R. 259; 1 Con. & L. 559; 2 Dr. & War. 555.

Onus of Proving.]—On a deposit of a policy of assurance, by way of equitable mortgage, the onus does not lie on the mortgagee to shew that notice of the deposit was given to the office before the act of bankruptcy, but with the assignees, to shew that it was not. *Stevens, Ex parte*, 4 Deac. & C. 117.

Sufficiency.]—A party to whom the bankrupt had assigned a policy of assurance sends an agent to the office for the purpose of paying the annual premium, who, in course of conversation with one of the clerks in the office, tells him of the policy having been so assigned:—Held, that this was not sufficient notice to the insurance office. *Curbis, Ex parte*, 4 Deac. & C. 354.

An equitable mortgagee of two policies of assurance, which the bankrupt had effected on his own life, writes to the insurance office, saying, "I am holder of the undermentioned policies," stating the particulars of the policies in question, and inquiring what sum the office would give, if they were delivered up to be cancelled:—Held, that this was a sufficient notice to the office of a change of ownership. *Stright, Ex parte, Eyles, In re*, 2 Deac. & C. 314; Mont. 502; 2 L. J., Bk. 12. See *Tennyson, Ex parte*, Mont. & Bli. 67.

c. Rights of Mortgagees.

Foreclosure on Non-payment.]—A. and B., being jointly interested in a policy on a debtor's life, agreed with each other that A. should keep up the policy, and B. contribute a share of the premiums:—Held, that A. was entitled to foreclose B. for non-payment of his share of the premiums. *Parker* v. *Anglesey* (*Marquis*), 25 L. T. 482; 20 W. R. 162.

Where there are no funds to keep up mortgaged policies of insurance, the mortgagee has a right to have them sold. *Ford* v. *Tynte*, 41 L. J., Ch. 758; 27 L. T. 304.

Abandonment of Security.]—A deed of assignment provided that the debtor's affairs should be administered as in bankruptcy, and provided that it should not affect any surety or security which any of the creditors might have: but that if such security should be enforceable against the debtor or his estate, then the creditor, unless he consented to abandon his security, should be entitled to receive dividends upon so much only of his secured debt as might remain after such security should have been realised, or after credit should have been given for the full value. A creditor held a policy upon the life of the debtor, which at the time of the assignment was of no appreciable value, and he proved for and received a dividend upon the whole amount of his secured debt without taking credit for the policy:—Held, that he had not abandoned his security. *Ib.*

Sale of Equity of Redemption set aside.]—The sale of an equity of redemption in a reversionary interest belonging to the mortgagor, and in two policies of assurance on his life, was set aside on the ground of undervalue. The two mortgaged policies of assurance having in the purchaser's hands been allowed to lapse, and a new policy having been substituted for them by the purchaser:—Held, that the vendor was at liberty to adopt what the purchaser had done in the matter of the substitution of the new policy, and was, on redeeming, entitled to the substituted policy as part of the equity of redemption. *Nesbitt* v. *Berridge*, *Butler* v. *Berridge*, 4 De G. J. & S. 45; 10 Jur. (N.S.) 53; 9 L. T. 588; 12 W. R. 283; 3 N. R. 53.

Balance—Unsecured Debts.]—The mortgagees of a policy of assurance, mortgaged to them by a deceased testator to secure a sum of money, received after his death, under the policy, a sum exceeding the amount due to them for principal and interest in respect of the mortgage debt. They were also creditors of the testator for other debts not secured:—Held, that they were entitled to retain the balance in their hands in discharge of their unsecured debts. *Haselfoot* or *Hazlefoot, In re, Chauntler's Claim*, 41 L. J., Ch. 286; L. R. 13 Eq. 327; 26 L. T. 146.

Marshalling.]—A mortgagee of a life estate and policies of assurance had also obtained subsequent judgments, being charges under 1 & 2 Vict. c. 110, on the life estate. There were intervening incumbrances on the life estate only. On his first mortgage being discharged out of the life estate:—Held, that the next incumbrancer was entitled, on the principle of mar-

shalling, to be paid out of the policies, and that the first mortgagee could not, by consolidating his securities, throw his subsequent charges on the policies so as to prevent this. *Ford* v. *Tynte*, 41 L. J., Ch. 758; 27 L. T. 304.

H. was surety to an insurance company for a loan secured on policies on the life of the debtor. The office held another policy as security for another loan for the same debtor. The debtor became bankrupt, and the company sued the surety. He paid part of the debt:—Held, that on the falling in of the policies, the surety was entitled to have the securities marshalled so as to be paid in full, including the costs of defending the action. *Heyman* v. *Dubois*, 41 L. J., Ch. 224; L. R. 13 Eq. 158; 25 L. T. 558.

The debtor's wife had paid the surety part of the money he had paid as surety out of her separate estate:—Held, she was not a necessary party to a suit by the surety to obtain the benefit of his security. *Ib.*

Set-off.]—The money payable on a policy on the life of A. deposited with the insurance company as a security for a loan to B. is to be paid to the surety of B., satisfying the loan, and cannot be set off against a debt due by A. to the company of which B.'s surety had no notice. *Jeffery's Policy, In re*, 20 W. R. 857.

Production of Deed in Action.]—See *Carter* v. *Hubback*, infra, col. 75.

Premiums — Lien — Costs — Land Agents' Charges.]—A testator assigned policies of assurance on his own life to his solicitor as trustee, to secure to mortgagees the repayment of a loan. On a claim against the testator's estate of a lien on the policy-moneys (a) in respect of solicitor's costs, (b) in respect of premiums paid by the solicitor on the policies, and (c) in respect of work done as a land agent:—Held, that the solicitor was entitled to be repaid the premiums and to a lien in respect of his solicitor's costs, but that land agency charges were not the subject of a lien. *Walker, In re, Meredith* v. *Walker*, 3 R. 455; 68 L. T. 517.

See further as to premiums, supra, col. 30, PREMIUMS.

Married Woman—Policy created for purpose of Mortgage—Chose in Action of Wife.]—A married woman, entitled to income for her separate use, agreed to assist her husband in obtaining a loan from an assurance company. A policy was accordingly effected with the company, by which a sum of money was assured to the survivor of the husband and wife upon the death of the one first dying. By a mortgage deed of the same date, reciting an agreement for a loan by the office at the request of husband and wife, the wife assigned her separate income, and the husband the policy, by way of mortgage for securing the sum advanced by the company. By the same deed the husband and wife, the wife joining for the purpose of binding her separate estate, covenanted that the husband would pay the premiums, and there was a declaration by the husband alone that if he did not pay them the mortgagees might pay them out of income, and a declaration by all parties that if the policy-moneys became payable before the mortgage debt was paid, the company might pay it out of those moneys. After the death of the husband the wife claimed the moneys payable under the policy:—Held, that although the policy, if taken alone, created an interest in the wife not capable of being assigned so as to bar her right by survivorship, yet as it had been created for the purpose of the mortgage, and as a part of the same transaction, and in pursuance of a contract that it should be a security to the company, the wife's interest was included in the security. *Winter* v. *Easum*, 2 De G. J. & S. 272; 10 Jur. (N.S.) 759; 12 W. R. 1018.

Policy effected as part of Mortgage Transaction—Annuity granted by Mortgagor—Rights to Policy-Money.]—A., a tenant for life, granted an annuity to B. for B.'s life, in consideration of 500*l.*, and a policy of insurance on A.'s life was assigned absolutely to B. in order the more effectually to secure the payment of the annuity and the repayment of the 500*l.*; and it was agreed that as soon as A. should give unexceptionable security for the annuity, it should be decreased by amount of the annual premium of the policy, which was to be paid by B. out of the annuity until such security should be given. No other security was given for the annuity, and the premiums were paid by B. until her death:—Held, that the representatives of B. were entitled to the policy, although several annual premiums had been paid by A. after the death of B. *Kavanagh* v. *Waldron*, 9 Ir. Eq. R. 279; 3 Jo. & Lat. 214.

Equitable Relief—Personal Decree against Mortgagor.]—An assignment of a policy by way of mortgage contained no covenant to pay the debt secured; and the mortgagee in consideration of a sum equal to the debt delivered to the plaintiff as security the assignment, the policy, and a promissory note of the mortgagor for the amount of the debt. The plaintiff filed a bill against the mortgagor and mortgagee, praying the ordinary relief; and the mortgagor before answer served the plaintiff with notice offering all the equitable relief to which he was entitled. The cause having come to a hearing:—Held, that, even supposing the mortgage contained an implied covenant to pay the debt, the court could not pronounce a decree against him or grant more than the ordinary equitable relief. *Hinds* v. *Blacker*, Ir. R. 11 Eq. 322.

d. GIFT.

Without Assignment.]—R. having insured his life, handed the policy over to his mother, telling her that she might keep it, and he subsequently handed over to her two receipts for premiums paid by him on the policy. There was no assignment of the policy, but his mother retained it in her possession and had it in her possession at the time of his death. In an action by R.'s administratrix for the recovery of the policy and receipts:—Held, that though the gift passed no right to the mother to recover the money secured by the policy, the administratrix nevertheless could not maintain detinue or trover against her for the documents. *Rummens* v. *Hare*, 46 L. J., Ex. 30; 1 Ex. D. 169; 34 L. T. 407; 24 W. R. 385—C. A.

H. insured his life for 100*l.* and gave the policy to his wife on condition that she paid the premiums. He afterwards devised all his property to the plaintiff, who was his sole executrix, upon trust for his children. The wife took possession of the policy, and paid all the premiums out of her separate estate:—Held, that the policy passed under the will to the plaintiff, as there was no

assignment in writing. *Howes* v. *Prudential Assurance Co.*, 49 L. T. 133.

Where a man effects an insurance on his own life, but in his daughter's name, and pays the premiums himself:—Held, that though he retains the policy in his own possession, it is a complete gift to the daughter, and she is on his death entitled to the insurance moneys. *Richardson, In re, Weston* v. *Richardson*, 47 L. T. 514.

Donatio Mortis Causâ.]—A policy of life insurance may be the subject of a donatio mortis causâ. *Witt* v. *Amiss*, 1 B. & S. 109; 30 L. J., Q. B. 318; 7 Jur. (N.S.) 499; 4 L. T. 283; 9 W. R. 691. S. P. and *S. C.*, *Amiss* v. *Witt*, 3 Beav. 619.

Voluntary Assignment — Sale by Assignee—Title.]—A. insured his life, and afterwards assigned the policy to B. for a nominal consideration. B.'s executors then sold and assigned the policy to D. for valuable consideration, and then D.'s executors sell it to E.:—Held, that they could make a good title to the policy, and that E. was bound to complete his purchase. *Ashley* v. *Ashley*, 3 Sim. 149.

Effect given to voluntary assignment of a policy of assurance containing an irrevocable power of attorney. *Pearson* v. *Amicable Assurance Office*, 27 Beav. 229. *And see*, supra, col. 45, as to voluntary assignment.

e. SALE.

Misrepresentation.]—A policy on the life of A. had been assigned to the plaintiff; the defendant having privately ascertained that A. was dangerously ill, treated with the plaintiff for the purchase of the policy for a small sum, representing it as the then value of the policy, the plaintiff not being aware of A.'s illness:—Held, that the sale was void, and that the plaintiff might recover the value of the policy in an action of trover. *Jones* v. *Keene*, 2 M. & Rob. 348.

A sale by auction of a policy of assurance on the life of a third person cannot be invalidated on the ground of fraud, because the particulars of sale did not mention that the vendor had only a redeemable interest in the life of the party insured, although that interest is afterwards redeemed, if the practice of the office is to pay such policies without inquiring into the continuance of the interest, and if there is no misrepresentation or improper concealment of facts by the vendor. *Barber* v. *Morris*, 1 M. & Rob. 62.

Incumbrances.]—A. agreed to assign a life policy to B. When the policy was effected, it was agreed that the payment of one-third of the annual premiums should be deferred until the death of the person insured, and be a charge on the policy:—Held, that this was an incumbrance on the policy, which the assignor was bound to discharge. *Gatayes* v. *Flather*, 34 Beav. 387.

Assignees for value of a life policy hold subject to the equities affecting the same. The 30 & 31 Vict. c. 144, has not altered their position in this respect. *British Equitable Insurance Co.* v. *G. W. Ry.*, 38 L. J., Ch. 132; 19 L. T. 476; 17 W. R. 43.

f. OPERATION OF BANKRUPTCY.

Order and Disposition.]—As to what is necessary to take a life policy out of the order and disposition of the bankrupt. *See* BANKRUPTCY, ORDER AND DISPOSITION.

Payment of Premiums.]—The 154th section of the Bankruptcy Act of 1861 discharges a bankrupt from liability as a surety in respect of payments of premiums on a policy of insurance becoming due subsequently to the date of the adjudication. *Saunders* v. *Best*, 17 C. B. (N.S.) 731; 10 Jur. (N.S.) 1204; 11 L. T. 421; 13 W. R. 160.

A. borrowed money of B., and executed a deed of assignment, by way of mortgage, to B., of a policy on his own life, with a covenant to keep up the annual payments for premiums:—Held, that this was not a liability to pay money upon a contingency provable under 12 & 13 Vict. c. 106, s. 178. *Metcalfe* v. *Hanson*, 35 L. J., Q. B. 225; L. R. 1 H. L. 242.

A defendant covenanted to pay a sum by instalments, and to pay the premiums on a policy effected on the life of B., so that his life might be continually insured in 1,000*l.*, and to produce the receipt for the premium. In an action on this covenant, the declaration alleged two breaches—non-payment of the premiums, and non-production of the receipt for the premium. The defendant pleaded a certificate of conformity, under an adjudication of bankruptcy. The plaintiff new assigned that the action was brought for the non-payment and non-production of a premium which became due after filing the declaration of insolvency, and after the allowance of the certificate. The defendant pleaded an equitable plea, that after filing the petition for adjudication, the plaintiff proved part of the debt, and elected to take the benefit of the petition with respect to the whole debt:—Held, that the plea to the new assignment was a good equitable answer. *Elder* v. *Beaumont*, 8 El. & Bl. 353; 27 L. J., Q. B. 25; 4 Jur. (N.S.) 23; 6 W. R. 57.

Policy is Chose in Action—Bankruptcy Act, 1869.]—A life policy is a "thing in action" within the exception to the reputed ownership clause of the Bankruptcy Act, 1869, s. 15, sub-s. 5. *Ibbetson, Ex parte, Moore, In re*, 8 Ch. D. 519; 39 L. T. 1; 26 W. R. 843—C. A.

The second mortgagee of a policy of life assurance gave no notice of his mortgage to the first mortgagee or to the insurance company till after the mortgagor had filed a liquidation petition, and a trustee had been appointed under it:—Held, that the policy being a thing in action, and as such excepted from the reputed ownership clause of the Bankruptcy Act, 1869, the second mortgagee was entitled to the policy subject to the rights of the first mortgagee. *Ib.*

Order and Disposition of Assignor.]—Assignees of policies gave no notice to the insurance offices till after the bankruptcy and subsequent death of the assignor whose life the policies insured. The assignee in bankruptcy had not then given notice:—Held, that the policies belonged to the estate of the bankrupt. *Currie, In re, Caldwell, Ex parte*, 41 L. J., Bk. 55; L. R. 13 Eq. 188; 20 W. R. 363. *And see cases*, ante, cols. 56, 59.

A policy on the life of a bankrupt, who was then manager of a branch of the insurance company, was subject to a condition that all notices of assignment or cheques should be given in writing at the principal place of business of the company. The bankrupt, whilst manager, assigned the policy; and no notice was given at the head office:—Held, that the policy was in the bankrupt's order and disposition with the

assent of the true owner. *Young, In re*, 25 L. R., Ir. 372.

A mortgagee of a policy of insurance effected in the name of a deceased person does not, by giving notice to the executors, without giving notice to the company, take the policy out of the order and disposition of the mortgagor. *Thompson* v. *Tompkins*, 2 Dr. & Sm. 8; 8 Jur. (N.S.) 185; 6 L. T. 305; 10 W. R. 310.

Executors transferred a fund, part of their testator's estate, into court, under the Trustee Relief Act. One of the residuary legatees mortgaged his share, and the mortgagee gave notice to the executors, and did not obtain a stop order. The mortgagor became bankrupt, and his assignees obtained a stop order:—Held, that the previous notice was sufficient to take the mortgagor's share of the fund out of his order and and disposition. *Ib.* *See also as to* NOTICE, supra, col. 56.

—— **Right of Assignees.**]—A policy of insurance on the life of the bankrupt passes to his assignees. *Schoudler* v. *Wace*, 1 Camp. 487. But see *Grant* v. *Hill*, 4 Taunt. 380. *Wills* v. *Wells*, 2 Moore, 247; 8 Taunt. 264.

—— **Policy Effected by Insolvent to Secure Debt—Payment.**]—Assignees in insolvency held to be entitled to a policy of assurance on the life of an insolvent, effected to secure a sum of money borrowed by the insolvent, but afterwards paid off, the policy having been effected at the expense of the insolvent, and mentioned in his schedule as one of the securities for the debt. *Storie's Trust, In re*, 1 Giff. 94; 28 L. J., Ch. 888; 5 Jur. (N.S.) 1153.

g. TRUST FOR WIFE AND CHILDREN.

Effect of.]—A husband effected a policy for the benefit of his wife and children under the Married Women's Property Act, 1870, and died insolvent. His wife and one child of the marriage predeceased him. Upon a petition by his surviving children, under the 10th section of the act, for the appointment of a trustee of the policy-money and for a declaration as to the rights of the petitioners:—Held, that the court had, under that section, no jurisdiction to do more than make the order appointing a trustee; but since under the policy there was a trust either for the wife for life with remainder to the children, or, in the alternative, for the wife and children as joint-tenants, the order was directed to be prefaced with an expression of opinion that the wife took no interest and that the surviving children took as joint-tenants. *Mellor's Policy Trusts, In re*, infra, not followed. *Adams' Policy Trusts, In re*, 52 L. J., Ch. 642; 23 Ch. D. 525; 48 L. T. 727; 31 W. R. 810.

Semble, a policy effected by a husband under s. 10 of the Married Women's Property Act, 1870, "for the benefit of his wife and children," should be read in conjunction with that section, and should, by virtue of the words "separate use" in the section, be construed as giving the wife a life interest only, with remainder to the children. *Ib.*

In a similar case widow and children held entitled as joint-tenants to the policy-moneys. Dictum in *Adams' Policy Trusts*, supra, not followed. *Davies' Policy Trusts, In re*, 61 L. J., Ch. 650; [1892] 1 Ch. D. 90; 66 L. T. 104.

A husband effected a policy for the benefit of his wife and children under the Married Women's Property Act, 1870. The husband died insolvent, and the wife being in poor circumstances, so that the income of the policy-moneys was not sufficient to support her and the children, the moneys were distributed as if the husband had died intestate. *Mellor's Policy Trusts, In re*, 47 L. J., Ch. 246; 7 Ch. D. 200; 26 W. R. 309.

Where a husband surrendered a policy on his life which was of no value and received in substitution a similar policy which provided that the sum insured should be paid to the wife in case she survived her husband, and the wife paid all the premiums until the death of her husband, who died insolvent:—Held, that the transaction was protected by s. 10 of the Married Women's Property Act, 1870, and that the widow was entitled to the policy-money. *Holt* v. *Everall*, 45 L. J., Ch. 433; 2 Ch. D. 266; 34 L. T. 599; 24 W. R. 471—C. A.

A married man insured his life under a policy which, after reciting that he was desirous of assuring his life under the provisions of the Married Women's Property Act, 1870, for the benefit of his wife and children, stated that his wife and children, and failing them, his heirs, administrators or assigns, would be entitled after his death to the policy money:—Held, that the wife and children took the policy-money as joint-tenants. *Adams' Policy Trusts, In re* (23 Ch. D. 525), not followed. *Seyton, In re, Seyton* v. *Satterthwaite*, 56 L. J., Ch. 775; 34 Ch. D. 511; 56 L. T. 479; 35 W. R. 373.

Contingent Interest—Possibility—Interest for Benefit of Wife.]—A policy of insurance on the life of a husband for the benefit of his wife, was in 1876, effected with an insurance company which carried on business at New York, through their branch office in London. The application for the policy was made by him on behalf of his wife. The premiums were made payable in London. By the policy the company promised to pay the amount assured to the wife for her sole use, if living, and, if she were not living, to the children of the husband, or, if there should be no such children, to the executors or assigns of the husband, at the London office. The policy also provided that, on the completion of a period of ten years from its issue, provided it should not have been previously terminated by lapse or death, the legal owner should have the option of withdrawing the accumulated reserve and surplus appropriated by the company to the policy. The husband paid the premiums until July, 1883, when he filed a liquidation petition under the Bankruptcy Act, 1869. In 1884 he obtained his discharge. After 1883 the wife paid the premiums out of her separate estate. In 1866 the wife exercised the right of withdrawal, and the company paid 2,959*l.* in respect of the policy:—Held, that even if the sum thus paid did not by virtue of the policy belong to the wife for her separate use, the husband's contingent interest in it at the time when he obtained his discharge was a mere possibility, and that, consequently, it did not pass to the trustee in the liquidation. *Dever, Ex parte, Suse, In re*, 56 L. J., Q. B. 552; 18 Q. B. D. 660—C. A.

Conviction of Wife for Murder of Husband—Resulting Trust in favour of Husband's Estate.]—A husband insured his life for the

benefit of his wife under the provisions of s. 11 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75). He died, and his wife was tried for and convicted of his murder:—Held, that the effect of s. 11 was to create a trust in favour of the wife in respect of the sum insured, but that inasmuch as it was against public policy for the wife to benefit by her own criminal act, the trust in her favour failed, and a resulting trust arose in favour of the deceased husband's estate, in respect of which his executors were entitled to recover the sum insured from the insurance company. *Cleaver* v. *Mutual Reserve Fund*, 61 L. J., Q. B. 128; [1892] 1 Q. B. 147; 66 L. T. 220; 40 W. R. 230; 56 J. P. 180—C. A.

Appointment of Trustees.]—See *Graham's Policy Trusts, In re*, 29 L. R., Ir. 498. *Atkinson's Policy Trusts, In re*, 13 R. 285.

Policy effected by Husband for Benefit of Wife and Children—Married Women's Property Acts.]—*See* HUSBAND AND WIFE.

Customs' Annuity and Benevolent Fund—Power to Bequeath.]—See *Phillips' Insurance, In re*, ante, col. 52.

h. SETTLEMENTS.

Covenant to Insure—Liability of Trustees for not compelling Assignment of Policy.]—A husband covenanted to insure his life for 1,200*l*., and assign the policy to trustees, and confessed a judgment to them for that amount to be called in if the policy was not so assigned and kept up. Another sum of 800*l*. vested in them by same settlement on similar trusts, was lent by trustees to husband on security of assignment of a policy for 800*l*. on his life. No other policy was assigned to them, and no steps taken to enforce judgment or covenant:—Held, that proceeds of policy might be applied to purpose for which policy was really assigned, and that liability of trustees for not compelling husband to insure depended on his ability. *Ball* v. *Ball*, 11 Ir. Eq. R. 370.

Liability of Policy — Covenant to Pay a Sum after Death.]—The rule of equity which prevents a party from receiving any interest under a settlement until he has discharged obligations or covenants, to which he is liable under it, applied to the case of a policy of assurance assigned to the trustees as a security for the payment of a sum which the husband had covenanted that his representative should pay after his death, and against a purchaser of the husband's interest under the settlement from his assignees under a fiat in bankruptcy. *Burridge* v. *Row*, 13 L. J., Ch. 173; 9 Jur. 299—L.C.

Ultimate Trust—Assignee of Husband and Wife.]—Among the trusts of a settlement (the subject of the settlement being property limited to the separate use of wife), it was provided that the trustees should effect a policy of assurance to the amount of 3,000*l*. on the life of the wife, and annually pay the premium out of the trust-money during the life of the wife, and stand possessed of the insurance in trust after the decease of the wife to invest the 3,000*l*. and pay the interest to the husband for life, if he should survive the wife, and after his decease to pay the 3,000*l*. to such persons as the wife should by will appoint; and in default of such appointment, to the persons entitled under the Statute of Distributions. There were no children of the marriage, and the wife having survived her husband, joined with the surviving trustee of the settlement in making a voluntary assignment of the policy to her cousin, who paid the annual premium during his life, and by his will appointed G. his executor and residuary legatee. G. continued to pay the premium, and on the death of the assured received the value of the policy:—Held, on a bill filed by the next of kin of the wife against G. and against the executor and residuary legatee of the wife, that the assignment was valid, and that G. was entitled to the value of the policy. *Godsall* v. *Webb*, 2 Keen, 99; 7 L. J., Ch. 103.

Voluntary Settlement—Subsequent Assignment by Settlor.]—J. B. made a voluntary assignment by deed of a policy of assurance upon his own life for 1,000*l*. to trustees upon trust for the benefit of his sister and her children, if she or they should outlive him. The deed was delivered to one of the trustees, and the grantor kept the policy in his own possession. No notice of the assignment was given to the assurance office, and J. B. afterwards surrendered, for a valuable consideration, the policy and a bonus declared upon it to the assurance office. Upon a bill filed by the surviving trustee of the deed to have the value of the policy replaced, the court held that upon the delivery of the deed, no act remained to be done by the grantor to give effect to the assignment of the policy, and that he was bound to give security to the amount of the value of the policy assigned by the deed. *Fortescue* v. *Barnett*, 3 Myl. & K. 36; 2 L. J., Ch. 98.

Renewable Leaseholds — Surplus Policy-moneys—Who entitled.]—A testator being possessed of leaseholds for lives insured each of the lives, and by his will directed the policies to be kept up and the leases renewed from time to time. He gave his real and personal estate upon trust, subject to a life interest for A. in tail:—Held, that the trust for renewal was valid, but that, subject to such trust, the moneys received by virtue of the policies were part of the personal estate of the testator, and vested absolutely in the tenant in tail. *Meller* v. *Stanley*, 2 De G. J. & S. 183; 12 W. R. 780.

Assignment by Settlor—Assignee held to be Trustee.]—B. by a deed executed in 1830, for a nominal consideration, assigned a policy of assurance upon his own life to trustees for his children, of whom A. was one; and the entire interest in the policy became vested in S. and A. No notice of this deed was ever given to the assurance company. S. married; and by a deed executed in 1854, reciting that she was entitled to a moiety of the policy, this moiety was put in settlement. C. acted as solicitor in preparation of this deed. In 1854, B., by deed without consideration, professed to assign the residue of the policy to C. On the preparation of this deed, B. stated that he had led A. to believe that he should have 100*l*. out of the produce, and directed that he should be made a party to the assignment, and a deed was so prepared accordingly. A. declined to execute this deed, which was therefore abandoned, and

another was prepared; but he did not, during the life of B., expressly allege that he had any claim upon the policy. C. gave to the company notice of the assignment of 1854, and after the death of B., obtained the policy from the trustee, and was paid the sum due:—Held, that C., having obtained the policy from the trustee, must be treated as a substitutionary trustee. *Justice* v. *Wynne*, 12 Ir. Ch. R. 289.

Policy in Wife's Name—Voluntary Settlement of—Payment of Premiums.]—On 5th November, 1844, a policy of insurance for 2,000*l.* was effected upon the life and in the name of B., the wife of A. By a post-nuptial settlement dated 27th November, 1844, reciting that B. was desirous of making provision for her husband and children, and that A. had agreed to join in the deed for the purpose of assuring "all his interest, if any," in the policy, A. and B. assigned to C. and D. the policy and all sums payable thereunder upon trust to invest the same and pay the income to A. and his assigns during his life and after his decease to divide the trust funds equally among the children of A. and B. The settlement contained no power of revocation. A. predeceased his wife, having paid all premiums during his lifetime. Upon the death of B., the question arose whether the policy-moneys were subject to the trusts declared by the settlement:—Held, that the policy was intended by the husband to be and was the separate property of the wife at the date of settlement, in which the husband concurred only for conformity and to bind such interest, if any, as he had; that the settlement was valid and that the policy moneys were bound by the trusts of the settlement. *Winn, In re, Reed* v. *Winn*, 57 L. T. 382.

Trustees unable to Pay Premiums.]—*See* VII. PREMIUMS, ante, col. 41.

i. RIGHT OF POLICY-MONEYS.

Power to appoint Sum assured — Express Reference—Assets—Will—Special Contract.]—The rules of a life assurance society provided that the assured might nominate a person to receive the sum assured, and that in case of no nomination the sum should be paid to his assigns under any disposition or charge specifically affecting the same, either by express reference thereto or by reference generally to sums due on assurances, by deed, will or other instrument. If no nomination, disposition or charge, the sum was to be paid to his widow; if no widow, to his children living at his death; if no children, to his executors. The assured made no nomination. By his will, after exercising certain powers of appointment, he gave all his residuary estate in trust for his three daughters, and the widow and children of a deceased son, but made no express or general reference to the sum assured. He left no widow:—Held, that although the testator might have made the sum assured assets by expressly referring thereto, he had not done so, and that there was nothing illegal as against creditors in the contract made when the assurance was effected, and that under this contract his three children were entitled to the fund. *Davies, In re, Davies* v. *Davies*, 61 L. J., Ch. 595; [1892] 3 Ch. 63; 67 L. T. 548; 41 W. R. 13.

Policy taken out before Loan Advanced.]—M., having obtained from the W. Company one loan on the security of a policy effected with them on his own life, and a charge on funds, in which he had an interest contingent on his surviving S., applied to the company for a further advance, to be secured by a further charge on the premises comprised in the first transaction, and also by an insurance to be effected by M. on his own life against the life of S., for the amount of the new advance; no distringas to be placed on the trust fund. The directors of the company, by resolution communicated to M., "entertained" the proposal, with the alteration that there was to be a distringas for both loans, and the new policy was to be for 500*l.* more than the amount of the proposed fresh advance. The deed for securing the fresh advance was accordingly prepared on the footing that the new policy was to be taken out in M.'s name, and assigning and dealing with it accordingly. M. appeared before the medical officer of the K. Company, with whom this counter-insurance was effected, and the distringas was placed upon the stock for the amount of both loans; but it was found impossible to serve the trustee of the fund with notice of the transaction. The loan was never actually advanced, M. dying in the lifetime of the tenant for life. The secretary of the W. Company, who had undertaken to complete the policy with the K. Company, had taken it out not in M.'s name but in the name of the trustees of the W. Company, who accordingly received the whole amount:—Held, that the W. Company were trustees of the amount so received for the benefit of M.'s estate. *Martin* v. *West of England Life and Fire Insurance Co.*, 4 Jur. (N.S.) 158.

Policy effected to Secure Debt—Payment of Debt.] — See *Courtenay* v. *Wright*, supra, col. 36.

On Redemption—Dropped Policy—Surrender.]—Where the grantor of an annuity covenanted to facilitate the effecting any insurance on his life, and to pay extra premium to a certain amount, and on electing to repurchase the annuity by giving a certain notice pursuant to the grant, the grantee covenanted, upon the grantor electing to take it, to assign any policy then vested in him in respect of the annuity, but that it should not be incumbent on the grantee to keep any policy on foot. The grantor gave the notice to redeem, and his election to take the policy: — Held, that although the grantee might have allowed the policy to drop, he could not surrender it for his own profit. *Hawkins* v. *Woodgate*, 7 Beav. 565; 8 Jur. 743.

Policy kept up by Purchaser of Reversionary Interest—Purchase set aside.]—The purchaser of a reversionary interest at an undervalue (the purchase being set aside), kept up policies on the life of the vendor:—Held, that he was entitled to the policy-moneys. *Foster* v. *Roberts*, 7 Jur. (N.S.) 400.

Premiums Paid by Mortgagee.]—Upon the execution of a mortgage to secure an annuity to the mortgagor, the mortgagee insured the life of the mortgagor, and informed the latter by letter that the policy would be assigned to him on payment of arrears and expenses. The premiums were paid by the mortgagee until the mortgagor's death:—Held, that the mortgagee was entitled

to the policy-moneys. *Bashford* v. *Cann*, 11 W. R. 1037.

Policy kept up by Bankrupt.]—A bankrupt, after his bankruptcy, kept up the premiums on policies which he had mortgaged previously to his bankruptcy and which his assignees had disclaimed:—Held, that his representatives were entitled to the policy-moneys, subject to the mortgage debt. *In re*, *Learmouth*, 14 W. R. 628.

Mutual Assurance Society—Member's Claim to Benefit of Policy.]—Where by the deed of settlement of a mutual assurance society the grantees of policies were the only assured members, and a claim entitling the grantee to the benefit of his policy was to make him no longer an assured member:—Held that the claim must be a claim for the full value of the policy. *Stevens* v. *Mutual Life Assurance Society*, 5 W. R. 236.

Mortgage or Assignment—Fetter on Redemption.]—Trustees of an insurance society advanced 10,000*l*. to C. on the security of a reversionary interest to which C. was entitled contingently on his surviving his father. As part of the loan transaction the trustees insured the life of C. against that of his father for 34,500*l*. in the society of which they were trustees, and paid the premiums till C.'s death. C. executed a bond charging the reversion with principal, premiums and interest on principal and premiums. By written agreements the interests and premiums were to accumulate at compound interest for five years. The agreements contained special clauses providing (inter alia) to whom the policy in certain specified events should belong, and declared that in the event of C. paying the whole sum due before the death of his father the trustees should be bound to assign the policy to C., and that if C. should predecease his father without having paid all principal moneys, interest and costs, the policy should belong absolutely to the trustees, they being bound in that event to impute to the debt all moneys they might receive in respect of the policy. C. died in his father's lifetime, having never paid anything:—Held, that upon the true construction of the documents the contract was, not that the policy should be effected for the trustees' protection only and for their sole benefit, subject to an option for C. to make it his own in the event of his paying off the debt in his lifetime, but that the policy was mortgaged to the trustees and was the property of C. subject to the charge; therefore that in accordance with the equitable doctrine against fettering a mortgagor's right of redemption, C.'s representatives were entitled to the policy-moneys after deducting all sums due. *Salt* v. *Northampton* (*Marquess*), 61 L. J., Ch. 49; [1892] A. C. 1; 65 L. T. 765; 40 W. R. 529—H. L. (E.)

Interpleader.]—A life insurance company received notice of an assignment by an insurer of a policy, which the company had granted, and the insurer afterwards became insolvent. Soon after the death of the person whose life was insured, the assignee for value applied for payment of the sum due upon the policy; and the company inquired of the provisional assignee of the insolvent whether he would consent to payment being made to the assignee for value. The provisional assignee said he could not give such consent, but that it must be sought for from the Court of Insolvent Debtors. The insolvent himself gave notice to the company not to pay over the policy-moneys to his assignee for value, on the ground that the debt for which it was assigned as a security was satisfied. In the meantime an action was brought upon the policy by the assignee for value, in the name of the insolvent, against the company:—Held, that it was not a case in which the company was entitled to file a bill of interpleader against the plaintiff in the action, the insolvent and his provisional assignee, the insolvent having no title, and the title of his provisional assignee being subordinate to that of the assignee for value. *Fenn* v. *Edmonds*, infra, overruled. *Desborough* v. *Harris*, 5 De G. M. & G. 439; 1 Jur. (N.S.) 986; 3 Eq. R. 1058; 4 W. R. 2.

A life insurance company received notice of an assignment by an insurer of a policy which the company had granted, and the insurer afterwards became bankrupt. Soon after the death of the person whose life was insured, the party to whom the assignment had been made applied for the payment of the sum due upon the policy, and the company inquired of the assignees of the bankrupt whether there was any objection to payment being made to the claimant. The assignees did not assent to the payment, but made no positive claim to the policy. In the meantime an action was brought upon the policy by the claimant, in the name of the bankrupt, against the company:—Held, that it was a case in which the company were entitled to file their bill of interpleader against the plaintiff in the action, the bankrupt and his assignees, and that the assignees, who had in the suit shewn no title to the policy, must pay the costs. *Fenn* v. *Edmonds*, 5 Hare, 314.

IX. BONUSES.

Who Entitled to.]—By the deed of settlement of a life assurance society a fund, to be composed of surplus profits, was created, of which part was to be divided amongst the shareholders at intervals of five years:—Held, that "special" dividends arising from this fund, and also "extraordinary" dividends upon shares in a similar company, declared out of surplus profits at the discretion of the managers, were income, and, as such, the property of a tenant for life entitled to the "dividends, interest and income" of the shares. *Hopkin's Trusts*, *In re*, 43 L. J., Ch. 722; L. R. 18 Eq. 696; 30 L. T. 627; 22 W. R. 687.

By a marriage settlement the husband covenanted to effect a policy on his life, in the names of trustees, for the sum of 2,500*l*., and to settle "the said sum of 2,500*l*." upon certain trusts:—Held, that the trustees were entitled to the bonuses which accrued upon the policy. *Gilly* v. *Burley*, 22 Beav. 619; 2 Jur. (N.S.) 897; 4 W. R. 769.

Bequest—"The Residue."]—The testator, after reciting that he was entitled to a policy of insurance on his life for 2,000*l*., bequeathed 400*l*., part thereof to E.; 100*l*. and 100*l*., other parts thereof, to two other legatees; and he left "the residue" to J. H. C. At the time of the testator's death considerable sums by way of bonus were added to the policy:—Held, that the gift of "the residue" of the moneys, payable on foot of the

insurance, was residuary and not specific, and that J. H. C. took the entire residue of the proceeds of the policy, including the bonuses, but subject to any liability for the satisfaction of which the policy could be resorted to, and that such liabilities were to be borne primarily by the legatee of such residue in exoneration of the specific legatees of the insurance. *Corballis* v. *Corballis*, 9 L. R., Ir. 309.

New Policy taken out on Lapse of Old.]—W. insured his life in 1812, and paid the premiums till 1816, when, owing to removing to another house, he omitted to pay it. But in 1817 he got a new policy for the same amount at the same premium as his policy of 1812, and this premium was duly paid till 1854, when he died. Bonuses attached to policies of 1812. W.'s executor filed a bill, praying that the company might be ordered to pay all bonuses as if the policy had been dated and continued since 1812, but no direct evidence was given beyond the above facts, and W. had made no similar application till 1839 :—Held, that the bill shewed no right to any equity against the company, for there was nothing to shew that the policy of 1812 had not been forfeited. *Windus* v. *Tredegar* (*Lord*), 15 L. T. 108—H. L.

X. LOST POLICIES.

Sums secured by life policies alleged to have been lost, or destroyed in the lifetime of the insurer, ordered to be paid to his administratrix by the company, without any other indemnity than the decree of the court. *Crokatt* v. *Ford*, 25 L. J., Ch. 552 ; 2 Jur. (N.S.) 436 ; 4 W. R. 426.

An insurance company paying money under a decree of the court upon a policy which has been lost, is not entitled to any further indemnity. *England* v. *Tredegar* (*Lord*), 35 L. J., Ch. 386 ; L. R. 1 Eq. 344 ; 35 Beav. 256.

Interest on Lost Policy.]—*See* infra, col. 81.

XI. VALUATION OF POLICIES.

Rules.]—The rules of the Life Assurance Companies Act, 1872, for valuing policies, do not apply where, under the contract of insurance, a stated sum is at the winding-up payable on the policy. *British Imperial Insurance Corporation, In re, Farr's and Whittall's Claims*, 47 L. J., Ch. 318.

Company in Liquidation.]—In estimating the value of a current policy in a life assurance company in course of liquidation, the measure of proof is the sum which would be required in each particular case to purchase a policy of the same amount at the same premium in a solvent office. *English Assurance Co., In re, Holdich's Case*, 42 L. J., Ch. 612 ; L. R. 14 Eq. 72 ; 26 L. T. 415 ; 20 W. R. 567.

XII. ACTIONS ON POLICIES.

Parties—Assignment—Personal Representative of Person insured.]—In an action by an equitable mortgagee of a policy of insurance against the insurance company for payment of the policy-money, the court has jurisdiction under the s. 44 of the 15 & 16 Vict. c. 86, to dispense with a legal personal representative of the assured where none exists. In a case where the mortgage debt was larger than the policy-money, and the estate of the insured was insolvent :—Held, that the jurisdiction to dispense with a personal representative was rightly exercised. The dicta of James and Cotton, L.JJ., in *Webster* v. *British Empire Mutual Life Assurance Co.* (supra, col. 50) commented on. *Curtius* v. *Caledonian Fire and Life Insurance Co.*, 51 L. J., Ch. 80 ; 19 Ch. D. 534 ; 45 L. T. 662 ; 30 W. R. 125—C. A.

—— **Trustees.**]—A policy was effected by A. upon her own life with an insurance company ; it was by deed, and executed by three trustees of the company : A. afterwards assigned it to B. and died. The money due on the policy was paid to B. by a cheque drawn by the trustees on the bankers of the company, and he gave an acknowledgment of having received the money from the trustees. By the deed of trust the board of directors was to cause all moneys belonging to the company to be deposited with the bankers in the name of the trustees, and such moneys were not to be withdrawn but for the purposes of the company, and by cheques signed by the trustees, or by three or more directors under some authority to be given to the trustees. After the payment to B. it was discovered that the policy was void on account of fraud :—Held, that, under these circumstances, the three trustees were the proper plaintiffs to recover back the money so paid to B. *Lefevre* v. *Boyle*, 3 B. & Ad. 877 ; 1 L. J., K. B. 199.

When a policy is assigned to a trustee who, either by express terms or by fair construction, has a power to give receipts, the company ought not to refuse payment to the trustee. *Curtin* v. *Jellicoe*, 13 Ir. Ch. R. 180.

—— **Holder of Dishonoured Bill of Exchange.**]—If an insurance company discharges by bill of exchange a liability upon a policy which limits the claim to the capital of the company, and the bill is not paid, the holder has a clear right to sue, or prove in a winding-up upon the bill, and not merely in respect of the original contract. *State Fire Insurance Co., In re, Meredith, Ex parte*, 32 L. J., Ch. 300 ; 8 L. T. 146 ; 11 W. R. 416.

Inspection of Medical and Confidential Reports.]—An insurance office in accepting a proposal to insure the life of a person acted on reports as to his health and habits made by his private friends, a report by his own medical officer on his examination of such person, and a statement by such person written on the back of the medical report. The private friends' reports consisted of replies to printed questions, with a notice by the office that the replies would be considered strictly private and confidential. The medical report was headed with the words "confidential medical examination." In an action against the office to recover the amount insured, in which the question was whether the policy had been obtained by untrue statements as to the health and habits of the person whose life was so insured, the court allowed the plaintiffs to have inspection of the reports, as well those of the private friends as of the medical officer. *Mahony* v. *National Widows' Life Assurance Fund*, 40 L. J., C. P. 203 ; L. R. 6 C. P. 252 ; 24 L. T. 548 ; 19 W. R. 722.

See DISCOVERY.

Production of Deed in Action.]—In a suit by assignees in trust from T. of two policies of assurance (which formed part of a trust estate in T.'s hands as surviving executor of J.) to impeach an alleged prior mortgage of the policies by T. to the company which issued them, the bill, in effect, alleged (though the answer denied) that the giving of the prior mortgage was a breach of trust on T.'s part of which the company was aware at the time. The bill also alleged, and the answer admitted, that the company intended to surrender the policies or sell them by auction. On summons by the plaintiffs for production of documents:—Held, that the plaintiffs had not shewn sufficient interest in the mortgage deed to entitle them to its production. *Carter* v. *Hublack*, 24 W. R. 354—C. A.

Capital Punishment.]—F. assured his life in January, 1815, and paid premiums regularly till 1824. In June, 1815, he committed a felony, of which he was convicted in October, 1824, and for which he was executed in November, 1824. A bill was filed in 1825 by his representatives claiming under him and in his right, for payment of the sum alleged to be due on the insurance, and decree in favour of the representatives; but the judgment was reserved, on the ground that, by the general policy of the law, the insurance became void as to those claiming under and in right of F., in consequence of the death being occasioned by his own criminal act. *Amicable Society* v. *Bolland*, 2 Dow & Cl. 1; 4 Bligh (N.S.) 194.

Particulars—Disease.]—In an action on a policy, a condition of which was that the person whose life was insured had not been afflicted with certain specified disorders or any other complaint, the company pleaded that the assured, at the time of the policy, had symptoms of disease of the stomach:—Held, that the company must deliver particulars under this plea. *Marshall* v. *Emperor Life Assurance Society*, 6 B. & S. 886; 35 L. J., Q. B. 89; L. R. 1 Q. B. 35; 12 Jur. (N.S.) 293; 13 L. T. 281.

Restraining Action on.]—A bill having been filed by an insurance company to cancel a life policy as obtained by misrepresentation, a motion was made to restrain an action upon the policy which was commenced immediately after the filing of the bill:—Held, that the court had complete jurisdiction, but that the question would be more suitably tried before a jury; and motion refused accordingly. *Hoare* v. *Bremridge*, 42 L. J., Ch. 1; L. R. 8 Ch. 22; 27 L. T. 593; 21 W. R. 43.

The declaration made by the insured in a proposal to effect a life policy, which it was agreed should be the basis of the contract, stated that if any untrue averment was made in the answers to the questions contained in the proposal or put by the company's medical officer, the policy should be void. The company filed a bill to set aside the policy, alleging, as distinct grounds of fraud, first, a suppression of the fact that other companies had declined to insure the life; and secondly, an untrue answer to a question as to the habits of the deceased. After the bill was filed, and before the time for answering had expired, the assignee of the policy commenced an action upon it. The court refused with costs an interlocutory injunction to restrain the action, holding that the question whether the assured was of sober habits was one for a court of law with the aid of a jury. *Life Association of Scotland* v. *McBlane*, Ir. R. 9 Eq. 176.

In 1812 an insurance society granted a policy for 5,000*l.* to W. on his life, which was forfeited in 1816 for nonpayment of premiums. A fresh policy was granted to W. in 1817 on the same terms as the forfeited policy. In the meantime a by-law of the society had been passed, whereby the holders of policies granted in 1817 were prevented from participation in certain bonuses to which holders of policies granted in 1812 were entitled. After the death of W., in 1855, his executors accepted payment of 8,000*l.* as due on the policy of 1817. In 1860 one of the executors filed a bill alleging that the policy of 1817 was accepted on condition that the assured should be entitled to the same rights as he would have been under the policy of 1812, and praying for an order for the payment of the further bonuses. The bill was dismissed, and the executor brought an action against the society to recover the further bonuses. The society filed a bill to restrain the action:—Held, that the former suit having been brought on the footing that the policy of 1812 was void, the defendant could not be allowed to bring an action on that policy. *Tredegar* v. *Windus*, 44 L. J., Ch. 268; L. R. 19 Eq. 607; 32 L. T. 596; 23 W. R. 511.

Held, also, that the right of the society to plead the decree in equity in the action did not prevent the court from granting the injunction. *Ib.*

An assignee of a policy brought an action against an assurance company under 30 & 31 Vict. c. 144, for the purpose of recovering the moneys secured by the policy. The company filed a bill in equity in order to have the action restrained and the policy brought into court to be cancelled, on account of the fraud alleged to have been practised upon them in obtaining it:—Held, that the company was not entitled to an injunction, inasmuch as the facts alleged were a complete answer to the action, and that granting the injunction would neutralise the act of parliament. *Scottish Amicable Society* v. *Fuller*, Ir. R. 2 Eq. 53; 16 W. R. 274. *But see* now Judicature Act, 1873, s. 24, sub-s. 5.

Bill in Chancery—Demurrer.]—To a bill brought to recover a sum of money upon a policy of insurance, the defendants demurred, because the plaintiff's remedy was at law. Demurrer allowed. *Ghettoff* v. *London Assurance Co.*, 4 Bro. P. C. 436.

—— **Parties to—Secretary and Manager.**]—The secretary and manager of a mutual insurance company is properly made a defendant to a bill to enforce a claim against the company where the rules provide that claims are to be paid by means of cheques countersigned by him, and that the money to pay the claims is to be raised by bills of exchange to be drawn by him on the members of the association, notwithstanding that he is not a member of the association and not personally liable to pay any part of the claim. *Pepper* v. *Green*, 2 Hem. & M. 478.

A bill can be sustained against the secretary and manager of a mutual insurance company under similar circumstances, notwithstanding his bankruptcy, and his assignees are not as such necessary parties to the suit. *Pepper* v. *Henzell*, 2 H. & M. 486; 13 W. R. 962.

—— **Parties to—Different Classes of Insurers.**]—Some persons insured in a company for sums of money payable at death, some for an allowance during sickness, some for annuities :—Held, that all these classes could be properly represented by plaintiffs some of whom were of each class of insurers. *Evans* v. *Coventry*, 25 L. J., Ch. 489 ; 2 Jur. (N.S.) 557 ; 4 W. R. 466.

Payment of Policy-Moneys into Court.]—An assurance company having its principal office in Edinburgh, and a branch office in London, issued a policy on which was indorsed a memorandum that the moneys to become payable thereunder should be payable to the executors, administrators or assigns of the assured at the office of the company in London. On the death of the assured, the policy-money being claimed by the executor of the assured who had proved the will in Scotland, and by the equitable mortgagees of the policy, the company commenced an action in the Court of Session in Scotland, in order to have the conflicting claims adjudicated upon, and subsequently they filed a bill against the company and the executor of the assured. On a summons taken out by them that the company might pay the policy-money into court :—Held, that the company having admitted they had no interest in the money, must pay it into court without being indemnified from having to pay it into court in Scotland, although the practice of the Scotch courts might be to require this to be done, notwithstanding the payment of the same sum into an English court. *Cook* v. *Scottish Equitable Life Assurance Society*, 26 L. T. 571.

A. assured his life, and in March, 1852, assigned the policy to B. absolutely. B. in December, 1869, assigned the policy to C. absolutely. In March, 1875, A. died. The office admitted C.'s title to the policy-money, subject to production of evidence that an assignment by way of mortgage made by A. in March, 1851, of which the office had notice, but on which no claim had ever been made, was satisfied ; and on C.'s declining to comply with the requisition, in July, 1875, paid the money into court under the Trustees Relief Act :—Held, that the Trustees Relief Act, until extended by the Judicature Act, 1873, s. 25, sub-s. 6, did not enable an assurance society having notice of conflicting claims to pay policy-moneys into court, unless the moneys were the subject of a trust ; but that the objection could not be entertained on a petition praying payment out of court of moneys so paid in. *Haycock, In re*, 45 L. J., Ch. 247 ; 1 Ch. D. 611 ; 24 W. R. 291.

Held, also, that the requisition was proper, inasmuch as, if the mortgage had not been satisfied, the mortgagee might, by virtue of the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), have sued the office in his own name on his assignment. *Ib.*

Held, also, that the assurance society was entitled to its costs as between solicitor and client, but not to its charges and expenses. *Ib.*

By a marriage settlement alleged to have been made in consequence of false representations by the husband, a policy of assurance on the life of the wife's mother was settled on the usual trust, giving the husband a life interest after the death of the wife. The marriage was dissolved soon after its celebration on the ground of the husband's adultery and desertion. There was no issue. The trustees of the settlement, having no funds to keep up the policy, assigned it absolutely to the wife, who paid the premiums from the date of such assignment. On the death of the assured, the assurance society, after some delay, paid the money due on the policy into court on the ground that the wife could not give a discharge :—Held, that, under the special circumstances, the husband had no claim on the fund. *Rosier, In re*, 37 L. T. 426.

Held, also, that the society was nevertheless justified in paying the money into court, but that it must pay interest from the time when the money became payable till it was paid into court, though there was then no legal hand to receive it. *Ib.*

An insurance company is not a trustee, but a debtor, and is not justified in paying policy-moneys into court under the Trustees Relief Act, nor is it discharged by such payment. *Matthew* v. *Northern Assurance Co.*, 47 L. J., Ch. 562 ; 9 Ch. D. 80 ; 38 L. T. 468 ; 27 W. R. 51.

Therefore, where M. had become entitled, by assignment (of which the statutory notice had been given to the company), to certain policy-moneys, and the company had paid the moneys into court, not being satisfied as to his title thereto, the fund being also claimed by the executors of the assured, the company was held not to be discharged by such payment, and was ordered to pay to M. the amount of the policy with interest, and the costs of the action. *Ib.*

A banking company having received notice in writing of conflicting claims to moneys placed with them on deposit, paid such moneys into court under the Trustees Relief Act, after first deducting therefrom their costs of payment in. Upon petition by one of the claimants for payment out :—Held, that the proviso in s. 25, sub-s. 6, of the Judicature Act only applied to debts of which there had been an absolute assignment in writing ; and that the banking company, not being trustees within the Trustees Relief Act, were not entitled to pay the deposit moneys in court thereunder :—But held, that the petitioner must be taken to have submitted to the jurisdiction under the Trustees Relief Act by petitioning the court, and upon the principle of *Haycock, In re* (supra), the bank were entitled to their taxed costs of the payment in and of the petition, and such costs were directed to be taxed accordingly. *Sutton's Trusts, In re*, 48 L. J., Ch. 350 ; 12 Ch. D. 175 ; 27 W. R. 529.

Where adverse claims are made to moneys payable under a policy of insurance, the company may pay the money into court under the Trustees Relief Act. *United Kingdom Life Insurance Co., In re*, 34 Beav. 493 ; 11 Jur. (N.S.) 424 ; 12 L. T. 441 ; 13 W. R. 645.

On the death of a party whose life has been insured in an insurance office, if disputes arise as to the parties entitled to the amount of the insurance, the company may pay the amount due from them into court, under the Trustees Relief Act. *Hall, In re*, 5 L. T. 395 ; 10 W. R. 37.

When conflicting claims are made on an assurance company in respect of policy-moneys, but one of the claimants offers an indemnity, the company ought not to institute an interpleader suit, but should (if not satisfied with the indemnity) pay the money into court under the Trustees Relief Act. *Chapman* v. *Besnard*, 17 W. R. 358.

Proof of Death of Assured.]—A policy on the life of Nutt was granted in 1863. An action was brought upon it in 1874, and the question was whether Nutt was then alive or dead. He had been absent from his former home for more than seven years, having left it in 1867. His sister and brother-in-law, who lived where he had formerly lived, gave evidence as to his absence, and said that they had not heard of him for more than seven years. On cross-examination they said that a niece of his had said that when she was in Melbourne in December, 1872, or January, 1873, she saw a man whom she believed to be her uncle Nutt, but he was lost in the passing crowd before she could get to speak to him. No effort appeared to have been made to find him at Melbourne, and the other relatives believed the niece to have been mistaken. The jury expressed a similar opinion. The judge directed the jury that they "could not say that the man had not been heard of during the last seven years when one of his relatives declared that she had seen him alive and well within the last three years, and still less could they say that he had never been heard of, when all the members of his family stated that they had heard of what she had stated," and "that the ground for the presumption of death from a man having been absent for seven years was entirely removed by the direct evidence that every relative had heard that he was alive." And lastly, the judge said to the jury: "Under these circumstances, unless you are prepared to find that he was dead in April, 1875, and find it upon evidence which tends to prove exactly the contrary, and in the absence of that evidence upon which alone the presumption should be raised of his death, your verdict ought to be for the defendant." The Court of Appeal considered this to be a misdirection, and ordered a venire de novo. On appeal, the Lords were equally divided, and so the decision of the Court of Appeal stood affirmed. *Prudential Insurance Co.* v. *Edmonds*, 2 App. Cas. 487.

Letters of Administration — Presumption of Death of Assured—Notice to Insurance Company.]—See *Barber, In goods of*, 11 P. D. 78; 56 L. T. 894; 35 W. R. 80.

Evidence of Death—Cestui qui vie.]—Money was payable to a tenant pur autre vie under a policy, after proof, to the satisfaction of directors, of the cestui que vie. An order was made under 6 Anne, c. 72, that the cestui que vie ought to be deemed and taken to be dead under the statute, and the remainderman entered:—Held, that the directors might reasonably require further evidence of the death of the cestui que vie. *Doyle* v. *City of Glasgow Life Assurance Co.*, 53 L. J., Ch. 527; 50 L. T. 323; 32 W. R. 476; 48 J. P. 374.

Presumption of Death.]—*See* EVIDENCE, II.

Pleadings.]—To an action on a policy on the life of H., conditioned that if he went out of Europe all claim to any interest in the funds of the society should cease, with a proviso that he should be at liberty to visit Tangiers, or any other port within the Mediterranean: the company with whom the policy was effected pleaded that he departed beyond the limits of Europe, otherwise than by visiting Tangiers, or any other port within the Mediterranean. The court refused to allow an equitable replication, that at the time of making the policy it was expressly stipulated that the policy should not be vitiated by reason that H. visited ports and places out of Europe, and that the policy was entered into on the terms of such stipulation; but the court allowed a replication of leave and licence. *Reis* v. *Scottish Equitable Life Assurance Society*, 2 H. & N. 19; 26 L. J., Ex. 279; 3 Jur. (N.S.) 417; 5 W. R. 592.

In an action to recover the amount of a life policy, where the rules of the society stipulate that the insured shall be of sober and temperate habits, it is sufficient upon a plea denying the sober and temperate habits of the insured, for the company to shew that his habits were intemperate; and it is no answer to prove the intemperance not to have been to such a degree as to injure the health of the insured, or to shorten his life. *Southcombe* v. *Merriman*, Car. & M. 286.

Right to Begin.]—In an action on a policy, to be cancelled in case of suicide, by return of the premiums, on a plea that the deceased died by suicide, and that the premiums were ready to be returned, the defendant is entitled to begin. *Stormont* v. *Waterloo Life Assurance Co.*, 1 F. & F. 22.

Evidence as to Suicide.]—In an action on a policy, on a plea of suicide, the onus being upon the defendant to prove that the death was by suicide, and he having put in the deposition of the widow and executrix, given upon the coroner's inquest, to the effect that the day before his death the deceased had unaccountably gone out of his bedroom very early in the morning, and immediately afterwards had been found in peril of falling over the banisters; that, later in the day, after he had complained of giddiness and pains in the head, he had been seen falling out of a window, his wife being in the room at the time and not being able to say how he came to fall out:—Held, that there was a scintilla of evidence to support the plea; that the question upon it was, not merely whether the deceased threw himself out of the window, but whether, if so, he did it voluntarily, and not through confusion of his senses. *Ib.*

Power of Arbitrator to state Special Case.]—The defendants' special act provided for the reference to arbitration of any question arising on any of their contracts of insurance, and that the "submission to any such arbitration" might be made a rule of court:—Held, that the umpire in a reference under the act had power to state a special case for the opinion of the court under the Common Law Procedure Act, 1854, s. 5. *Isitt* v. *Railway Passengers' Assurance Co.*, 58 L. J., Q. B. 191; 22 Q. B. D. 504; 60 L. T. 297; 37 W. R. 477.

Prohibition—Court of Assurance.]—Prohibition refused to the court of policies of assurance in a case of insurance of a man's life. *Bendir* v. *Oyle*, Style, 166.

Authority of Directors—Contract—Seal—7 & 8 Vict. c. 110.]—In an action against an insurance company established under 7 & 8 Vict. c. 110, it is sufficient for the plaintiff to produce a contract signed by three directors, although not under seal of the company, and to shew by receipt of premiums and otherwise that the contract has been acknowledged by the company. It lies on the company to shew that formalities required by the deed of settlement have not been observed.

Charles v. *National Guardian Assurance Society*, 5 W. R. 694.

Arbitration Clause.]—See *Brownstein* v. *Accidental Death Insurance Co.*, infra, col. 86.

Interpleader.]—See *Desborough* v. *Harris*, supra, col. 72.

Costs.]—Costs of an insurance company, paying into court moneys in respect of a life policy on which there were various claims, allowed as between solicitor and client. *Webb, In re*, 35 L. J., Ch. 850; L. R. 2 Eq. 456; 12 Jur. (N.S.) 595; 14 L. T. 89; 14 W. R. 857.

An insurance company having been served with a petition for the payment out of court of the proceeds of a policy, is entitled to the costs of appearance. *Cobb, In re*, 15 W. R. 29; 15 L. T. 170.

An insurance company paid the amount of a policy, the right of which was disputed, into court, under the Trustees Relief Act:—Held, that the company was entitled to their costs from the person wrongfully claiming the fund. *United Life Assurance Co., In re*, 34 Beav. 493; 11 Jur. (N.S.) 424; 12 L. T. 441; 13 W. R. 645.

The solicitors who gave notice to an assurance company of possible claims on the proceeds of a life policy, whereby a portion of the moneys was paid into court, ought not to be made respondents to a petition for payment of the fund out of court, or to pay any costs of such petition, or of the payment into court, but they will not be allowed their costs of appearance in full. *Moseley, Ex parte, Provident Clerks' Mutual Life Assurance Association, In re*, 21 L. T. 384; 18 W. R. 126.

XIII. INTEREST ON POLICY-MONEYS.

Before 3 & 4 Will. 4, c. 42, s. 28, interest was not recoverable in an action upon a policy on the life of A., by which a certain sum was made payable six months after due proof of his death, although the money insured was not paid at the time stipulated for that purpose. *Higgins* v. *Sargeant*, 3 D. & R. 613; 2 B. & C. 348; 2 L. J. (O.S.) K. B. 33; 26 R. R. 379.

Interest is not payable on a sum recovered, on a lost policy, from a life insurance company. *Bushman* v. *Morgan*, 5 Sim. 635.

B. AGAINST ACCIDENT, INJURY OR DISEASE.

Contract—Misdescription.]—As to residence and occupation, see *Perrins* v. *Marine and General Travellers' Insurance Society*, ante, col. 25.

—— **Health.**]—An insurance having been effected in the name and on the life of a pauper dependent on his son for support, ruptured, and subject to fainting fits:—Held, that there was nothing in the life insured which falsified a declaration that the insured had not been subject to epileptic or other fits; and that "there was not any circumstance or information touching his occupation or habits of life, with which the directors ought to be made acquainted, as rendering him peculiarly liable to accident"; nor was his being driven out in a vehicle a voluntary exposure to obvious risk, within the meaning of an exception on those terms. *Shilling* v. *Accidental Death Insurance Co.*, 1 F. & F. 116.

—— **Time within which Notice to be Given.**]—The provisions of a policy issued by an assurance company, making it a condition precedent to the right to recover that a notice, specifying the particulars of the accident, should be delivered at the chief office of the company, in London, within seven days after its occurrence, applies to cases where owing to the sudden character of the accident, and its resulting in instantaneous death, there was nobody capable of giving the required notice. *Gamble* v. *Accident Assurance Co.*, Ir. R. 4 C. L. 204.

The provision is not discharged by reason of the fact that owing to the act of God the accident was of so sudden and fatal a character that it was impossible to have given the required notice within the specified time. *Ib.*

Interest.]—An insurance against death by accident is within the 14 Geo. 3, c. 48, s. 2, as to interest. *Shilling* v. *Accidental Death Insurance Co.*, 1 F. & F. 116. S. P., 2 H. & N. 42; 26 L. J., Ex. 266; 5 W. R. 567.

Premiums—Expiration of Policy.]—A. on the 22nd of January, 1852, effected with a company an insurance against death or injury from accident, the premium on which was payable on the 22nd of January in each year. By one of the conditions indorsed on the policy (the 1st), the premium was to be paid "within twenty-one days from the day on which the same should first accrue or become due," and "provided the same should be from time to time paid within such space of twenty-one days, the policy should not be void notwithstanding the happening before the expiration of such space of twenty-one days of the event or events, upon the happening whereof the amount secured by the policy should, according to the terms thereof, become payable." By another condition (the 2nd), "if the premium should be unpaid for twenty-one days next after it should become due, the policy should be absolutely void, and the assured should forfeit all claim thereunder." And (by the 4th condition), "in every case when a new premium should become payable, the directors should be at liberty to terminate the risk, by refusing to accept such premium." A. duly paid the premiums down to 1855. On the 27th of January, 1856, an accident happened to him, which caused his death on the 1st of February following. On the 4th of February the company had notice of his death, and a correspondence took place between their secretary and the attorney of A.'s executors respecting the cause of the death, and their claim on the policy, neither party at first knowing that the premium which became due on the 22nd of January, 1856, was unpaid. On the 8th of February, the secretary for the first time became acquainted with the fact of the nonpayment of the premium, but did not communicate it to the executors, or their attorney, until the 13th (the day after the expiration of the twenty-one days allowed by the first condition for payment of the premium), when he informed the latter by letter that the directors had considered and rejected the claim:—Held, first, that there was nothing in the conditions to enable the executors to pay the premium after his death, and that if they had tendered it within the twenty-one days, the company would not have been bound to accept it. *Simpson* v. *Accidental Death Insurance Co.*, 2 C. B. (N.S.)

257; 26 L. J., C. P. 289; 3 Jur. (N.S.) 1079. See *S. C.*, 5 W. R. 307.

Held, also, that the company not being estopped from denying the payment, the plea was a good answer to the action. *Ib.*

Held, also, that the policy expired on the 22nd January, 1856, and that neither the executors nor the insured (had he been living) had an absolute right to keep the policy alive by payment or tender of the premium within the twenty-one days after that date. *Ib.*

Risks—Sun-stroke.]—By a policy effected by S. with a company for granting assurance against loss of life and personal injury arising from accidents at sea, it was agreed that in case S. should sustain any personal injury from or by reason or in consequence of any accident which should happen to him upon any ocean, sea, river, or lake during the continuance of the policy, the company should pay to him a reasonable compensation, and that if he should die from the effects of the injury, the company should pay to his executors 100*l.* At the time of effecting the policy he was about to sail on a voyage to Aden. He proceeded on his voyage and arrived in the Cochin River on the south-west coast of India, where he was struck down by a sun-stroke while attending to his duty in the ship, and died the same day from the effects of the sun-stroke:—Held, that the death could not be said to have arisen from accident within the meaning of the policy, and therefore that he could not recover. *Sinclair* v. *Maritime Passengers' Assurance Co.*, 3 El. & El. 478; 30 L. J., Q. B. 77; 7 Jur. (N.S.) 367; 4 L. T. 15; 9 W. R. 342.

—— **Disability from following Pursuits.**]—A policy against accident contained a proviso, "that in case such accident shall not cause the death of the insured immediately, but shall cause any bodily injury to the insured of so serious a nature as wholly to disable him from following his usual business, occupation, or pursuits, the company will pay to the insured a compensation in money at the rate of 5*l.* per week during the continuance of such disability." An insured, a solicitor and registrar of a county court, sprained his ankle severely, and was confined to his bedroom for some weeks, being unable to get down stairs. He was prevented from passing his accounts as registrar, and from attending at various places at which he was required to complete purchases for his clients:—Held, that inasmuch as the insured was so disabled as to be incapable of following his usual occupation, business, or pursuits, he was "wholly disabled from following his usual occupation, business, or pursuits" within the meaning of the policy. *Hooper* v. *Accidental Death Insurance Co.*, 5 H. & N. 557; 29 L. J., Ex. 484; 7 Jur. (N.S.) 74; 8 W. R. 616—Ex. Ch.

—— **Secondary Cause of Death.**]—By one of the conditions of a policy against accidental death or injury, it was provided that the policy insured against cuts, stabs, concussions, &c., "when accidentally occurring from material and external cause, where such accidental injury is the direct and sole cause of death to the insured, or disability to follow his avocations"; and then followed this exception: "but it does not insure against death or disability arising from rheumatism, gout, hernia, erysipelas, or any other disease or cause arising within the system of the insured before, or at the time, or following such accidental injury, whether causing death or disability directly or jointly with such accidental injury":—Held, that death from hernia caused solely and directly by external violence, followed by a surgical operation performed for the purpose of relieving the patient, is not within the exception. *Fitton* v. *Accidental Death Insurance Co.*, 17 C. B. (N.S.) 122; 34 L. J., C. P. 28.

Under a similar policy the insured cut his foot accidentally against the broken side of an earthenware pan; a few days later erysipelas supervened, and of that disease he died shortly afterwards. The erysipelas was caused by the wound, and but for that he would not have suffered from it. In an action by his executrix to recover the amount assured:—Held, that the insurers were protected by the condition and were not liable. *Smith* v. *Accident Insurance Co.*, 39 L. J., Ex. 211; L. R., 5 Ex. 302; 22 L. T. 861; 18 W. R. 1107.

—— **Railway Accident.**]—A company entered into a contract of insurance with a party whereby it undertook to pay 1,000*l.* to his legal representatives in the event of death happening to the assured from railway accident whilst travelling in any class carriage on any line of railway of Great Britain or Ireland, a proportionate part of that sum to be paid to the assured himself in the event of his sustaining any personal injury by reason of such accident. The assured travelled in a railway carriage to a certain place, and in getting out of the carriage after the train stopped, met with an injury, without any negligence on his part, and in consequence of the step of the carriage being accidentally slippery:—Held, first, that this was a railway accident within the meaning of the policy. *Theobald* v. *Railway Passengers' Assurance Co.*, 10 Ex. 45; 2 C. L. R. 1034; 23 L. J., Ex. 249; 18 Jur. 583; 2 W. R. 528.

Held, secondly, that the assured could only recover for the personal expense and pain occasioned to him by the injury, and was not entitled to damages for loss of time or loss of profit occasioned by it. *Ib.*

Held, thirdly, that it was not a true measure of damage to assume 1,000*l.*, the sum insured, as the value of life, and estimate a proportionate sum for the injury sustained. *Ib.*

—— **External Causes.**]—On an insurance against bodily injury by accident or violence, provided that the accident operated by external causes, insurers are liable for an injury to the spine caused by lifting a heavy burden in the course of business. *Martin* v. *Travellers' Insurance Co.*, 1 F. & F. 505.

—— **"Sole Cause of Death."**]—A policy of insurance against death from accidental injury contained the following condition: "This policy insures payment only in case of injuries accidentally occurring from material and external cause operating upon the person of the insured, where such accidental injury is the direct and sole cause of death to the insured, but it does not insure in case of death arising from fits . . . or any disease whatsoever arising before or at the time or following such accidental injury, whether consequent upon such accidental injury or not, and whether causing such death directly or jointly with such accidental injury." The insured, while

at a railway station, was seized with a fit and fell forwards off the platform across the railway, where an engine and carriages which were passing went over his body and killed him :—Held, that the death of the insured was caused by an accident within the meaning of the policy, and that the insurers were liable. *Lawrence* v. *Accidental Insurance Co.*, 50 L. J., Q. B. 522; 7 Q. B. D. 216; 45 L. T. 29; 29 W. R. 802; 45 J. P. 781.

—— **Death by Drowning while in an Epileptic Fit.**]—By a policy of insurance defendants agreed to pay to the representatives of W. 1,000*l.* if "the insured shall sustain any personal injury caused by accidental, external, and visible means within the intention of this policy and the provisions and conditions thereof, and the direct effect of such injury shall occasion the death of the insured." The policy provided "that the insured shall not be entitled to make any claim under this policy for any injury by any accident unless such injury shall be caused by some outward and visible means, of which proofs satisfactory to the directors can be furnished, and that this insurance shall not extend to any injury caused by or arising from natural disease or weakness, or exhaustion consequent upon disease . . . . or to any death arising from disease, although such death may have been accelerated by accident." The insured, whilst crossing a stream, was seized with an epileptic fit, fell in, and was drowned. He did not sustain any personal injury to occasion death other than drowning. In an action by his executrix on the policy :—Held, that the death was within the words of the policy, and that defendants were not protected by the proviso, and therefore were liable. *Trew* v. *Railway Passengers' Assurance Co.* (6 H. & N. 839) discussed and followed. *Winspear* v. *Accident Insurance Co.*, 6 Q. B. D. 42; 43 L. T. 459; 29 W. R. 116—C. A.

—— **Evidence.**]—A policy against accidents or violence contained a proviso that no claim should be made by the insured, in respect of any injury, unless caused by some outward and visible means, of which satisfactory proof could be furnished to the directors of the company :—Held, that death by drowning, where the insured had gone into the sea for the purpose of bathing only, was a death by external violence within the meaning of the policy. *Trew* v. *Railway Passengers' Assurance Co.*, 6 H. & N. 839; 30 L. J., Ex. 317; 7 Jur. (N.S.) 878; 4 L. T. 833; 9 W. R. 671—Ex. Ch.

An insured was twenty-six, and a clerk in the service of an ironmonger, when he effected the policy; he had been under medical treatment in consequence of having strained himself, and for five or six weeks was unable to attend to his duties at his employer's; he returned to his duties shortly before his death, which was alleged to have happened at Brighton, whither he had gone down, by leave of his employer, in order to have sea-bathing; he left his lodgings there in the evening, about seven o'clock of the day after he arrived, going towards the sea, but was never subsequently seen alive, though some clothes, identified to be his, were found, about eight o'clock, on the top of the steps of a bathing machine; and some time after this a naked body was washed up at a place on the coast about 200 miles from Brighton, which there was evidence to identify as the body of the insured, but the coroner's jury found that it was the body of a person unknown :—Held, sufficient to go to a jury to enable them to find that the insured met his death by drowning. New trial ordered. *Ib.*

A policy was entered into with a company against bodily injury from any railway accident directly affecting the assured while travelling on any line of railway in Great Britain or Ireland by a passenger train propelled by steam. One of the conditions in the deed of settlement of the company, which by the terms of the policy was incorporated with it, provided that before payment of the sum insured by any policy, proof of the death or accident, satisfactory to the directors of the company, should be furnished by the claimant, together with such further evidence or information, if any, as the directors should think necessary to establish the claim :—Held, that this must be understood to mean such evidence or information as the directors might reasonably, and not such as they might unreasonably and capriciously, require. *Braunstein* v. *Accidental Death Insurance Co.*, 1 B. & S. 782; 31 L. J., Q. B. 17; 8 Jur. (N.S.) 506; 5 L. T. 550.

A policy of assurance against injuries caused by accident or violence contained a proviso, that no claim should be made under it in respect of any injury unless the same should be caused by some outward and visible means, of which satisfactory proof could be furnished to the directors :—Held, that this must be understood to mean such proof as a court of justice would determine ought to be satisfactory to the directors. *Trew* v. *Railway Passengers' Assurance Co.*, 6 Jur. (N.S.) 759.

Reference to Arbitration or Action.]—A policy was entered into with a company, against bodily injury from any railway accident directly affecting the assured while travelling on any line of railway by a passenger train. There was a condition indorsed on the policy, that in case of difference of opinion as to the amount of compensation payable in any case, the question should be referred to the arbitration of a person to be named by the secretary for the time being of the Master of the Rolls, and all expenses and costs should be subject to the decision of such arbitrator; and the award made on such arbitration was to be taken as a final settlement of the question, and might be made a rule of court :—Held, that a reference to arbitration in the manner prescribed was rendered a condition precedent to an action for an injury within the policy. *Ib.*

Exception—Accident caused by "Exposure of the Insured to Obvious Risk."]—A policy of insurance against accidental death or injury excepted from the risks insured against accidents happening "by exposure of the insured to obvious risk of injury." The insured met his death through attempting in broad daylight to cross the main line of a railway in front of an approaching train by which he was run over and killed. There was no evidence that he was short-sighted or deaf. At the place where the accident happened there was no station, or proper crossing; and there was no obstruction to prevent a person about to cross from seeing an approaching train. There was no ground for imputing negligence to the servants of the railway company :—Held, that the risk

incurred by the insured being one which either was obvious to him, or would have been obvious to him if he had been paying reasonable attention to what he was doing, the case came within the exception in the policy. *Cornish* v. *Accident Insurance Co.*, 58 L. J., Q. B. 591; 23 Q. B. D. 453; 38 W. R. 139; 54 J. P. 262—C. A.

Accident—Policy—Time, Computation of—Insurance "from" a Date.]—The plaintiffs, a tramway company, effected with the defendants an insurance against accidents for twelve calendar months from November 24, 1887. An accident happened on November 24, 1888:—Held, that the effect of "from" in the expression "for twelve calendar months from November 24, 1887," was to exclude November 24, 1887, and to include November 24, 1888, in the period of the insurance, and that the defendants were therefore liable. *South Staffordshire Tramways* v. *Sickness and Accident Assurance Association*, 60 L. J., Q. B. 47; [1891] 1 Q. B. 402; 63 L. T. 807; 55 J. P. 168.

Specified Sum payable in respect of any one Accident.]—The plaintiffs, a tramway company, effected with the defendants an insurance against "claims for personal injury in respect of accidents caused by vehicles" to the amount of "250*l.* in respect of any one accident." One of the plaintiff's tramcars was overturned, forty persons were injured, and the plaintiffs became liable to pay claims to the amount of 833*l.*:—Held, that "accident" in the policy meant injury in respect of which a person claimed compensation from the plaintiffs, and that the liability of the defendants was consequently not limited to 250*l.*; but the plaintiffs were entitled to recover the amount of 833*l.* on the policy. *South Staffordshire Tramways* v. *Sickness and Accident Assurance Association*, 60 L. J., Q. B. 260; [1891] 1 Q. B. 402; 64 L. T. 279; 39 W. R. 292; 55 J. P. 372—C. A.

Accident—"Injury caused by violent, accidental, external and visible Means."]—By a policy of insurance against accident the defendants agreed to pay the plaintiff compensation if he should sustain "any bodily injury caused by violent, accidental, external and visible means." The policy contained a proviso that the insurance should not cover injury arising from natural disease or weakness. The plaintiff sustained injury by breaking a ligament in his knee while he was in the act of stooping:—Held, that such injury was covered by the policy; the words "external means" must be construed as the antithesis of internal means—e.g. disease or weakness. *Hamlyn* v. *Crown Accidental Insurance Co.*, 62 L. J., Q. B. 409; [1893] 1 Q. B. 750; 4 R. 407; 68 L. T. 701; 41 W. R. 531; 57 J. P. 663—C. A.

Construction of Policy—Loss of Sight—Knowledge of Agent imputed to Principal.]—B. effected an insurance with the defendant company through their agent against accidental injury. The proposal for the insurance contained a statement by the assured that he had no physical infirmity, and that there were no circumstances that rendered him peculiarly liable to accidents, and it was agreed that the proposal should form the basis of the contract between him and the company. By the terms of the policy, the company agreed to pay the insured 500*l.* on permanent total disablement, and 250*l.* on permanent partial disablement—the policy stating that by permanent total disablement was meant, inter alia, "the complete and irrecoverable loss of sight to both eyes," and by permanent partial disablement was meant, inter alia, "the complete and irrecoverable loss of sight in one eye." At the time when he signed the proposal for the insurance the assured had lost the sight of one eye, a fact of which the defendant's agent was aware, though he did not communicate it to the defendants. The assured during the currency of the policy met with an accident, which resulted in the complete loss of sight in his other eye, so that he became permanently blind:—Held, that it must be taken, first, that the assured had sustained a complete loss of sight to both eyes within the meaning of the policy; secondly, that the knowledge of the defendants' agents was under the circumstances the knowledge of the defendants, and that they were liable on the policy for 500*l.* *Bawden* v. *London, Edinburgh, and Glasgow Assurance Co.*, 61 L. J., Q. B. 792; [1892] 2 Q. B. 534; 57 J. P. 116—C. A.

Insurance against Disease — Whether a "Policy" within 14 Geo. 3, c. 48, s. 2.]—The defendants, the proprietors of a certain medical preparation called "The Carbolic Smoke Ball," issued an advertisement in which they promised to pay 100*l.* to any person who contracted the influenza after having used one of their smoke balls, in a certain specified manner and for a certain specified period. The plaintiff, upon the faith of the advertisement, purchased one of the defendants' smoke balls, and used it in the manner and for the period specified, but nevertheless contracted the influenza:—Held, that the above facts established a contract by the defendants to pay the plaintiff 100*l.* in the event which happened; and that such contract was not a policy within 14 Geo. 3, c. 48, s. 2; and that the plaintiff was entitled to recover. *Carlill* v. *Carbolic Smoke Ball Co.*, 62 L. J., Q. B. 257; [1893] 1 Q. B. 256; 4 R. 176; 67 L. T. 837; 41 W. R. 210; 57 J. P. 325—C. A.

Railway Passengers' Assurance Company—Arbitration—Stay of Proceedings.]—Sects. 3 and 16 of the Railway Passengers' Assurance Company's Act, 1864, provide that questions of differences arising shall, if either the company or the persons claiming require it, be referred to arbitration. By s. 33, where an action has been commenced, the court or a judge, "upon being satisfied that no sufficient reason exists why the matters cannot and ought not to be referred to arbitration, and that the company were at the time of the bringing of the action or suit, and still are, ready and willing to concur in all acts necessary and proper for causing the matters to be decided by arbitration, may make an order staying all proceedings in the action." A claim was made against the company, which they disputed, but they did not give notice before the commencement of the action that they required to have the question referred to arbitration. After an action had been commenced the company took out a summons to stay all proceedings in the action:—Held, that as the company had not given notice before the commencement of the action that they required to have the question referred to arbitration, ss. 3 and 16 did not apply, and that, under the circumstances of the

case, the court were not satisfied that no sufficient reason existed why the matters could not or ought not to be referred to arbitration, or that the company were at the beginning of the action ready and willing to concur in all acts necessary and proper for causing the matters to be decided by arbitration, and therefore no order ought to be made under s. 33. *Fox* v. *Railway Passengers' Assurance Co.*, 52 L. T. 672—C. A.

"Accident"—Shock caused by Fright.]—A shock to the nerves of an employee caused by fright sustained in the discharge of his duty, and incapacitating him from employment, is an "accident" within the meaning of a policy issued by a railway company to such employee, under which a weekly allowance is to be paid by the company in case of such employee "being incapacitated from employment by reason of accident sustained in the discharge of his duty in the company's service." *Pugh* v. *L. B. & S. C. Ry.*, 65 L. J., Q. B. 521; [1896] 2 Q. B. 248; 74 L. T. 724; 44 W. R. 627—C. A.

Renewal of Policy by Consent—New Contract Year by Year—Assignment to Trustees for Creditors.]—An accident policy of assurance with a company which provides for the payment of a premium for one year from the date thereof, and which is capable of being renewed only by consent of the company, is not a continuing policy for all purposes, but upon each renewal a new contract is entered into year by year. When, therefore, the person assured has assigned all his property, "credits, estate, and effects whatsoever" to trustees for the benefit of his creditors, and died two year afterwards from an accident, while the renewed policy was subsisting, the moneys payable thereunder do not pass to the trustees under the deed, but belong to the executors of the assured. *Stokell* v. *Heywood*, 65 L. J., Ch. 721; [1897] 1 Ch. 459; 74 L. T. 781. Cp. *Phœnix Life Assurance Co.* v. *Sheridan*, supra, col. 31.

C. FIRE.

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II. Insurance of Ships against Fire —*See* Shipping (*Marine Insurance*).

I. CONTRACT.

Contract of Indemnity.]—Assurances against fire are contracts of indemnity. *Dalby* v. *India and London Life Assurance Co.*, 15 C. B. 365; 3 C. L. R. 61; 24 L. J., C. P. 2; 18 Jur. 1024; 3 W. R. 116—Ex.Ch.

A policy against fire is, in its nature, a contract of indemnity, and the insured is not entitled to recover more than such an amount as will indemnify him against the actual loss or damage sustained according to the real quantity and value of the goods at the time of the fire. *Chapman* v. *Pole*, 22 L. T. 306.

A policy of insurance against fire is a contract of indemnity. *Darrell* v. *Tibbitts*, 50 L. J., Q. B. 33; 5 Q. B. D. 560; 42 L. T. 797; 29 W. R. 66; 44 J. P. 695—C. A. See also *Rayner* v. *Preston*, 50 L. J., Ch. 472; 18 Ch. D. 1; 44 L. T. 787; 29 W. R. 546.

Reference to Printed Proposals.]—If a policy refers to certain printed proposals, the proposals will be considered as a part of the policy. *Worsley* v. *Wood*, 6 Term Rep. 710; 2 H. Bl. 574; 3 R. R. 323. And see *Oldman* v. *Bewicke*, 2 H. Bl. 577, n.

By the proposals of an insurance company it was stipulated that "persons insured shall give notice of the loss forthwith, deliver in an account, and procure a certificate of the minister, churchwardens, and some reputable householders of the parish, importing that they knew the character of the assured, and believe that he really sustained the loss and without fraud":—Held, that the procuring such a certificate was a condition precedent to the right of the assured to recover, and that it was immaterial that the minister, &c., wrongfully refused to sign the certificate. *Ib.*

A deed-poll, containing an insurance against fire, may refer to conditions in a printed paper, without stamp, seal or signature; and it may be a part of those conditions that the insured shall procure a certificate of his character, and that the loss happened without fraud. *Routledge* v. *Burrell*, 1 H. Bl. 254.

Ambiguity—Parol Evidence.]—A policy mentioned a building, oil-mill, of one floor only, with stone and tile, occupied by ——, for crushing of linseed and grinding of dyewood, but no refining of oil therein, 1,000*l.*; on fixed machinery and millwright works, including all the standing and growing gear therein, 1,000*l.*; one engine-house adjoining the mill, 200*l.*; one steam-engine therein, 300*l.*; one logwood warehouse, in which chopping dyewood is performed, communicating with the mill, 200*l.*; one warehouse on the other side of the mill, to the east side, merely for the stowing of goods, 300*l.*:—Held, that there was no ambiguity in the policy, and that evidence was not receivable to shew that it was intended to insure the machinery and gear in the logwood warehouse. *Hare* v. *Barstow*, 8 Jur. 928.

Latent Ambiguity—Evidence—Question for Jury.]—In an action upon a policy of fire insurance, if the evidence discloses a latent ambiguity in the policy so that it becomes necessary to go into the consideration of other documents, and to resort to parol evidence to solve that ambiguity, it ceases to be merely a question for the court on the construction of the

instrument, and raises a question of fact which must be determined by the jury. *Hordern* v. *Commercial Union Assurance Co.*, 56 L. J., P. C. 78; 56 L. T. 240—P. C.

Liability of Directors.]—By a policy under seal, three of the directors of a fire association admitted the plaintiff as a member of that society upon the terms and conditions prescribed by the deed of settlement of the association; and he subscribed a certain sum as the consideration money for one year's assurance; and it was declared that he should be entitled to a remuneration out of the society's funds, in case of loss by fire happening to any property therein specified, not exceeding the sums set against each article respectively; and it was further stipulated, that neither of the directors who signed the policy, nor the plaintiff, nor the holder of it, should, as members of the society, be subject or liable to any demand for loss, except under the articles establishing the society, and as was provided by the same. The plaintiff having sustained a loss by fire, brought an action against the directors who signed the policy; and averred in his declaration, that the funds of the association were sufficient to satisfy the amount of such loss; and the jury found a verdict for him:—Held, that such declaration was sufficient; and that the directors were liable by the terms of the policy. *Andrews* v. *Ellison*, 6 Moore, 199.

F., W. and M. being trustees and directors of an insurance company, executed a policy to indemnify A. and others from loss by fire, whereby they ordered, directed and appointed the directors for the time being to pay the loss which A. and others should sustain in the event of a fire happening; and the policy went on to recite certain provisions, containing the words "conditions and agreements"; and a loss having happened:—Held, that the policy was not an instrument or an agreement upon which an action of covenant would lie; and consequently, that neither the executing parties, nor the directors for the time being, were liable at law. *Alchorne* v. *Saville*, 6 Moore, 202, n. See *Gurney* v. *Rawlins*, 2 M. & W. 87; 6 L. J., Ex. 7.

"Policy"—What is.]—Any contract of insurance comes within the word "policy," and there is no statutory or formal document necessary to make a contract of insurance. If a contract of insurance is created by any binding means, that is a "policy" to all intents and purposes. *Norwich Equitable Fire Assurance Society, In re*, 57 L. T. 541.

Slip of Policy, Effect of.]—The plaintiffs, a firm of merchants in New Zealand, in October, 1886, employed a firm of insurance brokers in London to effect for them insurances against fire upon goods in New Zealand. The brokers instructed B., an insurance broker at Lloyd's, to effect a portion of the insurances, and B. prepared a slip containing particulars of the risk, which was initialled by the defendant and other underwriters at Lloyd's. Owing to a misunderstanding between the insurance brokers no policy was put forward for signature by the defendant and the other underwriters, and in February, 1887, the goods in New Zealand were seriously damaged by fire. No premiums had then been paid, but two days after the fire the insurance premiums were paid by the plaintiffs to the insurance brokers. A policy was then tendered to the defendant for signature, but he refused to sign it or to pay the amount for which he had initialled the slip. In an action to recover the amount:—Held, that the slip formed a complete and binding contract of insurance, that it was not subject to an implied condition that a policy should be put forward for signature within a reasonable time, and that, in the absence of circumstances shewing an intention on the part of the plaintiffs to abandon the insurance, they were entitled to recover. *Thompson* v. *Adams*, 23 Q. B. D. 361.

Renewing Lapsed Policy.]—*See* infra, col. 98, II. PREMIUMS.

Untrue Statements—Partnership.]—The firm of D. & Co. made a proposal in writing for a policy of fire insurance, and to the question "Has the proponent ever been a claimant on a fire insurance company?" they answered "No":—Held, that claims made by a member of the firm before he became a partner in it were not covered by the question, and that the answer was not untrue. *Davies* v. *National Fire and Marine Insurance Co.*, 60 L. J., P. C. 73; [1891] A. C. 485; 65 L. T. 560—P. C.

Construction—Loss occasioned by "Incendiarism"—Fire spreading from adjoining Premises.]—Goods in a house were insured against fire by a policy containing a condition "that it did not cover any loss or damage occasioned by, or in consequence of, incendiarism." While the policy was subsisting, adjoining premises were set on fire by an incendiary, for whose act the policy-holder was admittedly not responsible; and the fire having spread to the house containing the insured goods, they were destroyed:—Held, that the word "incendiarism" in the policy included any act of incendiarism wherever committed which directly caused the loss; that in the absence of evidence pointing to any other cause, the act of the incendiary must be assumed to be the direct cause of the loss, and that therefore the insurance company was not liable. *Walker* v. *London and Provincial Insurance Co.*, 22 L. R., Ir. 572.

—— Option of Insurers to terminate Policy on Notice.]—A policy of insurance against fire was issued subject to the conditions, first, that it should not apply to any portion of the subject of insurance which should, by reason of some act done after its date without the consent of the insurers, be exposed to increased risk of fire, or removed to a building or place other than that described in the policy; second, that the insurers might terminate it by notice if "by reason of such change, or from any other cause whatever," they should desire to do so, refunding to the insured a ratable proportion of the premium for the unexpired time of the policy:—Held, that the insurers had, by force of this condition, the option of terminating the policy at will. *Sun Fire Office* v. *Hart*, 58 L. J., P. C. 69; 14 App. Cas. 98; 60 L. T. 337; 37 W. R. 561; 53 J. P. 548—P. C.

Policy Destroyed—Indemnity on Payment.]—The court will not direct an indemnity to be given on payment of a policy of insurance accidentally destroyed. *Crokatt* v. *Ford*, 25 L. J., Ch. 552; 2 Jur. (N.S.) 436; 4 W. R. 426.

II. PREMIUMS.

Loss before Payment of.]—In a policy against loss by fire, from half a year to half a year, the assured agreed to pay the premium half-yearly, "as long as the insurers should agree to accept the same," within fifteen days after the expiration of the former half-year; and it was also stipulated that no insurance should take place till the premium was actually paid; a loss happened within fifteen days after the end of one half-year, but before the premium for the next was paid:—Held, that the insurers were not liable, though the assured tendered the premium before the end of the fifteen days, but after the loss. *Tarleton* v. *Staniforth*, 1 Bos. & P. 471; 5 Term Rep. 695; 3 Anst. 707; 4 R. R. 845. And see *Roberts* v. *Security Co.*, post, col. 124.

—— **Refusal to Pay increased.**]—By a policy under seal, referring to certain printed proposals, a fire office insured premises from 11th November, 1802, to 25th December, 1803, for a certain premium which was to be paid yearly on each 25th December, and the insurance was to continue so long as the insured should pay the said premium at the said times, and the office should agree to accept it. And by the printed proposals it was stipulated, that the insured should make all future payments annually at the office, within fifteen days after the day limited by the policy, upon forfeiture of the benefit thereof, and that no insurance was to take place till the premium was paid. And by a subsequent advertisement (agreed to be taken as part of the policy), the office engaged that all persons insured there by policies for a year or more had been and should be considered as insured for fifteen days beyond the time of the expiration of their policies; yet held, notwithstanding this latter clause, the assured having, before the expiration of the year, had notice from the office to pay an increased premium for the year ensuing, otherwise they would not continue the insurance, which the assured refused, that the office was not liable for a loss which had happened within fifteen days from the expiration of the year for which the insurance was made, though the assured, after the loss and before the fifteen days expired, tendered the full premium which had been demanded. The effect of the whole contract taken together being only to give the assured an option to continue the insurance or not, during fifteen days after the expiration of the year, by paying the premium for the year ensuing, notwithstanding any intervening loss, provided the office had not, before the end of the year, determined the option by giving notice that they would not renew the contract. *Salvin* v. *James*, 6 East, 571; 2 Smith, 646; 8 R. R. 540. And see *Doe* d. *Pitt* v. *Shewin*, 3 Camp. 134.

Recovery from Tenant.]—Where a lessee of a factory, under a covenant with his lessor to keep the premises insured in the Alliance or such other office as the lessor should appoint, executed an underlease to the plaintiffs whereby they covenanted to pay any sum or sums of money expended in fire insurance, and in the erroneous belief that the premises (which were empty) were used for a hazardous trade, paid 26*l.* 5*s.* per cent. for insurance in another office, and sought to recover the amount at law against the underlessee, a court of equity restrained the action upon the plaintiffs undertaking to pay the amount of premium, which was found to be properly payable, and made the defendants pay the costs of the suit. *Leather Cloth Co.* v. *Bressey*, 3 Giff. 474; 8 Jur. (N.S.) 425; 6 L. T. 63; 10 W. R. 370.

—— **Agent to Receive.**]—A policy contained the following clause:—"It is part of this contract than any person other than the assured who may have procured this insurance to be taken by this company, shall be deemed to be the agent of the assured, and not of this company under any circumstances whatever, or in any transaction relating to this insurance." A broker who effected the insurance for the assured, and received the premium, had frequently effected other insurances with the company, deducting his commission from the premiums and handing over the balance:—Held, that he was the agent of the company to receive the premium. *Kelly* v. *London and Staffordshire Insurance Co.*, 1 Cab. & E. 47.

Specific Appropriation.]—Where the plaintiffs being agents for an insurance office remitted to it 100*l.* "for premiums," and it appeared that the 100*l.* was to the knowledge of the office in excess of what they owed as agents, and that the terms on which certain lapsed policies should be renewed by the office for their benefit had been ascertained by consent: — Held, that although there was not in the office any specific appropriation of any part of the 100*l.* to the payment of the premiums on the lapsed policies, yet that it must be taken to have been received on account thereof, and that from the date of receipt there was a good contract for the renewal of the old insurance. *Kirkpatrick* v. *South Australian Insurance Co.*, 11 App. Cas. 177—P. C.

Mortgagee—Right to Insure and Add Premiums to Debt.]—*See* MORTGAGE.

III. INTEREST.

Insolvent Debtor.]—A person, discharged by the Insolvent Debtors Court as an insolvent debtor, effected an insurance against fire on some property acquired by him before the insolvency. The property having been destroyed by fire, the order for his discharge was afterwards annulled on the ground of fraud, and the insolvent adjudged to undergo twelve months' imprisonment from the date of the vesting order. He then brought an action on the policy, to which the company pleaded that he had no insurable interest in the property:—Held, that the action lay. *Marks* v. *Hamilton*, 7 Ex. 323; 21 L. J., Ex. 109; 16 Jur. 152.

An insolvent retains an insurable interest in goods concealed from his creditors. *Goulstone* v. *Royal Insurance Co.*, 1 F. & F. 276.

Husband and Wife.]—A husband has an insurable interest in goods settled to his wife's separate use, they residing together, and sharing in the use of the property. *Ib.*

Wharfinger.]—A. effected with a company a policy against fire, in which he was described as a corn and flour factor; the policy was on goods in his warehouses, and on "goods in trust or on commission therein." The company contracted with him to make good any damage by fire to the property insured. A. was a wharfinger and warehouseman; he had in his warehouses goods

belonging to his customers, which were deposited with him in that capacity, and on which he had a lien for the charges for cartage and warehouse rent, but no further interest of his own. No charge was made to the customers for insurance, nor were they informed of the existence of the policy. His warehouse was consumed by fire, with all the goods in it. The company paid the value of his own goods, and the amount of his lien on his customers' goods, but refused to pay the value of the customers' interest in the value of the goods beyond the lien:—Held, that the goods of the customers were in trust, within the meaning of the policy, and that he was entitled to recover the entire value. *Waters* v. *Monarch Fire and Life Insurance Co.*, 5 El. & Bl. 870; 25 L. J., Q. B. 102; 2 Jur. (N.S.) 375; 4 W. R. 245.

Carriers.]—Carriers insured goods against fire, by a policy whereby "goods held in trust or on commission, were to be insured as such, otherwise the policy would not extend to cover such property." The sum of 15,000*l.* was declared to be insured "on goods, their own, and in trust as carriers" in a warehouse:—Held, that to the named amount, the whole value of goods in the warehouse, in their possession as carriers, was insured; and that they were entitled to recover the whole value of such goods destroyed by fire in the warehouse. *L. & N. W. Ry.* v. *Glyn*, 1 El. & El. 652; 28 L. J., Q. B. 188; 5 Jur. (N.S.) 1004; 7 W. R. 238.

Held, also, that the carriers would be trustees for the owners of the goods of the amount thus recovered, less their charges as carriers in respect of the goods. *Ib.*

Insurance on goods is sufficient to cover the interest of carriers in the property under their charge; for, in general, if the subject-matter of the insurance is rightly described, the particular interest in it need not be specified. *Crowley* v. *Cohen*, 3 B. & Ad. 478; 1 L. J., K. B. 158.

Millers.]—Millers received wheat from different farmers. The wheat, on receipt, was, with the consent of the farmers, mixed with other wheat, and became part of the millers' current stock. The millers could at any time grind or sell the wheat so received. The farmers could at any time claim the price of the wheat delivered by each, according to the market price for wheat of like quality, at the time of payment claimed. They had also the option of claiming an equal quantity of wheat of like quality, instead of the value in money. The millers often made advances to the farmers on the wheat received from them. The farmers, after a certain time, paid a storage charge to the millers. The millers insured the current stock of wheat in their mill. In the proposal for insurance they answered the question whether the insurance was "for self or in trust, and if in trust on account of whom?"—in these words—"for selves." A condition of the policy was that goods held in trust must be insured as such, otherwise the policy would not cover them. The mill and stock were destroyed by fire. To an action on the policy, the insurers pleaded that the statement in the proposal was a misrepresentation, the stock having been held by the millers, "in trust for other persons":—Held, that the description of the subject of insurance was correct, for that this was not a case of possession given subject to a trust, but of property transferred for value upon special terms of settlement. *South Australian Insurance Co.* v. *Randell*, 6 Moore, P. C. (N.S.) 341; L. R. 3 P. C. 101; 22 L. T. 843.

Tenant from Year to Year.]—A tenant from year to year insuring is not limited in his claim on the insurance company to the extent of his interest in the property insured. *Simpson* v. *Scottish Union Insurance Co.*, 1 H. & M. 618; 32 L. J., Ch. 329; 9 Jur. (N.S.) 711; 8 L. T. 112; 11 W. R. 459; 1 N. R. 537.

IV. CONDITIONS.

a. As to Other Policies.

Communication of—When Necessary.]—The plaintiffs effected a policy of insurance with the defendant, as chairman of a fire insurance company, for 3,000*l.*, "on wool in bales or fleeces greasy and washed, in all or any shed or store, on station or in transit to Sydney by land only, or in any shed or store, or any wharf in Sydney, until placed on ship." The policy contained a provision as follows:—"No claim shall be recoverable if the property insured be previously or subsequently insured elsewhere, unless the particulars of such insurance be notified to the company in writing." The plaintiffs subsequently effected an insurance with a marine insurance company to cover 16,500*l.* upon wool, the risk being described as "at and from the River Hunter to Sydney per ships and steamers, and thence per ship or ships to London, including the risk of craft from the time that the wools are first waterborne and of transhipment or landing and reshipment at Sydney." The frequent practice at the port of Sydney is that wool arriving there for shipment is not delivered direct to the ship for which it is intended, but is conveyed to the stores belonging to the persons who are acting as the stevedores of the ship, and is there pressed for the purpose of reducing its bulk. By the practice and course of business, the stevedores' receipt is regarded as between the ship and the shippers as equivalent to the mate's receipt, and bills of lading are given in exchange for it. Certain wool belonging to the plaintiffs was forwarded by several consignments by several steamers from the River Hunter to Sydney. The plaintiffs' agent at Sydney had the wool conveyed on its arrival to his own stores, for the purpose of being weighed, and entered into a contract for its conveyance to London on board a ship. The wool was then conveyed from his warehouses to the stores of the stevedores of the ship, who gave the usual receipts for the same. While in the stevedores' warehouses, a portion of the wool was destroyed or damaged by a fire, and the plaintiffs sought to recover such loss upon the policy effected with the defendant company. The company resisted the claim, upon the ground that the policy of marine insurance above mentioned came within the terms of the provision in the fire policy, and ought to have been communicated to them:—Held, that the marine policy did not cover the wool in the stevedores' warehouses, and was not such an insurance as the plaintiffs were bound under the provisions in the fire policy to notify to the defendant company, and that the plaintiffs were therefore entitled to recover. *Australian Agricultural Co.* v. *Saunders*, 44 L. J., C. P. 391; L. R. 10 C. P. 668; 33 L. T. 447—Ex. Ch. Cp. *Lishman* v. *Northern Maritime*

Insurance Co., 44 L. J., C. P. 185; L. R. 10 C. P. 179; 32 L. T. 170.

In a proposal for the re-insurance of a ship in a company, it was stated that she was "insured only for 4,000*l.*" This was the amount of the original insurance. The proposal also contained the amounts of insurances effected in other offices, but from this list, an insurance, effected without the assured's knowledge by a mortgagee, was omitted:—Held, that the words "insured only for 4,000*l.*" must be construed as stating the amount of the original insurance, and not as a representation of the sum total insured in all offices whatever; the occasion on which, and the purpose for which, the words were used suggesting some limitation on their generality. *Anderson* v. *Pacific Fire and Marine Insurance Co.*, 21 L. T. 408—P. C.

Lloyd's Policy — "Same Rate, Terms and Identical Interest" — Condition Precedent.]—The plaintiff effected with the defendant, a Lloyd's underwriter, a policy of fire insurance, containing the following clause:—"Warranted to be on same rate, terms and identical interest as the U. Assurance Co. 800*l.*, and the G. Assurance Co. 700*l.*, and to follow their settlements." The rate at which the plaintiff had insured with the U. Co. was not, in fact, the same as the rate specified in the Lloyd's policy:—Held, that the clause was one going to the root of the transaction, and therefore a condition precedent to any liability; and that as the condition had not been fulfilled the defendant was not liable. *Barnard* v. *Faber*, 62 L. J., Q. B. 159; [1893] 1 Q. B. 340; 4 R. 201; 68 L. T. 179; 41 W. R. 193—C. A.

Average Condition — Sub-tenant Insuring — Covenant to Repair — Laches.]—A. being owner of a house granted a lease to G., containing a covenant by the tenant to repair, but not a covenant to insure. A. insured the premises with the defendant company in the sum of 1,000*l.*, and G. also insured them with another company in the sum of 1,100*l.* A.'s policy was subject to the condition that if at the time of any loss or damage by fire happening, there should be any other subsisting insurance, whether effected by the insured or any other person "covering the same property," the defendants should not be liable to pay or contribute more than their ratable proportion of such loss or damage. The premises being destroyed by fire, G. was paid upon his policy 625*l.*, but did not apply the same in reinstating the premises, and subsequently became bankrupt. In an action by A. on the policy effected with the defendants, they relied in their defence (1) upon the condition as exempting them from liability save as to 62*l.*, which they admitted to be due as their apportionment of the loss; (2) on A.'s neglect and laches in not compelling G. to repair the premises, as disentitling A. to recover from the defendants more than the said sum of 62*l.*:—Held, that neither defence could be sustained; "property" in such a condition means the estate of the insurer in the premises, not the actual building. *Andrews* v. *Patriotic Assurance Co.*, 18 L. R. Ir. 355.

b. DESCRIPTION OF PROPERTY.

Goods.]—If a person, who is not a linen-draper, insures his "stock-in-trade, household furniture, linen, wearing apparel and plate," against fire, this will not protect linendrapery goods subsequently purchased on speculation; and the word "linen" in the policy must be confined to household linen by way of apparel. *Watchorn* v. *Langford*, 3 Camp. 422.

Profits.]—The profits of a business are insurable, but they must be insured quâ profits. *Sun Fire Office, In re*, 3 N. & M. 819. *S. C.*, nom. *Wright and Pole, In re*, 1 A. & E. 621.

Nature of Building.]—Goods insured, described in a policy to be in the dwelling-house of the insured, the insured having only one room, as a lodger, in which the goods were, are correctly described within the condition, that "the houses, buildings or other places, where goods are deposited and kept, shall be truly and accurately described"; such condition relating to the construction of the house, and not to the interest of the parties in it. *Friedlander* v. *London Assurance Co.*, 1 M. & Rob. 171.

An agricultural building, described in a policy as a barn, though not strictly so, is not such a misdescription as would vacate the policy, as the building, had it been more correctly described, would have paid the same rate of insurance. *Dobson* v. *Sotterby*, M. & M. 90; 31 R. R. 718.

It is a first principle of the law of insurance that, when a thing is warranted to be of a particular nature or description, it must be exactly such as it is represented to be, otherwise the policy is void; therefore, where a mill was insured as being of one class, and turned out to have been of another at the time it was insured:—Held, that an action on a policy against a loss by fire could not be sustained, as, whether the misrepresentation was in a material point or not, or whether the risk was equally great in the one class as in the other, was wholly immaterial, the only question being, whether the building was de facto that which was insured. *Newcastle Fire Insurance Co.* v. *Macmorran*, 3 Dow, 255. See *Hore* v. *Barstow*, ante, col. 90.

Condition of Premises.]—A., abroad, having two warehouses, wrote to this country to effect an insurance upon one of them only, without stating, as was the fact, that a house nearly adjoining it had been on fire on that evening, and that there was danger of the fire again breaking out; and sent his letter after the regular post time. The fire having broken out again on the next day but one following, and consumed A.'s warehouse:—Held, that this was a material concealment, although his letter was written without any fraudulent intention. *Bufe* v. *Turner*, 2 Marsh. 47; 6 Taunt. 338; 16 R. R. 626.

Alteration.]—A policy for one year upon a "brick building used as a dwelling-house and store (described in a paper attached to this policy)." The description annexed was that the house was composed of two storeys, of given height and materials, with a given roof, and means of obtaining water. During the year the house was altered by adding to it a storey, but so that the alteration did not increase the hazard or probability of fire, except so far, if at all, as the increase of the area of the building by a third storey may be considered to have necessarily increased such hazard or probability; and afterwards during the year the house was totally burnt:—Held, that the underwriter was not

liable; for the description was by reference incorporated into the policy, and the description amounted to a warranty, and not only to a warranty that the building was as described at the time the description was given and at the date of the policy, but that it would not be altered by the assured so as to increase the risk during the year, and that it had been so altered. *Sillem* v. *Thornton*, 3 El. & Bl. 868; 2 C. L. R. 1710; 23 L. J., Q. B. 362; 18 Jur. 748; 2 W. R. 524.

Value.]—A contract of fire insurance being a contract of indemnity, on which the assured is only entitled to recover the value of the property destroyed, wilful misrepresentations of the value of the property destroyed will, under the usual conditions against fraudulent claims, defeat and vitiate the whole claim. *Britton* v. *Royal Insurance Co.*, 4 F. & F. 905; 15 L. T. 872.

Immaterial Omission.]—In a policy against fire, one of the conditions was that "the nature and material structure of the building should be truly described," and another that it should be stated whether any hazardous business was carried on:—Held, that an omission to mention a steam-engine bonâ fide used in the building, but only to grind corn for the horses used on the premises, was not a want of proper description avoiding the policy. *Baxendale* v. *Harding*, 4 H. & N. 445; 28 L. J., Ex. 236; 7 W. R. 494.

A fire insurance was effected in respect of property through an agent named Donald, who inspected the premises. One condition of the policy was that any material misdescription of the property would render the policy void. The buildings were described as built of brick and slated, but it turned out that one of the buildings was not roofed with slate, but with tarred felt. The company alleged that Donald was not their agent; but the agent of the insured; and that the misdescription rendered the policy void:—Held, that the misdescription was immaterial, and not sufficient to vitiate the policy; but that, if material, it was made by Donald as the agent of the insurance company, and the insured were not responsible for it. *Universal Non-Tariff Fire Insurance Co., In re, Forbes' claim*, 44 L. J., Ch. 761; L. R. 19 Eq. 485; 23 W. R. 464.

Construction—Hay in Yard.]—A fire policy, according to its true construction, insured specifically the ricks of hay actually in the assured's hay-yard at the time of effecting the policy:—Held, in an action for loss of hay by fire, that he was not entitled to recover for the loss of any hay that did not answer the above description, i.e. which was not actually in the hay-yard at the time of effecting the policy. *Gorman* v. *Hand-in-Hand Insurance Co.*, Ir. R. 11 C. L. 224.

Agricultural Machines in certain Place.]—The policy, according to its true construction, insured certain "agricultural machines" then being in a specified place, and provided that, in case of their removal from that place without assent, the risk should cease. In an action on the policy for the loss by fire of the identical machines, it appeared that they were not, at the time of the fire, in the place specified:—Held, that the contract rendered the place material, and that the insurers were not liable for the loss. *Ib.*

In such cases, however, the policy must receive a reasonable construction; and the risk upon horses or agricultural implements—the contemplated use of which would necessarily render frequent removal from the specified place essential—does not absolutely cease upon such removal; but ceases pro tempore when they leave it, and re-attaches upon their return. *Ib.*

Steam-Engine.]—A policy on a mill, millwrights' work, standing and going gear, engine-house and steam-engine, recited "that the buildings were brick-built, warmed by steam, lighted by gas, and worked by the steam-engine above mentioned, in tenure of one firm,"—"standing apart from all other mills, and worked by day only":—Held, that the recital did not mean that the steam-engine was not worked by night. *Whitehead* v. *Price*, 2 C. M. & R. 447; 1 Gale, 151; 5 Tyr. 825.

In a fire policy upon cotton-mills it was warranted that the mills were brick-built, and stated that they were warmed and worked by steam, lighted by gas, worked by day only:—Held, that the stipulation that the mill should be worked by day only, meant that the usual cotton manufacture carried on by mills in the daytime should not be carried on at night, and that it was consequently no breach of this warranty, that on one occasion, in order to turn machinery in an adjacent building, the steam-engine (which was not in the mill, but in an adjoining building) and certain perpendicular and horizontal shafts in the mill, were at work. *Mayall* v. *Mitford*, 1 N. & P. 732; 6 A. & E. 670; W. W. & D. 310.

An insurance against fire was effected on certain premises, the policy containing the following conditions: 1. The persons making insurances to give an accurate description of the buildings, and if there should be used therein any steam-engine, stove, &c., or any description of fire-heat other than common fireplaces, or any process of fire-heat be carried on therein, the same to be noticed and allowed in the policy, otherwise the policy to be void. In case of any circumstance happening after an insurance, whereby the risk should be increased, the assured to give notice in writing to the insurers, and the same, previous to a loss, to be allowed by indorsement on the policy, otherwise the policy to be void. 2. In case of any alteration being made in a building insured, or of any steam-engine, stove, &c., or any other description of fire-heat being introduced, or of any trade, business, process or operation being carried on or goods deposited therein, not comprised in the original insurance, or allowed by indorsement thereon, notice thereof must be given; and every such alteration must be allowed by indorsement on the policy, and any further premium which the alteration may occasion must be paid; and unless such notice be duly given, such premium paid, and such indorsement made, no benefit will arise to the assured in case of loss. The assured, who was a cabinet maker, placed a small steam-engine on the premises, with a boiler attached, and used it in a heated state for the purpose of turning a lathe, not in the course of his business, but by way of experiment. After this engine had been on the premises for several days a fire happened:—Held, that the assured could not recover on the policy, since the terms of the conditions applied to the introduction of a steam-engine in a heated state at any time, without notice to the

company. *Glen* v. *Lewis*, 8 Ex. 607; 22 L. J., Ex. 228; 17 Jur. 842.

Deposit of Dangerous Goods.]—A policy was on premises "where no fire is kept, and where no hazardous goods are deposited." These words mean the habitual use of fire and deposit of hazardous goods; and, therefore, where a fire happened in consequence of making a fire, and bringing a tar-barrel on the premises to repair them:—Held, that the insured was entitled to recover. *Dobson* v. *Sotheby*, M. & M. 90; 31 R. R. 718.

A policy contained the usual conditions of avoidance in case of misrepresentation, or of any alteration in the buildings insured, or in the mode of using them, without notice to the office. A kiln used for drying corn, being part of the premises insured, was used upon one occasion for drying some bark, a more dangerous process, and the premises then took fire and were burned down:—Held, that the conditions had reference to some permanent alteration of the buildings, or of the mode of carrying on business, and not to a single instance. *Shaw* v. *Roberts*, 1 N. & P. 279; 6 A. & E. 75; W. W. & D. 94; 6 L. J., K. B. 106; 1 Jur. 6.

A policy against fire was subject to this condition: "In the insurance of goods, the building or place in which the same are deposited is to be described, the quantity and description of such goods, also whether any hazardous trade is carried on, or any hazardous articles deposited therein; and if any person shall insure his goods or buildings, and shall cause the same to be described otherwise than they really are, to the prejudice of the company, or shall misrepresent or omit to communicate any circumstance which is material to be made known to the company, in order to enable them to judge of the risk they have undertaken, or are required to undertake, such insurance shall be of no force":—Held, that this condition was to be referred to the time when the policy was effected, and that, in the absence of fraud, neither by the general law of insurance, nor by such condition, was the policy avoided by the circumstance, that subsequently to the effecting of the policy, a more hazardous trade had, without notice to the company, been carried on upon the premises. *Pim* v. *Reid*, 6 Man. & G. 1; 6 Scott (N.R.) 982; 12 L. J., C. P. 299.

—— **Reasonableness of Limitation.**]—Among the conditions contained in a fire policy, it was provided the policy was to be void if at any time there were more than 56 lbs. weight of gunpowder on the premises, unless specially provided for in the policy. The premises were used for general trade, and the assured sold gunpowder, but no special insurance was made for the assured having more than 56 lbs. weight of gunpowder on the premises:—Held, that the condition limiting the amount of gunpowder was not unreasonable, and was not discharged by the specification of stock-in-trade (including hazardous) in the policy. *M'Ewan* v. *Guthridge*, 13 Moore, P. C. 304; 8 W. R. 265.

A policy against fire was effected on a ship. The policy contained a proviso to the effect that the insurance thereby made should be subject to the several conditions thereon expressed, so far as the same were or should be applicable. One of these conditions (all of which were primarily intended to apply to the insurance of houses and buildings, and were in the form used for that purpose) provided, that if more than 20 lbs. weight of gunpowder should be "on the premises" at the time when any loss happened, such loss would not be made good:—Held, that the proviso was applicable to the ship insured. *Beacon Life and Fire Assurance Co.* v. *Gibb*, 1 Moore, P. C. (N.S.) 73; 1 N. R. 110; 9 Jur. (N.S.) 185; 7 L. T. 574; 11 W. R. 194.

Alteration—Question for Jury.]—Action on a policy effected by varnish makers with a fire insurance society. The declaration stated the insurance to be 100*l.* on the stock-in-trade in the oil store-room marked No. 7 (and which room was warranted as having no manufacturing process carried on therein), and 50*l.* on the stock-in-trade in the open part of the yard, subject to a condition, that if any alteration was made to any building insured, by which the risk of fire to the building, or any insured property, was increased, such alteration must be immediately notified to the society, in order to its being allowed by indorsement on the policy, otherwise the policy would be void. The declaration averred that certain stock-in-trade, in the open yard, was destroyed by fire, and that the society waived the warranty of the oil store-room, No. 7, having no manufacturing process carried on therein, and permitted the assured to carry on the manufacturing process of boiling varnish, and that after the waiver certain stock in the oil store-room was destroyed by fire. Pleas, that an alteration was made in the oil store-room, by which alteration the risk of fire to the room and stock-in-trade therein was increased, and that the alteration was not notified to the society. And that the assured carried on in the oil store-room, No. 7, the hazardous trade of a varnish maker, whereby the risk of fire to the room and stock-in-trade was increased, and that the increase of risk was not notified to the society. With respect to the first issue, the judge directed the jury to consider whether the alteration increased the risk of fire in the room No. 7:—Held, a misdirection, the question being, whether the use of the boilers, in the ordinary way as boilers, and not for boiling varnish, would have increased the risk. *Barrett* v. *Jermy*, 3 Ex. 535; 18 L. J., Ex. 215.

Increase of Risk.]—A party effected a policy in which the subject-matter was thus described: "on a range of buildings of three storey," curriers' shop, &c., "part of lower storey of the building being used as a stable, coach-house, and boiler-house; no steam-engine employed on the premises, the steam from the boiler being used for heating water and warming the shops. N.B., the process of melting tallow by steam in the boiler-house, and also the use of two pipe-stoves in the building are allowed; but it is warranted that no oil be boiled, nor any process of japanning leather, be carried on therein, nor in any building adjoining thereto." The description of insurance was four-fold—common, hazardous, doubly hazardous, and special risks; and the policy stated that, when special risks are proposed, the most particular specification of the property, and all circumstances attending the same, will be required, but all which special risks must be particularised in the policy, to render the same valid or in force. One of the conditions indorsed on the policy was, that "if after the assurance shall have been effected, the risk shall be increased by any alteration of

circumstances, and the particulars of the same shall not be indorsed on the policy, by the secretary or some other agent of the company, and a proportionate higher premium paid, if required, such insurance shall be of no force." The insurance in question was a special risk. After the policy was effected, the insured, without notice, erected in the stable the machinery of a steam-engine, which was supplied with steam by the boiler mentioned in the policy. By the terms of the policy, mills, and manufactories having mill, steam or engine work, were special risks. No notice of the erection or use of the steam-engine was given to the company. The premises were afterwards destroyed by accidental fire, not attributable to the erection or use of the steam-engine. At the trial, it was agreed that the jury should find, and the jury did find, that the risk of fire or damage thereby, was not increased by the erection or use of the steam-engine, nor by the alterations in the insured premises :—Held, that the policy was not avoided by the introduction of the steam-engine, and the use of the steam generated in the boiler to work it. *Stokes* v. *Cox*, 1 H. & N. 533 ; 26 L. J., Ex. 113 ; 3 Jur. (N.S.) 45 ; 5 W. R. 89—Ex. Ch.

Construction of Policy—"Stock-in-Trade."]—Under a policy on a corn-dealer and seedsman's "stock-in-trade, consisting of corn, seed, hay, straw, fixtures and utensils in business," the value of hops and malting cannot be recovered, although these articles form an ordinary part of the stock-in-trade of such a business. *Joel* v. *Harvey*, 5 W. R. 488.

V. EXTENT OF PROTECTION.

Burning by Mob.]—The burning of a house by a mob is not within a proviso of a policy which provides that the insurers shall not be liable in case the same be burnt by reason of any invasion, foreign enemies or any military or usurped power. *Drinkwater* v. *London Assurance Co.*, 2 Wils. 363.

What is Resulting Damage.]—A policy contained a recital, that it was agreed that plate-glass in which the insurer was interested should be insured "from loss or damage originating from any cause whatsoever, except fire, breakage during removal, alteration or repair of premises, . . . none of the glass being horizontally placed or movable," and then insured the owner from all damage or loss "from any cause whatever, except only as above specified, according to the exact tenor" of the printed conditions indorsed on the policy. A fire broke out on premises adjoining the shop of the insured, who thereupon opened the shop door, and admitted neighbours to save his property ; during the removal the mob, which had been attracted by the fire, broke down the shutters and destroyed the glass, for the purpose of plunder :—Held, that the damage to the glass did not originate from fire, or from breakage during removal, within the meaning of the exception in the policy. *Marsden* v. *City and County Insurance Co.*, 1 H. & R. 53 ; 35 L. J., C. P. 60 ; L. R. 1 C. P. 232 ; 12 Jur. (N.S.) 76 ; 13 L. T. 465 ; 14 W. R. 106.

Distant Explosion.]—By a policy premises were insured against loss or damage by fire. An explosion of gunpowder, at the distance of half a mile from the premises, caused them to be so shaken that the windows were broken and other damage was sustained :—Held, that the loss was not a damage by fire within the policy. *Everett* v. *London Assurance Co.*, 19 C. B. (N.S.) 126 ; 34 L. J., C. P. 299 ; 11 Jur. (N.S.) 546 ; 13 W. R. 862.

Explosion by Gas.]—A policy contained the following exception :—"Neither will the company be responsible for loss or damage by explosion, except for such loss or damage as shall arise from explosion by gas." In the premises of the assured, who carried on the business of extracting oil from shoddy, an inflammable and explosive vapour evolved in course of the process escaped and caught fire, setting fire to other things ; it afterwards exploded and caused a further fire, besides doing damage by the explosion :—Held, first, that the word "gas" in the policy meant ordinary illuminating coal. *Stanley* v. *Western Insurance Co.*, 37 L. J., Ex. 73 ; L. R. 3 Ex. 71 ; 17 L. T. 513 ; 16 W. R. 369.

Held, secondly, that the exemption of liability for loss by explosion was not limited to cases where the fire was originated by the explosion, but included cases where the explosion occurred in the course of a fire ; and that it exempted the company in respect both of the damage from the explosion itself and of the damage done by the further fire caused by the explosion. *Ib.*

Damage by Heat.]—A policy was effected against loss or damage by fire, on the stock of a sugar-house, the different storeys of which were heated by a chimney running up to the top. The insured negligently lighted the fire without opening the register at the top, by which means the heat was increased to such a degree as to spoil the sugar, but no ignition was produced :—Held, that this was not a loss within the policy. *Austin* v. *Drewe*, 2 Marsh. 130 ; 6 Taunt. 436 ; 4 Camp. 360 ; Holt, 126 ; 16 R. R. 647.

Steamer "Lying in Dock."]—See *Pearson* v. *Commercial Union Assurance Co.*, 45 L. J., P. C. 761 ; 1 App. Cas. 498 ; 35 L. T. 445 ; 24 W. R. 951 ; 3 Asp. M. C. 275. *Grant* v. *Ætna Insurance Co.*, 15 Moo. P. C. 516 ; 8 Jur. (N.S.) 705 ; 6 L. T. 735 ; 10 W. R. 772.

Payment of Premium—Risk when Commencing.]—In a policy of fire insurance, in the absence of a provision that the policy is not to attach until payment of the premium, such a provision will not be implied. *Kelly* v. *London and Staffordshire Fire Insurance Co.*, 1 Cab. & E. 47.

Duration.]—A policy, dated the 14th of February, 1868, and headed "six months ; premium to August 14th, 1868, 225 dollars," and reciting that the assured had paid 225 dollars and had agreed to pay the sum of 225 dollars during the continuance of the policy, was expressed to be in force "from the 14th of February till the 14th of August, and for so long after as the assured should pay the above premium at the time above mentioned" :—Held, that whether the 14th of February was covered or not, the whole of the 14th of August was covered by the policy ; and that the assured was entitled to recover in respect of damage done to the property insured by a fire which occurred at 11.30 p.m. on the 14th of August, although he had not paid premium on that day. *Isaacs* v. *Royal Insur-*

ance Co., 39 L. J., Ex. 189 ; L. R. 5 Ex. 296 ; 22 L. T. 681 ; 18 W. R. 982.

VI. ASSIGNMENT OF PROPERTY INSURED.

Right to Insurance Moneys.]—A purchaser of property insured against fire does not, by the mere fact of purchase, acquire a right to the insurance moneys. *Poole* v. *Adams*, 33 L. J., Ch. 639 ; 10 L. T. 287 ; 12 W. R. 683.

—— **Compulsory Purchase of Premises before Conveyance.**]—A party insured his premises in an office by a policy which provided that the capital should be liable to pay to the assured any loss or damage by fire to the buildings not exceeding 1,600*l*. The premises were afterwards required by the Metropolitan Board of Works under their compulsory powers, in order that they might be pulled down for the improvement of a street, and the amount of purchase-money payable to the assured was assessed by arbitration, according to the Lands Clauses Act. After the board had accepted the title of the assured, but before he had executed a conveyance, the premises were destroyed by fire :—Held, that the insurance office was liable to pay the assured 1,500*l*., the full value of the buildings at the time of the fire, and not merely the damage done to the buildings considered as old materials, for the dealings between the board and the assured did not affect the contract. *Collingridge* v. *Royal Exchange Assurance Corporation*, 47 L. J., Q. B. 32 ; 3 Q. B. D. 173 ; 37 L. T. 525 ; 26 W. R. 112.

—— **Insurance by Vendor—Fire after Contract but before Completion.**]—A house insured by the vendor was after the date of the contract for sale, but before completion, partly burnt down, and the vendor received the insurance moneys. There was no provision in the contract as to insurance : —Held, that the purchaser as against the vendor could not recover the insurance moneys either as an abatement of his purchase-money or for the reinstatement of the premises. *Rayner* v. *Preston*, 50 L. J., Ch. 472 ; 18 Ch. D. 1 ; 44 L. T. 787 ; 29 W. R. 546 ; 45 J. P. 829—C. A.

Semble, in such a case the insurance company can compel the vendor to refund the money they have paid if he receives the whole of his purchase-money on the ground that the contract of fire insurance is merely a contract of indemnity. *Ib.*

A vendor contracted with a purchaser for the sale of a house which had been insured by the vendor with the plaintiffs, an insurance company, against fire. The contract contained no reference to the insurance. After the date of the contract, but before the date fixed for completion, the house was damaged by fire, and the vendor received the insurance money from the plaintiffs :—Held, in an action by the plaintiffs against the vendor, that they were entitled to recover back the insurance money from the vendor, either for their own benefit or as trustees for the purchaser. *Castellain* v. *Preston*, 52 L. J., Q. B. 366 ; 11 Q. B. D. 380 ; 49 L. T. 29 ; 31 W. R. 559—C. A.

On payment of the moneys secured by a policy of fire insurance, the insurers are entitled to enforce all the remedies, whether in contract or in tort, which the insured has against third parties, whereby the insured can compel such third parties to make good the loss insured against. *Ib.*

Passing of Property.]—A policy expressed the insurance to be on "merchandise the assured's own, in trust, or on commission for which they are responsible" in or on certain specified warehouses, vaults, cellars, wharves, yards or quays. Whilst the policy was in force certain chests of tea, on a wharf included in the policy, were destroyed by fire. These teas had been deposited in bond by the importer with the wharfinger ; the assured had purchased them from the importer, and the warrants had been indorsed in blank by him to the assured. Before the fire occurred the assured had resold the teas in specified chests to customers, and had been paid for them ; they held, however, the warrants on behalf of the customers, but merely for the convenience of paying, if required, the charges necessary for clearing the teas payable by such customers :—Held, that the policy applied only to goods belonging to the assured, or for which they were responsible, and the property in the teas having, at the time of the fire, passed to the purchasers, they were then at the purchasers' risk, and were consequently not covered by the policy. *North British and Mercantile Insurance Co.* v. *Moffatt*, 41 L. J., C. P. 1 ; L. R. 7 C. P. 25 ; 25 L. T. 662 ; 20 W. R. 114.

—— **Risk of Purchaser.**]—Sugar refiners in the city of London were in the habit of making sales by sample, each sale consisting of one or more fillings or batches of boiled sugar. Upon a sale being effected, a sale-note was delivered to the purchaser which contained the price of the fillings per cwt., and the following words : "Prompt one month. Stored goods at sellers' risk for two months." Each filling comprised a number of specified titlers, or loaves of sugar of a varying weight, and it was the custom to pay for the sugar on the Saturday (called "the prompt") after the expiration of one calendar month from the day of sale, but the whole or portion of the sugar often remained in the warehouse of the refiners after the time for payment when it suited the convenience of the customer to delay the delivery, the customer paying on the prompt an approximate sum to the price, which was only finally ascertained and settled when the sugar was weighed on delivery. A sugar broker purchased four fillings or batches of sugar from the sugar refiners in the manner above stated, and paid an approximate sum to the value. Part of the sugar was removed by the broker ; but after the expiration of two months from the sale a fire occurred on the premises of the sellers, destroying the remainder which had never been weighed. They, without any agreement with the buyers, had effected floating policies upon all stock in their warehouse, making no distinction between goods sold and goods unsold ; but the amount which they received from the insurance office was not sufficient to cover the loss which they actually sustained, exclusive of the purchaser's goods :—Held, first, that the loss by the destruction of the undelivered sugar must fall on the purchaser—by Cockburn, C.J., on the ground that the property had passed to him ; by Blackburn, J., Lush, J., and Quain, J., on the ground that whether this was the case or not, the sugar, after the lapse of two months, was, by the terms of the contract of sale, at the risk of the purchaser. *Martineau* v. *Kitching*, 41 L. J., Q. B. 227 ; L. R. 7 Q. B. 436 ; 26 L. T. 836 ; 20 W. R. 769.

Held, secondly, that the purchaser was not

entitled to the benefit (by way of set-off or otherwise) of any part of the insurance money received by the sellers. *Ib.*

Settled Estate—Payment of Premiums out of Rents.]—During the infancy of a tenant in tail of freehold estates devised in strict settlement, part of which consisted of a corn-mill let on lease, the rents were received by his mother on his behalf, and she thereout paid the premiums necessary for keeping up a policy which had been effected in her name for insuring the mill against fire. The will contained no provision for fire insurance. The mill having been burnt down, and it not being considered for the benefit of any person interested in the settled estates that it should be rebuilt :—Held, that the insurance moneys belonged to the infant tenant in tail as his personal estate, and were not to be treated as real estate for the benefit of all persons interested in the settled estates. *Warwicker* v. *Bretnall*, 23 Ch. D. 188 ; 31 W. R. 520.

By an order of the Court of Chancery the receiver of real estates was directed to pay fire insurances on them. By a subsequent decree it was declared that H. was tenant in tail in possession of the real estates, and the receiver was directed to pay the balance to the account of H. A fire having taken place :—Held, that H. was entitled to the insurance money. *Seymour* v. *Vernon*, 21 L. J., Ch. 433 ; 16 Jur. 189.

On Bankruptcy.]—Covenant in a lease to insure in the name of the lessor, all the premises and all buildings which, during the term, might be erected thereon. The lessee mortgaged the premises for 500*l.*, and in the deed was contained a power for the mortgagees to insure in a sum not exceeding 500*l.*, and out of any moneys to be received by virtue of such insurance, or from the sale of the premises under their power of sale, to recoup themselves principal, interest and costs, and pay the surplus over to the lessee. The lessee insured the premises under the covenant in the lease for 1,000*l.*, and the mortgagees insured for 500*l.* in different offices. The lessee further insured in his own name in the Phœnix for 950*l.*, apportioning the amount in different sums amongst the stock, utensils, trade fixtures, fittings, household goods, furniture, musical instruments, &c., upon the premises, and a club or concert room erected thereon by the lessee. A fire occurred, whereby the whole of the premises was burned down, and all the property therein lost. The company having paid 350*l.* in respect of the insurances upon the stock, furniture, effects, &c., upon the premises at the time of the fire :—Held, that upon the subsequent bankruptcy of the lessee, the remainder of the moneys payable by the Phœnix passed to the assignees. *Leney, Ex parte, Barker, In re*, 10 L. T. 697.

Insurance by both Landlord and Tenant—Option of Purchase.]—Under the terms of a lease the tenant was bound to insure against fire, and had an option of purchasing the property. He insured in a sufficient sum. The premises were damaged by fire, and it then appeared that the landlord had a policy on the premises in another office, of which the tenant had no notice. The two offices apportioned the amount of loss between the two policies, and the landlord received what was thus payable under the policy effected by him. The tenant shortly after the fire gave notice to exercise his option of purchase, and proposed that the insurance moneys under both policies should go in part payment of the purchase-money. The landlord claimed to retain for his own benefit the money received under the policy effected by him, and insisted on the money under the other policy being applied in reinstating the premises, and on the tenant declining to do this brought ejectment against him :—Held, that the landlord was not entitled to retain for his own benefit the moneys received under the policy effected by him, nor to insist on the moneys being applied in reinstating the property after the tenant had exercised his option of purchase. *Reynard* v. *Arnold*, L. R. 10 Ch. 386 ; 23 W. R. 804.

Under the terms of a lease the landlord covenanted to insure, and the tenant had the option to purchase for a fixed sum. Before the time for exercising the option, the buildings demised were burnt, and the landlord received the insurance money. The tenant then exercised his option to purchase, and claimed the insurance money as part of his purchase :—Held, that, under the circumstances, the tenant had no claim to the insurance money. *Edwards* v. *West*, 47 L. J., Ch. 463 ; 7 Ch. D. 858 ; 38 L. T. 481 ; 26 W. R. 507.

Annuitant—Devisee subject to Annuity—Insurance by Devisee.]—A testator charged his real estate with an annuity to his widow, and, subject thereto, devised it to S. A., in fee, and appointed her his executrix. The testator had insured a house. Policy had expired a few months after his death, and was then renewed by S. A. Soon afterwards the house, which was the whole of his real estate, was burnt down. The insurance money was ordered to be paid into court, on a motion by the widow, in a suit instituted by her against S. A. for the administration of the testator's estate. *Parry* v. *Ashley*, 3 Sim. 97.

Devisee—Right to Policy-moneys.]—J., tenant for life, remainder to W. for life, remainder to J. in fee. During life of J., houses on estate were burnt down, and insurance money paid to J., the insurer, and placed in the Funds in his name. J., by will, devised estate to R. in fee, and his personal estate to W. W. applied part of insurance money in repairing house on estate. Insurance money unapplied remained in J.'s name. W., by will, stated the circumstances as to fund so standing in his brother's name, and bequeathed residue of his personal property :—Held, insurance money passed to R., as devisee of J. *Norris* v. *Harrison*, 2 Madd. 268.

Trade Utensils—Bankruptcy—Partnership—Order and Disposition.]—Where trade utensils, the property of one partner, and insured in his name, were left in the order and disposition of the partnership, and a fire happened which consumed them, and afterwards a joint commission issued against the partnership, the insurance money was held not to pass by assignment under joint commission. *Smith, Ex parte*, 3 Madd. 63 ; Buck. 149.

VII. ASSIGNMENT OF POLICY.

Right of Assignees.]—Where a fire policy has been assigned, the insurers, in the absence of an express contract to do so, are not bound, upon the application of the assignee, to pay him upon

the policy. *London Investment Co.* v. *Montefiore*, 9 L. T. 688.

In Case of Bankruptcy.]—The defendants assigned machinery by a bill of sale to secure a sum of money advanced by the plaintiff. The deed contained a covenant to insure, but no provision for the application of the policy-moneys in case of fire, in liquidation of the mortgage debt. The machinery was burnt, and the defendants became bankrupts:—Held, that the plaintiff had no claim to the benefit of the policy as against them. *Lees* v. *Whiteley*, 35 L. J., Ch. 412; L. R. 2 Eq. 143; 14 L. T. 472; 14 W. R. 534.

After the fire the defendants executed an assignment of their property to their creditors, but the deed was destroyed before any of the creditors signed it. The plaintiff, with the knowledge of the deed, gave the insurance office notice of his claim to the policy:—Held, that the deed of assignment was an act of bankruptcy, and that the policy being in the order and disposition of the bankrupts at the time of the notice to the insurance office, the plaintiff, on this ground also, had no claim to the proceeds of the policy as against the assignees. *Ib.*

A letter was written by a trader, before his bankruptcy, to the agent of an insurance company, authorising him to retain out of the proceeds of a fire policy the amount of the account due by the trader to a particular creditor; the letter was not acted upon, and the policy remained in possession of the trader up to the time of his bankruptcy, when the policy came to the hands of the assignees, to whom the company paid the full amount:—Held, that the letter did not operate as an assignment pro tanto of the policy, nor create, in favour of the particular creditor, any charge or lien upon the proceeds; although the company had notice of the letter before they paid the money to the assignees. *Foster's Policy, In re*, Ir. R. 7 Eq. 294.

Hand-in-Hand Office—Heir—Assignment Necessary.]—Under the constitution of the Hand-in-Hand fire office, the heir, to whom upon the death of the insured the property being freehold descended, cannot have the benefit of the policy without assignment. *Mildmay* v. *Folgham*, 3 Ves. 471.

Not Assignable without Notice to Office.]—Policies of insurance against loss or damage by fire are not in their nature assignable; nor can the interest in them be transferred from one person to another without the express consent of the office. *Lynch* v. *Dalzell*, 4 Bro. P. C. 431.

Policies of assurance not assignable in their nature, nor intended to be assigned from one to another person without the consent of the office. *Sadlers' Co.* v. *Badcock*, 2 Atk. 557.

It is necessary the party injured should have an interest or property in the house insured at the time the policy is made out, and at the time the fire happens, and therefore, after the lease of a house expired, the insured's assigning the policy does not oblige the insurers to make good the loss to the assignee. *Ib.*

Assignment of Policy—Validity.]—A trader insured his stock in trade and other effects. These were destroyed by fire. He assigned the policies to trustees on trust to pay and divide the moneys received thereunder among all his creditors ratably, and to pay the balance, if any, to himself:—Held, that the assignment was not void under 13 Eliz. c. 5, at the suit of a creditor whose debt was under 50*l.* *Green* v. *Brand*, 1 Cab. & E. 410.

VIII. REBUILDING PREMISES.

Effect of Statute.]—The 14 Geo. 3, c. 78, s. 83, is of universal and not of locally-circumscribed application, but only applies to insurance moneys upon houses and buildings. *Gorley, Ex parte, Barker, In re*, 4 De G. J. & S. 477; 34 L. J., Bk. 1; 10 Jur. (N.S.) 1085; 11 L. T. 319; 13 W. R. 60.

Moneys paid in respect of insurance of trade fixtures are not within its application. *Ib.*

Option to Reinstate.]—An insurance company, by the terms of its policies, had the option, in case of fire, of reinstating or paying the money to the assured. A fire having occurred and a claim having been made, the company exercised its option and paid the money. Although there would be no implied promise on the part of the assured to lay out the money in reinstating, as being without consideration, and, therefore, a mere nudum pactum; secus, where he has made an express promise, although only by parol. *Queen Insurance Co.* v. *Vey*, 16 L. T. 239.

Application for.]—In order to entitle an owner to the benefit of 14 Geo. 3, c. 78, s. 83, he must make a distinct request to the insurance office to apply the policy-money in rebuilding before they have settled with the tenant insuring; and in no case is the owner entitled to rebuild himself and claim the policy-money. *Simpson* v. *Scottish Union Insurance Co.*, 1 H. & M. 618; 32 L. J., Ch. 329; 9 Jur. (N.S.) 711; 8 L. T. 112; 11 W. R. 459; 1 N. R. 537.

Where a policy makes the assets of a company liable, excluding personal liability. Semble, that this does not give jurisdiction to a court of equity to interfere in the first instance to enforce the above provision, and that the proper course is first to apply for a mandamus. *Ib.*

Payment of Rent pending.]—A tenant has no equity to compel his landlord to expend money received from an insurance office, on the demised premises being burnt down, in rebuilding the premises or to restrain the landlord from suing for the rent until the premises are rebuilt. *Leeds* v. *Cheetham*, 1 Sim. 146; 5 L. J. (O.S.) Ch. 105; 27 R. R. 181.

Use and Occupation—Tenancy—Failure of Plaintiff to Reinstate.]—It is no defence to an action for use and occupation that the defendant was tenant of the premises, and that the premises were not reinstated after destruction by fire, although insured by the plaintiffs by a policy providing for payment or reinstatement in the usual way, and that relying upon such insurance the defendants had been induced not to insure themselves. *Lofft* v. *Dennis*, 1 El. & El. 474; 28 L. J., Q. B. 168; 5 Jur. (N.S.) 727; 7 W. R. 199.

Sufficiency of Rebuilding.]—A company, who insured a house from fire with an option to reinstate it in the event of a fire, having elected to reinstate it, employed a builder to reinstate it, who used the old walls so far as they remained;

and when he had finished all but a little of the painting, gave one of the insured a small sum of money to complete it and got him to sign a certificate that the work was complete, and received payment from the company. The old walls not bearing the weight of the new work, bulged. The assured sued the company for not duly reinstating the house, and the company defended the action without the defendant's authority, and the assured recovered damages. The company then sued the builder on his contract (the breach being an insufficient and imperfect reinstating), and also for fraudulent representation, and for the costs. The judge told the jury that the defendant was only bound to put the building as nearly as possible in the same state as before the fire; and they found that he had done so, and that the building was not less secure than before. At the close of the case the company relied on the omission of the painting, but the jury found that the value was nominal, and that in getting the certificate there was no fraud. The verdict was entered for the defendant, the judge telling the jury that in the absence of any express authority to defend the former action, the company could not recover costs:—Held, that the direction was right, and that the company was not entitled to a verdict, even for nominal damages. *Times Fire Assurance Co.* v. *Hawke*, 28 L. J., Ex. 317; at Nisi Prius, 1 F. & F. 406.

Impossibility of.]—A company executed a policy insuring premises against fire, reserving to themselves the right of reinstatement in preference to the payment of claims. The premises were damaged by fire, and the company elected to reinstate them, but did not do so. To an action for not paying, compensating or reinstating, the company pleaded that they elected to reinstate, and were proceeding to do so, when the commissioners of sewers caused the premises to be taken down as being a structure in a dangerous condition, and that such dangerous condition was not caused by the damage from the fire:—Held, that the plea was bad, inasmuch as the contract to reinstate (which became the one contract under the policy, after election made) being lawful at and ever since the time of contracting, the impossibility of its performance was no defence, and the company was bound, if they could not perform it, to pay damages for not doing so. *Brown* v. *Royal Insurance Co.*, 1 El. & El. 853; 28 L. J., Q. B. 275; 5 Jur. (N.S.) 1255; 7 W. R. 479.

Damages for Erecting on different Site—Building Acts.]—A house which had been erected before the Building Act, being consumed by fire, the officers of the company with whom it was insured, instead of paying the sum at which it was insured, elected to rebuild the premises; the Building Act, however, prevented them from re-erecting the house in exactly the same manner in which it was before the fire, and particularly from making the site and the building project into the street beyond the line of the adjacent houses:—Held, that the insured were entitled to maintain a bill in equity against the directors for the time being of the insurance company, for a compensation for the injury which they had sustained by reason of the inferior value of the premises erected by the insurance office, instead of the old premises. The amount of the damage, in respect of which compensation is due, will be ascertained by means of an issue. *Alchorne* v. *Savill*, 4 L. J. (o.s.) Ch. 47.

Rebuilding on Larger Site — Mortgage of Original Site—Right of Mortgagee.]—In 1841 A. mortgaged a wharf to B., and covenanted to lay out the insurance money in rebuilding the premises. A fire occurred in 1844, and A. having in 1845 purchased an adjoining slip of land, laid out the money in building, partly on both parcels. In 1846 A. mortgaged the slip to C., who had notice of the first mortgage. The claim of B. to have the benefit of the expenditure of the insurance money on the slip was rejected by the court. *Harryman* v. *Collins*, 18 Beav. 11; 18 Jur. 501.

Mortgagee Rebuilding — Right to Policy-moneys.]—A lessee who had covenanted to insure against fire in the joint names of himself and his lessor, with a proviso that the policy-moneys should be expended in reinstating the premises, assigned them by way of mortgage, with a power of sale, under which the mortgagee sold. The mortgage deed did not notice the policy. The premises were subsequently damaged by fire, and were reinstated by the mortgagee. On a claim filed by the mortgagee and his vendee, the mortgagor was decreed to deliver up the policy, and join with the lessor in signing the receipt to the insurance office, to enable the mortgagee to receive the money payable under the policy. A lessee in possession is not entitled as against his mortgagee to a lien on the policy-moneys for repairs done by him after a fire. *Garden* v. *Ingram*, 23 L. J., Ch. 478.

Statute as to — General Enactment — Trade Fixtures.]—The 14 Geo. 3, c. 78, s. 83, by which the governors and directors of insurance offices are authorised, upon the request of any persons entitled to any house or other buildings which may be burnt down or damaged by fire, or upon any grounds of suspicion that the owners or occupiers or other parties effecting the insurance have been guilty of fraud or incendiarism to cause the insurance money to be laid out in rebuilding, is a general enactment, and is not limited in its operation to the metropolitan district. *Gorely, Ex parte, Barker, In re*, 4 De G. J. & S. 477; 34 L. J., Bk. 1; 10 Jur. (N.S.) 1085; 11 L. T. 319; 13 W. R. 60.

Trade fixtures put up by a tenant, being removable by him, are not comprised in the expression "house or other buildings" in the statute. *Ib.*

Therefore, where such fixtures are separately insured and destroyed by fire during the tenancy, the landlord is not entitled to have the insurance money laid out under the act; and a covenant by the tenant to deliver up the fixtures at the determination of the tenancy, as conferring a mere personal right resting in contract, makes no difference in this respect. *Ib.*

Interpleader—Lessor of Property and Insuring Company.]—Interpleader may be in favour of an insurance company against the landlord of premises which have been burnt down, but insured by him and the tenant of the premises, under an agreement for a lease, and claiming therefore a right to have the money laid out in rebuilding the premises. *Paris* v. *Gilham*, G. Coop. 56.

Option to reinstate or replace Property Damaged or Destroyed.]—A condition in a policy of insurance against fire that, "the company may, if it think fit, reinstate or replace property damaged or destroyed instead of paying the amount of the loss or damage," entitles the company to exercise an option, and in the event of the property insured being wholly destroyed, to reinstate it by other property which is equivalent to that which has been destroyed; or in the event of the property insured being damaged but not destroyed, to reinstate it—that is, to repair and put it, not in the exact place, but in the same state in which it was before the fire occurred, instead of paying the amount of the loss or damage. *Anderson* v. *Commercial Union Assurance Co.*, 55 L. J., Q. B. 146; 34 W. R. 189—C. A.

Mortgagee—Claim by puisne Bondholder—Payment to prior Bondholders by other Insurers of sufficient Sum to reinstate—Rent of Mortgaged Premises.]—The pursuers having a heritable security by bond on certain premises insured them against fire in the defender's office for 900*l*. Prior securities had been given by the owner upon the same premises to other creditors, and those creditors had insured in other offices. The premises having been in part destroyed by fire, the prior incumbrancers recovered from and were paid by the offices in which they were insured an amount sufficient for the reinstatement of the premises, and for the payment of the rent during the period of reinstatement, but the premises were not in fact reinstated. It appeared that immediately before the date of the fire the value of the premises was sufficient to cover the prior bonds and that of the pursuers, but in consequence of the fire the value of the premises was so reduced that they were not sufficient to meet the balance remaining due to the prior creditors, and the pursuers' bond was left entirely uncovered:—Held, that the pursuers were entitled, notwithstanding the amount paid to the other creditors, to recover to the full extent of their loss, but that the pursuers were not entitled to recover anything in respect of the loss of rent of the premises after they had been damaged by fire. *Westminster Fire Office* v. *Glasgow Provident Investment Society*, 13 App. Cas. 699; 59 L. T. 641—H. L. (Sc.)

Semble, that 14 Geo. 3, c. 78, s. 83, relating to the application of insurance money on houses destroyed by fire, does not extend to Scotland—Per the Earl of Selborne and Lord Watson. *Ib.*

Landlord and Tenant—Liability for Rent and for Reinstatement of Premises.]—See *Leeds* v. *Cheetham*, *Brown* v. *Quilter*, and cases sub tit. LANDLORD AND TENANT (COVENANTS).

Right of Insurers to sue Hundred.]—As to the right of insurers who have paid for a loss caused by rioters to sue the hundred. See *Mason* v. *Sainsbury*, 3 Dougl. 61; *London Assurance Co.* v. *Sainsbury*, 3 Dougl. 345, ante, tit. HUNDRED.

IX. RIGHTS OF INSURERS.

To Benefit of Contract entered into by Assured—Landlord and Tenant.] — A policy of fire insurance is a contract of indemnity, and upon payment of the amount of loss the insurer is entitled to be put into the place of the assured; and if at a subsequent time the assured receives compensation from other sources for the loss sustained by him, the insurer is entitled to recover from the assured any sum which he may have received in excess of the loss actually sustained by him. *North British and Mercantile Insurance Co.* v. *London, Liverpool and Globe Insurance Co.* (5 Ch. D. 569) commented upon and followed. *Darrell* v. *Tibbits*, 50 L. J., Q. B. 33; 5 Q. B. D. 560; 42 L. T. 797; 29 W. R. 66; 44 J. P. 695—C. A.

According to the doctrine of subrogation, as between the insurer and the assured, the insurer is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised, or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be or has been diminished. A vendor contracted with a purchaser for the sale, at a specified sum, of a house which had been insured by the vendor with an insurance company against fire. The contract contained no reference to the insurance. After the date of the contract, but before the date fixed for completion, the house was damaged by fire, and the vendor received the insurance money from the company. The purchase was afterwards completed, and the purchase-money agreed upon, without any abatement on account of the damage by fire, was paid to the vendor:—Held, in an action by the company against the vendor, that the company were entitled to recover a sum equal to the insurance money from the vendor for their own benefit. *Castellain* v. *Preston*, 52 L. J., Q. B. 366; 11 Q. B. D. 380; 49 L. T. 29; 31 W. R. 557—C. A.

Contribution on Loss.]—By floating policies of insurance effected by B. & Co., wharfingers, they insured against loss or damage by fire, in the sums named, grain and seed, the assured's own or on commission, for which they were responsible, subject to conditions of average, and to this condition, that "if at the time of any loss or damage by fire happening to any property hereby insured, there be any other subsisting insurance or insurances, whether effected by the insured or by any other person, covering the same property, the company shall not be liable to pay or contribute more than its ratable proportion of such loss or damage." While these policies were subsisting a fire destroyed a quantity of grain stored with B. & Co., part of which belonged to R. & Co., who had also effected policies, called merchants' policies, on the grain thus destroyed, including also grain stored elsewhere, which policies contained the like conditions as the wharfingers' policies. B. & Co. were paid in full by the several insurance companies. In a suit to determine the liability of the companies inter se:—Held that the grantors of the merchants' policies were not liable to contribute to the loss; that B. & Co. were primarily liable, but being indemnified by the grantors of the wharfingers' policies, the latter were ultimately liable. *North British and Mercantile Insurance Co.* v. *London, Liverpool and Globe*

Insurance Co., 46 L. J., Ch. 537 ; 5 Ch. D. 569 ; 36 L. T. 629—C. A.

Held, also, that the condition as to double insurance only applied to cases where the same property was the subject-matter of insurance, and where the interests were the same. *Ib.*

Action by Owner for Negligence against Third Party.]—The owner of a building insured it against fire, but not to the full value. The building was burnt by what was alleged to be the negligence of the servants of a corporation ; and the owner brought an action for damages against the corporation :—Held, that the owner undertaking to sue for the whole amount of damage, would be allowed to conduct the action without the interference of the insurers, but would be subject to liability for anything done by him in violation of any equitable duty towards the insurers. *Commercial Union Assurance Co.* v. *Lister*, 43 L. J., Ch. 601 ; L. R. 9 Ch. 483.

Puisne Mortgagee—Reinstatement of Buildings.]—See *Westminster Fire Office* v. *Glasgow Provident Investment Society*, VIII. REBUILDING PREMISES, supra, col. 113.

Payment by Insurer — Right of Insurer to Benefit Assured might have Recovered.]—A policy of fire insurance being a contract of indemnity merely, the insurer on making good the loss insured against is entitled, even though payment be made with knowledge of a then subsisting contract relating to the subject-matter between the assured and third parties, to stand in the place of the assured, and to recover from him the full value of any rights or remedies which he had renounced, and to which, but for renunciation, the insurer would have a right to be subrogated. *West of England Fire Insurance Co.* v. *Isaacs*, 66 L. J., Q. B. 36 ; [1897] 1 Q. B. 226 ; 75 L. T. 564—C. A.

X. AMOUNT AND PROOF OF CLAIM.

Excessive Claim.]—An honest claim is not, under the condition against fraud, invalidated on account of error, or even some degree of exaggeration or over estimate ; and in such a case the insured will be entitled to recover according to the real value and the amount of actual loss sustained. But if the claim is wilfully and intentionally excessive, that will amount to such fraud as will, under the ordinary condition against fraudulent claims, invalidate the claim altogether, and disentitle him to recover at all. *Chapman* v. *Pole*, 22 L. T. 306.

Hiring other Premises.]—An innkeeper having insured against fire his interest "in the inn and offices" cannot, upon such inn and offices being partly burnt, recover against the insurers the loss sustained by his hiring other premises while his own were being repaired, and by the refusal of persons to go to the inn while under repair, the insurers having reinstated the premises in proper time. *Wright and Pole, In re*, 1 A. & E. 621 ; 3 N. & M. 819, sub nom. *Sun Fire Office, In re.*

Insufficient Salvage—Arbitration.]—A person effected three policies on goods ; one for 6,000*l.* with the A. company, another for 2,500*l.* with the B. company, and a third for 2,500*l.* with the C. company. A fire having happened, his claims against the companies were referred to arbitration. The agreement of reference recited that the value of a specified part of the goods was agreed at a sum named. The arbitrators found that the loss or damage sustained on the whole of the goods exceeded the sums insured, and that the whole salvage and proceeds of the salvage of and from the fire belonged absolutely to the assured :—Held, that in awarding that the assured was entitled to the salvage, which it appeared arose solely from the specified goods, the arbitrators had exceeded their jurisdiction. *Skipper* v. *Grant*, 10 C. B. (N.S.) 237.

—— **New Trial.**]—A plaintiff effected a policy against fire, with a condition that he should forfeit all benefit under the policy if there was any fraud or false swearing in the claim he made ; a fire ensued, and the plaintiff made affidavit of the damage to the extent of 1,085*l.* ; having sued for the amount, and a jury having found a verdict for him with only 500*l.* damages, the court granted a new trial. *Levy* v. *Baillie*, 7 Bing. 349 ; 5 M. & P. 208 ; 9 L. J. (O.S.) C. P. 108.

Proof in Bankruptcy.]—A., an owner of a saw-mill, received from B. timber to be sawn, and entered into a verbal agreement with him as to insuring it, which the court considered to amount to an agreement by A. to pay to B. the value of the timber if destroyed by fire while on A.'s premises. A fire broke out, by which all B.'s timber on the premises was destroyed. An account of the timber burnt was agreed to between B. and A., but no agreement as to the value was come to. B. commenced an action against A., the declaration containing two counts : the first for breach of an agreement to insure the timber ; and the second for negligence in not taking proper care of it. A. then became bankrupt. B. continued the action against the bankrupt, and obtained judgment, but did not sue out execution. He then applied to prove under the bankruptcy :—Held, that as, upon the happening of the fire, A. became answerable to B. for the value of the timber, and as it appeared that timber had a market price, so that its value could be fixed with certainty, B. was entitled to prove against the estate of A. for the value, there being no such uncertainty about the value as to make the case one of a claim for unliquidated damages. *Bateman, Ex parte*, 8 De G. M. & G. 263 ; 25 L. J., Bk. 19 ; 2 Jur. (N.S.) 265 ; 4 W. R. 329.

Evidence of Loss.]—To prove the value of furniture in the possession of the insured at the time of the loss, a former insurance of his furniture, renewed and kept up by him, was received. *Goulstone* v. *Royal Insurance Co.*, 1 F. & F. 276.

Insurers keeping Possession.]—Semble, that an action may be maintained by a person insured against the insurer for taking and keeping possession, for an unreasonable time, of his premises, and the salvage after a fire. *Oldfield* v. *Price*, 2 F. & F. 80.

XI. ACTION ON POLICY.

Condition requiring Notice of Loss and Particulars.]—A policy of insurance against fire was made subject to a condition that, on the

happening of any loss or damage to the insured property by fire, the insured should forthwith give notice thereof to the company, and, within fifteen days at latest, should deliver to the company as particular an account as might be reasonably practicable of the property so destroyed, with the estimated value of each article or matter, and in support thereof should give all such vouchers, proofs, and explanation as might be reasonably required, and should also, if required, make a statutory declaration of the truth of the account; and that, in default thereof, no claim in respect of such loss or damage should be payable until such account, &c., should be given and produced. Part of the insured property having been destroyed by fire, the insured gave immediate notice of loss, and delivered the account and particulars required by the policy before action brought, but more than fifteen days after the happening of the loss:—Held, that the delivery within fifteen days of the account was not a condition precedent to the right of the insured to recover. *Weir* v. *Northern Counties of England Insurance Co.*, 4 L. R., Ir. 689. And see *Gamble* v. *Accident Assurance Co.*, Ir. R. 4 C. L. 204.

Condition indorsed on a policy: "All persons insured by this company, sustaining any loss or damage by fire, shall, within fifteen days after the fire, deliver in as particular an account of the loss or damage as the nature of the case will admit of. In case any difference or dispute shall arise between the insured and the company, such difference shall be submitted to arbitrators":—Held, that the delivery of a particular within fifteen days was a condition precedent to the right of the insured to recover for the loss; but that the agreement to refer to arbitration was collateral, and not a condition precedent, and therefore could not be pleaded in bar to an action on the policy. *Roper* v. *London*, 1 El. & El. 825; 28 L. J., Q. B. 260; 5 Jur. (N.S.) 491; 7 W. R. 441.

A policy against fire contained several conditions, a non-compliance with which it was stated would make the policy void. It contained a condition that whenever a fire should happen, the insured should give immediate notice thereof to one of the secretaries or agents of the society, and within three months deliver to such secretary or agent, under his or her hand, accounts exhibiting the full particulars and amount of the loss sustained:—Held, that the delivery of such particulars was a condition precedent to the right to recover on the policy. *Mason* v. *Harvey*, 8 Ex. 819; 22 L. J., Ex. 336.

Discovery.]—A manufacturer effected a policy of insurance against fire upon his factory, machinery, and stock-in-trade. The factory and its contents were burnt down, and soon afterwards the manufacturer became bankrupt. The insurance company disputed the claim on the ground that it was fraudulent and excessive. The trustee in the bankruptcy brought an action against the company on the policy, and the company thereupon filed a bill against the trustee and the manufacturer to obtain discovery and to restrain the action till full discovery had been made:—Held, that the bill could not be sustained, inasmuch as the manufacturer was merely a witness over whom the plaintiff in the action had no control, and as it was not proved that any discovery for the purpose of the defence could be got from the trustee. *Manchester Fire Assurance Co.* v. *Wykes*, 33 L. T. 142; 23 W. R. 884—L.JJ.

Incendiary—Onus of Proof.]—A fire policy provided, according to its true construction, that the insurers should be liable for loss by fire, unless the fire was the act of an incendiary; to an action on the policy for loss by fire, the company pleaded that the loss was caused by the act of an incendiary:—Held, first, that the plea was in confession an avoidance, and that, as soon as the assured shewed the loss by fire, the burden of proving that the fire was the act of an incendiary was cast upon the insurers. *Gorman* v. *Hand-in-Hand Insurance Co.*, Ir. R. 11 C. L. 224.

Held, secondly, that it having been left doubtful, upon the evidence, whether the fire happened through accident or design, the judge was right in refusing to direct a verdict for the insurers upon that plea. *Ib.*

—— **Direction to Jury.**]—In an action against a company to recover a loss sustained by fire, the defence was, that the plaintiff had wilfully set fire to the premises. The judge directed the jury, that, in order to find a verdict against the plaintiff, they should be satisfied that the crime imputed to him was as fully and satisfactorily proved as would warrant them in finding him guilty on a criminal charge for the same offence:—Held, that such direction was right. *Thurtell* v. *Beaumont*, 8 Moore, 612; 1 Bing. 339; 2 L. J. (O.S.) C. P. 4; 25 R. R. 644.

Negligence of the Assured no Defence.]—Loss occasioned by the negligence of the assured is no defence to an action on a policy of insurance against fire. *Jameson* v. *Royal Insurance Co.*, Ir. R. 7 C. L. 126.

If premises are burned down through the negligence of the assured, yet the policy is an indemnity against that negligence. *Shaw* v. *Roberts*, 1 N. & P. 279; 6 A. & E. 75; W. W. & D. 94; 6 L. J., K. B. 106; 1 Jur. 6.

Felonious Act of the Wife of the Assured.]—An insurance company granted a fire policy to S., and during the currency of the policy S.'s wife feloniously burnt the property insured. The company, not admitting any claim on the policy, brought an action against S. and his wife for the damage done by the act of the wife:—Held, first, that the action could not be maintained, as the insurer has no rights other than those of his assured, and can enforce those only in his name and after admitting the claim on the policy. Secondly, that the action for the felony, if it were maintainable, was maintainable without shewing that the felon had been prosecuted. *Midland Counties Insurance Co.* v. *Smith*, 50 L. J., Q. B. 329; 6 Q. B. D. 561; 45 L. T. 411; 29 W. R. 850; 45 J. P. 699.

Semble, that a felonious burning by the wife of the assured, without his privity, is covered by the ordinary fire policy. *Ib.*

Payment of Claim by Bill—Winding Up—Right to sue on Bill.]—If an insurance company discharges by bill a liability upon a policy which limits the claim to the capital of the company, and the bill is not paid, the holder has a clear right to sue, or prove in a winding-up, upon the bill, and not merely in respect of the original contract. *Meredith, Ex parte, State Fire Insurance Co., In re*, 32 L. J., Ch. 300; 8 L. T. 146; 11 W. R. 416.

Suit in Equity—Demurrer.]—To a bill brought to recover a sum of money upon a policy of insurance, the defendants demurred, because the plaintiff's remedy was at law. Demurrer allowed. *Ghetoff* v. *London Assurance Co.*, 4 Bro. P. C. 436.

Condition Precedent—Proviso against Suing before Arbitration.]—In an action on a fire policy the defendant pleaded that the policy was made subject to a condition that, if any difference should arise in the adjustment of a loss, the amount to be paid should be submitted to arbitration, and the insured should not be entitled to commence or maintain any action upon the policy until the amount of the loss should have been referred and determined as therein provided, and then only for the amount so determined; that a difference had arisen, and the amount had not been referred or determined:—Held, that the determination of the amount by arbitration was a condition precedent to the right to recover on the policy, and the defence was an answer to the action. *Collins* v. *Locke* (4 App. Cas. 674) distinguished. *Viney* v. *Bignold* or *Norwich Union Insurance Society*, 57 L. J., Q. B. 82; 20 Q. B. D. 172; 58 L. T. 26; 36 W. R. 479.

—— **Arbitration.**]—By a policy against fire, it was declared that the capital of the company should be liable to pay to the assured any loss by fire not exceeding 4,200*l.*, "according to the exact tenor of the articles hereunto subjoined," one of which was as follows: "All persons assured by this corporation are, upon any loss or damage by fire, forthwith to give notice to the office in London, and within fifteen days after such fire to send in as particular account of their loss or damage as the nature of the case may admit, and make proof of the same by their oath, which loss or damage, after the same shall be adjusted, shall immediately be paid in money by the said corporation without any deduction;" and the article concluded with a stipulation that, "in case any difference should arise touching any loss or damage, the same should be referred to arbitration":—Held, by Kelly, C.B., and Martin and Pigott, BB. (dissentiente Bramwell, B.), that the adjustment of the amount was a condition precedent to the right of the assured to bring an action on the policy:—Held, contra, by Bramwell, B., that the contract was a collateral agreement for arbitration, and not a condition precedent to the right to maintain an action, and that the words in the article, "after the same shall be adjusted," pointed not to an adjusted loss, but rather to the time when it was to be paid. *Elliott* v. *Royal Exchange Assurance Corporation*, 36 L. J., Ex. 129; L. R. 2 Ex. 237; 16 L. T. 399; 15 W. R. 907. *And see* ARBITRATION.

Practice—Compliance with Condition in Policy—Non-Suit.]—Where in an action, on a fire policy, the plaintiffs' evidence shewed that they could have complied with the conditions as to giving within fifteen days a detailed account of their loss "as the nature and circumstances of the case will admit" much more fully than they had done:—Held, that they were rightly non-suited; and that, even if the question of non-compliance were for the jury, a verdict could not have been reasonably given in their favour. *Hiddle* v. *National Fire and Marine Insurance Co. of New Zealand*, 65 L. J., P. C. 24; [1896] App. Cas. 372; 74 L. T. 204.

D. GUARANTEE AND OTHER POLICIES.

I. GUARANTEE.

For Good Conduct—Warranty.]—An insurance company effected a policy with a literary institution to a certain amount against loss which might be occasioned by the want of integrity, honesty, or fidelity of W., in his employment as secretary to the institution. The basis of the contract was alleged to be a statement in writing, by the treasurer of the institution, containing a declaration of the truth of the answers to certain questions, with a proviso, that any fraudulent mis-statement or suppression should render the policy void. The statement contained the following questions and answers:—First, "Is the applicant at present in your employment, and if so in what capacity, and has he hitherto performed the duties of his situation faithfully and to your satisfaction?"—A. "He is secretary to the —— Literary Institution." Secondly, "Is the applicant personally known to you, or any of your firm, or by whom has he been introduced or recommended to you?"—A. "Only as above." Thirdly, "In what capacity do you intend to employ the applicant; and with reference to this question state, as far as circumstances will permit, (A) the nature of his intended duties and responsibilities?"—A. (A) "He is secretary of the —— Literary Institution, of which I am treasurer." (C) "The checks which will be used to secure accuracy in his accounts, and when and how often they will be balanced, and closed?"—A. (C) "Examined by finance committee every fortnight." (D) "The salary or emolument, and when it will be paid to him, and how and when it will be paid?"—A. (D) "80*l.* a year at present":—Held, that the statement that the accounts of W. would be examined once a fortnight by the finance committee of the institution did not amount to a warranty. *Benham* v. *United Guarantee and Life Assurance Co.*, 7 Ex. 744; 21 L. J., Ex. 317; 16 Jur. 691.

—— **Concealment.**]—A. was a collector of taxes, and he effected a guarantee policy with an insurance society. Before the society granted the policy, they put certain questions to him touching the amount of money at any one time to come to his hands, and to be retained by him. In reply to these questions, he stated that "he was to collect and account for the sums collected by him; that the amount of money which he was to receive, and retain in his hands, was from 100*l.* to 200*l.*, and not longer than a week; that his accounts would be checked weekly by the surveyor of taxes; that the balance of each account would, on the occasion of such check, be paid over; and that such balances would be occasionally tested by his employers." The whole amount of taxes receivable by him in a year was 9,000*l.*, and it was by dividing that sum by fifty-two that he was enabled to answer as he had done as to the 100*l.* and 200*l.* He absconded, in default to the amount of 654*l.* On a bill by his sureties against the society, for payment to them on the guarantee policy of the 654*l.*:—Held, that, having regard to the rules appended to the policy, the answer of A. as to the sum to be received by him weekly was incorrect; and as such inaccuracy had not been waived by the society, or communicated to them, the policy was void. *Towle* v. *National Guardian Insurance*

Society, 30 L. J., Ch. 900; 7 Jur. (N.S.) 1009; 5 L. T. 193; 10 W. R. 49—L. J.

—— **Condition Precedent to Right of Action—Prosecution for Embezzlement.**]—By an agreement and policy of insurance, the defendants agreed to reimburse the plaintiff any pecuniary loss, to the amount of 1,000*l.*, which he might sustain by reason of any fraud or dishonesty of A. in connection with his employment by the plaintiff, as should amount to embezzlement, and should be committed and discovered during the continuance of the policy. The policy provided (among other things) "that the employer shall, if and when required by the company, but at the expense of the company, if a conviction be obtained, use all diligence in prosecuting the employed to conviction for any fraud or dishonesty as aforesaid, which he shall have committed, and in consequence of which a claim shall have been made under this policy, and shall, at the company's expense, give all information and assistance to enable the company to sue for and obtain reimbursement by the employed, or by his estate, of any money which the company shall have become so liable to pay":—Held, by Lords Blackburn and Watson (Lord Selborne, C., dissentiente), that the prosecution of A. for embezzlement was a condition precedent to the plaintiff's right of action upon the policy. *London Guarantee and Accident Co.* v. *Fearnley*, 5 App. Cas. 911; 43 L. T. 390; 28 W. R. 893; 45 J. P. 4—H. L.

Debenture maturing on Specified Date — Resolution Postponing Date of Payment—Liability of Assurer.]—A policy of insurance containing a recital that the assured is the holder of a debenture which matures on a specified date, and guaranteeing that if the debtor makes default in payment of any principal money "due under the debenture," the assurer will pay the same to the assured, constitutes a contract of insurance against a particular event—namely, the default of the debtor to pay to the assured the amount of his debenture upon the specified date; and upon the debtor making such default the assurer becomes liable to the assured to the amount of the debenture, although payment of the debenture has under a condition indorsed thereon been postponed to a time later than the specified date. *Finlay* v. *Mexican Investment Corporation*, 66 L. J., Q. B. 151; [1897] 1 Q. B. 517; 76 L. T. 257.

Against Losses in Trade—Notice.]—A declaration stated that by an agreement between a guarantee company and the defendants, after reciting that they had delivered to the company a declaration stating the amount of their business and losses during the three years preceding, and that they were desirous of being guaranteed by the company in respect of their future sales, it was agreed that if they should pay the sums thereinafter mentioned, and should comply with the provisions of the deed of settlement of the company, the funds of the company should be liable to pay the defendants nine-tenths of their losses in respect of sales during three years and one month from the 1st of December, 1853, unto the 31st of December, 1856, and during any further period the defendants should contribute to the funds of the company, and the company should consent to receive further payments; but subject always to the provisions contained in the deed of settlement, and also to a proviso that every guarantee upon annual returns should, from the expiration of the original term, be treated as a renewed contract, unless either the member interested therein or the directors should give notice of an intention not to renew the same. The declaration then alleged that the defendants agreed to pay the company 43*l.* 15*s.* in each year during the guarantee that the agreement so made was an agreement on gross annual returns within the meaning of the proviso, and that no notice of an intention not to renew the guarantee had been given by either party, and alleged as breach the nonpayment of an instalment of 43*l.* 15*s.*, being the premium for 1857, and 10*l.* 18*s.* 9*d.*, an instalment for 1858. Pleas, first, that the sums are claimed in respect of periods after 31st of December, 1856, and that after such date the defendants refused to contribute to the funds of the company. Secondly, that the company had become dissolved, and was amalgamated with another company. Thirdly, for defence on equitable grounds, a plea stating an agreement to amalgamate, as in the second plea:—Held, that the first plea was bad, for the stipulation for notice was part of the contract, and no notice having been given, the agreement continued for another three years. *Solvency Mutual Guarantee Society* v. *York*, 3 H. & N. 588; 27 L. J., Ex. 487.

Held, also, that the second and third pleas were bad, since it did not appear that the company was not empowered by their deed of settlement to amalgamate. *Ib.*

—— **Renewal of Contract.**]—By an agreement between a company and the defendants, in consideration of a certain sum, it was agreed that the funds of the company should be subject and liable to make good to the defendants the loss occasioned to them during the term of two years by reason of any of the purchasers of their goods becoming bankrupt within such time, and during any future period in respect whereof the company should consent to receive further payments, but subject to the conditions indorsed on the instrument. One of the conditions indorsed was, that all guarantees, whatever might be the original term, should, from the expiration of such original term, be treated as a renewed contract of the like nature and conditions, unless either the members interested therein, or the board of directors, should give two calendar months' notice of an intention not to renew the same:—Held, that the renewed contract was not itself to be deemed to contain this particular condition as to the renewal, and that therefore, even in the absence of notice, the contract did not extend beyond one renewal. *Solvency Mutual Guarantee Co.* v. *Froane*, 7 H. & N. 5; 31 L. J., Ex. 193; 7 Jur. (N.S.) 899.

—— **Notice of Withdrawal by Contributory.**]—A. effected an insurance against bad debts for a term of three years, the following condition as to withdrawal being indorsed on the policy:—"Every guarantee shall be made for a specified term; but all guarantees upon gross annual returns, floating risks, or rent, whatever may be the original term of the same, shall from the expiration of such original term be treated as a renewed contract of the like nature and conditions, unless either the member interested therein, or the board of directors, shall give two calendar months' notice of an intention to renew

the same." The first year's premium was paid by A., and a claim admitted by the office in respect of a bad debt was set off against the remaining premiums, leaving a balance still due from A. A. being dissatisfied at not receiving the actual money, told B., the agent with whom he had effected the policy, that he should withdraw from the society, and have nothing further to do with it. He made no further payments in respect of premiums, nor were any demanded from him by the office:—Held, that there had been sufficient notice of withdrawal in accordance with the condition annexed to the policy to determine the contract at the end of the time, and that A. was not liable as a contributory. *Solvency Mutual Guarantee Society, In re, Hawthorne's Case*, 31 L. J., Ch. 625; 8 Jur. (N.S.) 934; 6 L. T. 574; 10 W. R. 572.

Held, also, that B. was a sufficient agent of the company for the purpose of receiving such notice. *Ib.*

Policy effected by Depositor to insure Repayment—Default of Bank—Liquidation—Scheme of Arrangement—Discharge of all Claims by Operation of Statute—Accord and Satisfaction.]—The plaintiff, having deposited with an Australian bank a sum of money for a fixed period at a fixed rate of interest, effected a policy of insurance with the defendant corporation, whereby the corporation contracted to pay the plaintiff the principal sum and interest if the bank made default in payment. The bank failed to pay the principal sum on the due date, and subsequently a scheme of arrangement between the bank and its creditors was sanctioned by the colonial court in accordance with the terms of a colonial statute, whereby certain provisions were made with regard to the claims of the creditors, and the creditors were bound to accept such provisions in satisfaction of their claims. The plaintiff having brought an action against the defendants on the policy:—Held, that the scheme of arrangement afforded no answer to the plaintiff's claim. *Dane* v. *Mortgage Insurance Corporation*, 63 L. J., Q. B. 144; 9 R. 96; [1894] 1 Q. B. 54; 70 L. T. 83; 42 W. R. 227—C. A.

Receiver—Security of Guarantee Society.]—The security of a guarantee society may be taken in the case of a receiver in a probate action. *Carpenter* v. *Solicitor to the Treasury, Stokes, In goods of*, 51 L. J., P. 91; 7 P. D. 235; 46 L. T. 821; 31 W. R. 108; 46 J. P. 663.

Guarantee Policy—Condition—Notice of Criminal Misconduct.]—Where in a guarantee policy there is a condition that the insurer is to give notice within six days of any liability being incurred, or the policy to be void:—Held, that this means notice of any criminal misconduct whereby it is clear that any liability has been incurred; and therefore that the plaintiff, on receipt of evidence that the person mentioned in the policy has been guilty of embezzlement, was not bound to give notice until he has ascertained that criminal liability had been incurred. *Ward* v. *Law Property Assurance and Trust Society*, 4 W. R. 605.

Insolvency of Insurance Company.]—See *Mortgage Insurance Corporation* v. *Pound*, 65 L. J., Q. B. 129—H. L. (E.)

II. OTHER POLICIES.

Glass.]—A policy contained a recital, that it was agreed that plate glass in which the insurer was interested should be insured "from loss or damage originating from any cause whatsoever, except fire, breakage during removal, alteration, or repair of premises, ... none of the said glass being horizontally placed or movable," and then insured the owner from all damage or loss "from any cause whatever, except only as above specified, according to the exact tenor" of the printed conditions indorsed on the policy. A fire broke out on premises adjoining the shop of the insured, who thereupon opened the shop door, and admitted neighbours to save his property; during the removal the mob, which had been attracted by the fire, broke down the shutters, and destroyed the glass, for the purpose of plunder:—Held, that the damage to the glass did not originate from fire, or from breakage during removal, within the meaning of the exception in the policy. *Marsden* v. *City and County Insurance Co.*, 1 H. & R. 53; 35 L. J., C. P. 60; L. R. 1 C. P. 232; 12 Jur. (N.S.) 76; 13 L. T. 465; 14 W. R. 106.

Cattle.]—A policy on the lives of cattle was an insurance on lives, within 55 Geo. 3, c. 184, and liable to duty. *Att.-Gen.* v. *Cleobury*, 4 Ex. 65; 18 L. J., Ex. 395.

Burglary—Proviso that no Insurance until Premium paid—Waiver.]—A proposal for insurance against loss by burglary and housebreaking having been made to an insurance company, a policy, which, after reciting that the premium had been paid, contained a proviso that no insurance should be held to be effected until the premium due thereon had been paid, was sealed with the seal of the company and signed by two of the directors and the secretary. The policy remained in the possession of the company, and was never handed to the assured. A loss occurred before payment of the premium, which, in fact, never was paid, though the assured was always ready to pay:—Held, that there was a concluded agreement between the company and the assured, that the company had waived the condition as to payment of the premium, and that the assured was entitled to recover on the policy the amount of the loss less the premium. *Roberts* v. *Security Co.*, 66 L. J., Q. B. 119; [1897] 1 Q. B. 111; 75 L. T. 531; 45 W. R. 214—C. A. And see *Tarleton* v. *Staniforth*, ante, col. 93.

E. INSURANCE COMPANIES.

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I. POWER AND AUTHORITY OF DIRECTORS.

a. ISSUING POLICY.

Marine.]—The Hull and London Fire Assurance Company was a company completely registered under 7 & 8 Vict. c. 110. The deed of settlement gave the company power to transact all the branches of business usually appertaining to marine insurance, and required that in every policy the funds of the company should alone be made liable. The company had a seal, with their name of incorporation on it. For marine insurances the directors appointed an agent to issue policies. The marine policies were headed "Hull and London Marine Assurance Company," and were signed by the agent, by order of the board of directors of the company, and had a stamp upon them with the words "Hull and London Marine Assurance Company." They contained no stipulation that the funds of the company should alone be liable:—Held, first, that the Hull and London Fire Assurance Company was not liable on such policies, because neither the directors nor any one else had authority to enter into such engagements on behalf of the company, as these policies purported to create; and there neither was nor could be any evidence that the signing of such policies by an agent, in a name not that of the company, was in accordance with the usual mode of conducting the business of partnership such as the company's, or within the scope of the ordinary authority of the directors or agents of such companies. *Hambro* v. *Hull and London Fire Assurance Co.*, 3 H. & N. 789; 28 L. J., Ex. 62.

Held, secondly, that no action lay against the Hull and London Fire Assurance Company, on an adjustment of losses on such policies by the directors. *Ib.*

Life.]—The deed of settlement of a life assurance society, completely registered under 7 & 8 Vict. c. 110, provided by the 20th clause of the deed that the common seal should not be affixed to any policies except by the order of three directors, signed by them and countersigned by the manager; and by clause 28, that every policy should be given under the hands of not less than three of the directors, and sealed with the common seal. By clause 101, the books containing the proceedings of the general meetings and of the board of directors were to be open to the inspection of shareholders. A policy was executed, sealed with the common seal, and signed by three directors, one of whom was manager; but there was no previous order made, as required by the 20th clause. The company, in discussion with the assured, treated the policy as effective:—Held, that they could not repudiate their liability on the policy, upon the ground that the execution was not authorised. *Prince of Wales Life Assurance Co.* v. *Harding*, El. Bl. & El. 183; 27 L. J., Q. B. 297; 4 Jur. (N.S.) 851.

The deed of settlement of an insurance society, registered under 7 & 8 Vict. c. 110, after empowering the directors to effect insurances on lives upon such terms and conditions and in such manner as they should think proper, provided that every policy or other instrument required in any of the transactions aforesaid should be given under the hands of not less than three of the directors, and sealed with the common seal of the society; and that there should be contained therein, and in every other contract to be entered into on behalf of the society, in or about the premises (meaning in or about matters connected with assurance), a reference to the deed, and a proviso negativing an unconditional liability. The deed also declared, that it should be competent to a board of directors to exercise certain general powers, and generally where the deed was silent, or did not otherwise provide, to act in the direction of the affairs of the society in such manner as in their absolute discretion they should think most conducive to its interests:—Held, that a memorandum, signed by three of the directors, but not under the seal of the society, stipulating that, on payment of certain premiums, the society would guarantee an assurance therein mentioned, and would issue, when required, a stamped policy, in the form authorised by their deed of settlement, was binding upon the general body of the shareholders, and created a good equitable debt. *Athenæum Life Assurance Co., In re*, 4 Kay & J. 549; 27 L. J., Ch. 829; 4 Jur. (N.S.) 1140; 6 W. R. 779.

b. MATTERS OF DISCRETION.

Voluntary Payments.]—An insurance company expressly excepted from their fire policies loss by explosion, except by the explosion of gas. An explosion occurred accidentally by the blowing up of a vessel laden with powder, by which damage was done to buildings insured by the company. The directors paid for the damage so caused, but they did it ex gratiâ, and for the benefit of the company. On a bill by a shareholder to make them refund the money:—Held, that this was a matter of internal management, and that, having regard to the powers of the directors, and the purposes of the company, the directors were justified in making the payments, the damage being done by something which, though not within, was analogous to, the risk insured against. *Taunton* v. *Royal Insurance Co.*, 2 H. & M. 135; 33 L. J., Ch. 406; 10 Jur. (N.S.) 291; 10 L. T. 156; 12 W. R. 549.

Reducing Premiums.]—When an insurance company undertook, upon being satisfied that the causes which originally led to the assessment of a higher premium upon the life insured were removed, to reduce the premium to that upon an ordinary life:—Held, that a court of equity could not interfere with the discretion of the directors, exercised bonâ fide, to compel them to perform their contract. *Manby* v. *Gresham Life Insurance Co.*, 29 Beav. 439; 31 L. J., Ch. 94; 7 Jur. (N.S.) 383; 4 L. T. 347; 9 W. R. 547.

c. INVESTING CAPITAL OR DIVIDING PROFITS.

Securities.] — Directors of a life insurance society, which was constituted by deed of settlement for the purpose of purchasing, selling and re-selling life, reversionary and other personal estates and interests, and of advancing money,

by way of loan, on personal security, and generally of carrying on the business of life insurance, and of an annuity, loan, and reversionary interest society, were empowered by such deed of settlement, at their own absolute discretion, and in the usual and ordinary course of the business of the society, to invest, lay out, or advance at interest, on government securities, or on such personal or other security as they should think fit and advantageous, and they lawfully might, such moneys, or such parts of the moneys and funds, of the society as they should think expedient:—Held, that a purchase by the directors of such society of Westminster Improvement Bonds was not within their powers. *Athenæum Life Insurance Society* v. *Pooley*, 3 De G. & J. 294; 28 L. J., Ch. 119; 5 Jur. (N.S.) 129; 7 W. R. 167.

Effect of Successive Charters.]—In 1822 a company granted a policy, admitting A. a member of their society, and binding themselves to pay to his executors, administrators, or assigns such proportion or share of the joint stock and fund of the society as should become due on the death of A., according to the charters and by-laws of the society. D. was assignee of the policy, which became a claim on the society in 1858. After making the policy, and before it became a claim, other charters were granted to the society, and acts of parliament were passed relating thereto, which modified and altered the manner of calculating the profits and apportioning them amongst the representatives of the lives insured; these provisions were in their terms general, without distinction as to past or future policies:—Held, that the policy was regulated by the later charters and acts of parliament, and that the distribution of the profits of the society on its becoming a claim must be in accordance therewith. *Drake* v. *Amicable Society*, 4 L. T. 439.

Reserve Fund.]—An insurance company, by a deed of settlement, was directed to create a reserve fund, and pay no dividend till a specified amount was realised. This provision was departed from by the consent of the majority of the shareholders, and a bonus was distributed every three years. The company afterwards amalgamated with another company, and it was agreed that 50*l.* per share should be paid upon all shares, and also a proportionate part of the surplus assets. A tenant for life of ten shares in the company claimed the share of the surplus assets which had been paid over to her trustee as part of her annual income:—Held, that these surplus assets, which must be considered as the reserve fund, were capital, and not income. *Nicholson* v. *Nicholson*, 30 L. J., Ch. 617; 9 W. R. 676.

Cross Insurance—Mutual Society—Membership.] — Where policies are effected by the manager and secretary of one assurance society in the office of another, being a mutual assurance society, although such policy is expressed to be effected "for and on behalf of the society," the secretary alone is thereby constituted a member, by reason of the sum secured being payable to him and "his successors in office." Where directors of one assurance society have power to effect cross insurances in the office of another, if they do so in a mutual assurance office, that does not constitute their society a member, being ultra vires. *Security Mutual Life Assurance Society, In re, Athenæum Life Assurance Society, Ex parte*, 6 W. R. 431.

II. AUTHORITY OF AGENTS.

To indorse Memoranda on Policies.]—A memorandum indorsed on a policy for a change of the voyage was signed by an agent of an insurance company. It was proved that the agent had signed similar memoranda on many other policies, and that his habit was to do so, and advise the company of it; though, when a policy was required, he always sent the proposals to the company:—Held, that this was sufficient proof of the agent's authority to sign such memorand; and that the other policies, on which the memoranda had been signed, need not be produced. *Brockelbank* v. *Sugrue*, 5 Car. & P. 21.

Local Agent.]—An ordinary local agent of an insurance company is not, without special authority, authorised to bind the company by a contract to grant a policy. *Linford* v. *Provincial Horse and Cattle Insurance Co.*, 34 Beav. 291; 10 Jur. (N.S.) 1066; 11 L. T. 330.

The London agent of a county insurance company received a proposal for an insurance. The party paid the annual premium to the agent, who promised that he should have the policy. The agent retained and misapplied the money, and never forwarded the proposal to the company:—Held, in the absence of proof of special authority to the agent, that the company was not bound to grant the policy. *Ib.*

A plate glass policy, which had been effected through L., the local agent of the company, was subject to a condition that, "in case of loss or damage, an immediate notice must be given to the manager, or to some known agent of the company." After the making of the policy, and before the loss, the company transferred this branch of its business to another company. The assured (not being aware of this transfer) gave notice of the damage to L., who made his report thereon to the latter company:—Held, that the notice to L. was a sufficient notice within the condition. *Marsden* v. *City and County Insurance Co.*, 1 H. & R. 53; 35 L. J., C. P. 60; L. R. 1 C. P. 232; 12 Jur. (N.S.) 76; 13 L. T. 465; 14 W. R. 106.

A policy was subject to a condition, making it void if the assured went beyond the limits of Europe without licence. An assignee of the policy, on paying the premium to a local agent of the society at the place where the assurance had been effected, informed him that the assured was resident in Canada. The agent stated that this would not avoid the policy, and received the premiums until the assured died:—Held, that the society was precluded from insisting on the forfeiture. *Wing* v. *Harvey*, 5 De G. M. & G. 265; 2 Eq. R. 533; 23 L. J., Ch. 511; 18 Jur. 394; 2 W. R. 370.

Mistake as to Company.]—A person entered into a contract with the agent of an insurance company to insure him, under the impression that he was dealing with the agent of another company:—Held, that there was a contract, and that the company whose agent he dealt with was liable. *Mackie* v. *European Assurance Co.*, 21 L. T. 102; 17 W. R. 987.

Manager taking Promissory Note for Premiums.]—An assurance company was incorpo-

rated by a Canadian statute, by which it was provided that all policies should be subscribed by three directors, countersigned by the secretary and manager, and the seal of the corporation. By a by-law a resolution to the same effect was passed. H. mortgaged a house to R. His representative, being dissatisfied with the security, applied for repayment of the mortgage money, when H. agreed to insure the premises for the benefit of the mortgagee's representative. In pursuance of this arrangement, H. applied to the company through M., their manager, to insure the premises against fire. H. was unable to pay the premium, and proposed to M. that the company should take his promissory note. This was agreed to by M. and a note was given, M. promising to send the policy. The particulars of the policy were entered in the books of the company, but the note being dishonoured when due, the entry was erased. The policy was never issued. Shortly afterwards the premises were burnt down :—Held, first, that the powers of M. as manager, being public, must be taken to have been known to H., the insurer, and that the acts of M. in the transaction were ultra vires and void. *Montreal Assurance Co.* v. *M'Gillivray*, 13 Moore, P. C. 87 ; 8 W. R. 165.

Held, secondly, that as such contract was not binding on M.'s principals, it did not become binding upon them by reason of its having been entered into through their agent. *Ib.*

Preliminary Agreement—Mistake.]—By a verbal agreement between the plaintiff and C., agent in London of an insurance society in Scotland, it was agreed that a policy should be granted to the plaintiff on the life of H., a merchant residing at Gibraltar, and that the policy should not be vitiated by reason of H. visiting ports on the coast of Africa ; and a proposal for the policy was drawn up by the plaintiff at the office of the society in London, and forwarded by the agent to the chief office of the society at Edinburgh. In that proposal it was stated that the policy could not be accepted except on the condition that H. should be at liberty "to visit Tangiers, or any other port within the Mediterranean, without subjecting himself to any extra premium ; but it was understood that he was not to reside out of Europe, at any place in the Mediterranean, beyond the period of three months, or to go into the interior of Asia or Africa." No mention was made in the proposal of ports on the coast of Africa. The policy was effected, with a memorandum endorsed upon it in the terms of the above condition, and the plaintiff paid several premiums. H. went to a port on the Atlantic coast of Africa, and died there within three months of his arrival. The society refused to pay, and an action was brought to recover the amount. The defence was, that the policy had become void by reason of H. having died at a port not within the terms of the agreement. On a bill filed by the plaintiff to have the mistake made in the indorsement on the policy rectified :—Held, that C., the agent in London, had no power to bind the society ; and as the memorandum had been framed under a mistake, the real terms of the agreement never having been communicated to or adopted by the society, the policy was not binding upon either party ; and the court ordered that the society should repay the premiums, and that the plaintiff should thereupon deliver up the policy to the society. *Fowler* v. *Scottish Equitable Life Insurance Society*, 28 L. J., Ch. 225 ; 4 Jur. (N.S.) 1169 ; 7 W. R. 5.

Sub-agent.]—A proposal for a life policy, accepted on behalf of a London assurance company by their agent in Australia, who acted in the transaction through the medium of a sub-agent, and the premium being paid is binding on the company, although the agent had no authority to appoint a sub-agent, and although there were some informalities, but of form only. *Rossiter* v. *Trafalgar Life Assurance Association*, 27 Beav. 377.

Dissolution of Company—Right to Payment.]—An insurance company covenanted with A. for valuable consideration to appoint him their agent, together with B., and that if B. should be displaced from the agency, the company would pay A. a certain sum ; the company having transferred their business to another company, and wound up their affairs and dissolved themselves :—Held, that this was a displacement of B. within the meaning of the covenant. *Stirling* v. *Maitland*, 5 B. & S. 840 ; 34 L. J., Q. B. 1 ; 11 L. T. 337 ; 13 W. R. 76.

Liability of Secretary for False Representations.]—An action lies against a secretary of an insurance company for false representations as to the management and general affairs of the company, whereby a party was induced to effect an insurance with the company, though it does not appear that he had thereby sustained any positive damage. *Pontifex* v. *Bignold*, 3 Scott (N.R.) 390 ; 3 Man. & G. 63 ; 9 D. P. C. 860 ; 10 L. J., C. P. 259.

III. ALTERING CONSTITUTION OR BUSINESS.

Life and Marine.]—At an extraordinary general meeting of a company established for granting assurances on lives, it was resolved to extend the business to marine insurances. The resolutions were afterwards confirmed ; a deed embodying them was executed by some, but not all of the shareholders, and in the annual return to the joint-stock companies registry office, the business of the company was stated to include marine assurance. The reports of the directors several times alluded to the extension of the business, and on one occasion a report alluding to such extension accompanied the dividend warrant. The business as extended was carried on for a year and a half, when the company was ordered to be wound up :—Held, that these circumstances were not sufficient to bind the general body of shareholders by acquiescence to the extension of business, which could only be effected by a new deed executed by all the shareholders ; consequently, holders of marine policies could not come in as creditors of the company in respect of losses upon such policies. *Phœnix Life Assurance Co., In re*, 2 J. & H. 441 ; 31 L. J., Ch. 749 ; 10 W. R. 816.

Held, however, that the holders of such policies might claim in respect of the premiums paid. *Ib.*

Fire.]—The third clause of the deed of settlement of a provident and life society, after specifying particularly the business of the society, authorised the society "generally to make and

effect insurances against all and every kind of risk, special or general, which may be effected according to law," and which might thereafter be determined upon by a special general meeting, "upon such terms and conditions as may seem reasonable and expedient, having due regard to the business of an insurance company." The thirteenth clause empowered the society in special general meeting to amend, add to, or repeal all or any of the clauses of the deed of settlement; and "to alter the objects, business and constitution of the society, or any or either of them," as might be thought proper, provided that no alteration was made in the third clause:—Held, that the above clause enabled the society to carry on the business of fire insurance. *Norwich Provident Insurance Society, In re, Bath's Case*, 47 L. J., Ch. 601; 8 Ch. D. 334; 38 L. T. 267; 26 W. R. 441—C. A.

Deed of Settlement—Power to alter—Sale of Business.]—The deed of settlement of an unincorporated life assurance company contained no provision for the sale or transfer of its business. But it provided that the proprietors might alter, amend, or repeal the laws, regulations and provisions of the company. Resolutions were passed with due formalities to take power to sell and transfer the business:—Held, that a sale and transfer of the business was intra vires. *Argus Life Assurance Co., In re*, 58 L. J., Ch. 166; 39 Ch. D. 571; 59 L. T. 689; 37 W. R. 215.

Guarantee Business and Treaty Business—Ultra Vires—Company in Liquidation.]—A fire insurance society being an unincorporated association, had powers of giving to, or taking from other offices policies by way of guarantee for the purpose of dividing the risk of insurance, and also under their powers entered into treaties with other companies appointing them their agents in foreign lands, and agreeing to accept and enter upon the risk of one-eighth of every fire insurance policy of such companies in force at the date of the treaty, or effected or renewed after that date, and agreed to be on all risks simultaneously with the other companies, the other companies agreeing to pay a proportion of the premiums, 20 per cent. commission to be allowed on such premiums to the agent for the expenses of conducting the agency. The fire insurance society having gone into liquidation, the chief clerk allowed the claim of another company for sums due to them in respect of guarantee and treaty business. On summons by the liquidator to vary the certificate:—Held, that guarantee business was insurance business contemplated by the deed of settlement, and within the powers of the society; that the treaty agreements did not constitute an amalgamation between the contracting companies, nor a partnership either inter se or as regarded third persons, but were agreements of agency: the society having had the benefit of these agreements, the burden of proof was upon them to shew that the agreements were invalid; that the treaty business was insurance business, being guarantee business carried on with a very unlimited faith in the agent; it was a re-insurance contract more wide and less prudent than an ordinary contract of re-insurance, but was within the powers of the society, and that the directors had by acquiescence ratified the acts of the manager of the agency department. *Norwich Equitable Fire Assurance Society, In re*, 57 L. T. 541.

IV. AMALGAMATION AND TRANSFER OF BUSINESS.

a. Powers of Company.

Consent of Policy-holders.]—On petition for the sanction of the court to a scheme for the transfer of the business of one life insurance company to another, it appeared that the holders of two policies, together amounting to much less than one-tenth of the whole amount insured by the company, were resident abroad and could not have received the notices of the scheme which had been duly posted, in time to express their assent or dissent:—Held, that as their remedy against the transferring company was preserved by s. 7 of the Life Assurance Companies Act, 1872, the court would sanction the scheme without waiting for their assent. *London and Southwark Insurance Corporation, In re*, 42 L. T. 247; 28 W. R. 565.

A policy-holder, by whose policy the funds of a company are made liable to pay the sum insured, and certain shares of profit by way of bonus, is entitled to restrain the company from transferring its business and assets to another company, contrary to the provisions of the deed of settlement, and without making provision out of its own assets for payment of the policy. *Kearns* v. *Leaf*, 1 H. & M. 681; 10 L. T. 185; 12 W. R. 462.

Action against Company for.]—A. affected a policy "upon and for twenty years' continuance of the life of himself," with a company. By the policy it was provided that the property of the company remaining at the time of any claim undisposed of, and inapplicable to prior claims and demands, in pursuance of the provisions of the deed of settlement, should alone be liable to answer all claims upon the company; and that no director, officer, or shareholder should be individually or personally liable. The deed of settlement entitled policy-holders to participate in profits; and also contained provisions enabling the directors, in certain events, to dissolve the company. The directors having, not in strict accordance with their powers to dissolve the company, transferred its funds and property to another company, who were to take their liabilities, A. brought an action against the company (his assurers), charging them with having wrongfully alienated and transferred their property, and ceased to carry on business:—Held, first, that there was no implied contract on the part of the company to continue to carry on the business. *King* v. *Accumulative Life Fund and General Assurance Co.*, 3 C. B. (N.S.) 151; 27 L. J., C. P. 57; 2 Jur. (N.S.) 1264; 6 W. R. 12. See *Solvency Guarantee Society* v. *York*, 3 H. & N. 588; 27 L. J., Ex. 487.

Held, secondly, that if there was, there was no evidence of any breach of it, inasmuch as, if the transfer was properly made, there was no cause of action, and if not warranted by the deed of settlement, it was ultra vires, and void. *Ib.*

Held, thirdly, that A. had commenced his action before he had sustained any injury. *Ib.*

Where no Special Power.]—A life and fire assurance society purchased the business of a life assurance company, taking all the assets, and undertaking all the liabilities:—Held, that, in the absence of any special power in their deed of settlement, the transaction was ultra

vires; that securities under the seal of the purchasing company, given in carrying out this arrangement to creditors of the selling company, were void; and that such creditors were not entitled to prove against the purchasing company, which was in the course of winding-up. *Era Assurance Co., In re, William, Ex parte*, 2 Johns. & H. 400; 30 L. J., Ch. 137; 6 Jur. (N.S) 1334; 3 L. T. 314; 9 W. R. 67.

Where one insurance company, A., transferred all its business, property, effects and liabilities to another company, B., on the terms of A. shareholders being indemnified, on a bill by A. for specific performance of the agreement, the court decreed such indemnity, and the other company, which was ordered to be wound up, having by its official manager filed a cross bill, alleging fraud and misrepresentation, and that such agreement was ultra vires, the company, B., having had the benefit of the agreement:—Held, not to be entitled to object that the agreement was ultra vires and improperly entered into by the managing body. *Anglo Australian Life Assurance Co.* v. *British Provident Society*, 3 Giff. 521; 8 Jur. (N.S.) 299; 6 L. T. 68.

An unregistered company which has no power under its deed of settlement to sell and transfer its business to another company may, nevertheless, carry into effect an agreement for that purpose by registering under the Companies Act, 1862, and then passing a resolution for voluntarily winding up, and directing the liquidator to carry out the agreement. *Southall* v. *British Mutual Life Assurance Society*, 40 L. J., Ch. 698; L. R. 6 Ch. 614; 19 W. R. 865. Affirming 23 L. T. 682.

A mutual insurance company may be amalgamated with, and its business transferred to, another company under the Companies Act, 1862, s. 161. *Ib.*

A clause in an agreement for the amalgamation of two companies, providing that part of the purchase-money shall be paid to the directors of the selling company by way of bonus, does not invalidate the amalgamation. *Ib.*

Deposit—Amalgamation—Repayment of Deposit.]—The E. Life Assurance Society made the deposit of 20,000*l.* required by the Life Assurance Companies Act, 1870, s. 3, but did not accumulate a life assurance fund out of premiums as mentioned in the section. The E. society effected an amalgamation with the M. Life Assurance Company, which had accumulated out of premiums previously received a fund exceeding 100,000*l.* There were no creditors of the E. society other than the policy-holders, nearly all of whom had agreed to accept the liability of the M. company. Upon a petition by the E. society and M. company for payment of the deposit to the M. company:—Held, that as there had not been an accumulation of a life assurance fund out of the premiums received by the E. society, the provisions of the section had not been complied with, and the order could not be made. But the court allowed the petition to stand over generally, intimating that it might be brought on again, when the M. company had accumulated out of the premiums to be received on all or any of their policies an additional life assurance fund amounting to 40,000*l.* *Scottish Economic Life Assurance Society, Ex parte*, 60 L. J., Ch. 14; 45 Ch. D. 220; 62 L. T. 926; 38 W. R. 684; 2 Meg. 271.

Sale or Transfer—S. 14 of Act of 1870.]—Where annuities are secured by the guarantee, under seal, of a life assurance company, to trustees for the annuitants, such trustees are policy-holders within the meaning of ss. 2 and 14 of the Life Assurance Companies Act, 1870. *Sovereign Life Assurance Co., In re*, 58 L. J., Ch. 811; 42 Ch. D. 540; 61 L. T. 455; 38 W. R. 58.

If a life assurance company has, under its deed of settlement, no power to sell or transfer its life assurance business, it cannot, under s. 14 of the Life Assurance Companies Act, 1870, enter into any arrangement for the sale or transfer of its life assurance business. *Ib.*

Transfer of Business—Confirmation by Court—Time for sending Notice.]—When a petition is presented by a life assurance company under the Life Assurance Companies Act, 1870, for the confirmation of a conditional agreement to transfer its business to another company, s. 14 of the act will have been sufficiently complied with if all the notices (required by that section to be given to each policy-holder of the transferred company) are given before the hearing (though some of them may have been given after the presentation) of the petition. *Briton Life Association, In re*, 56 L. J., Ch. 988; 35 W. R. 803.

b. NOVATION.

When effected.]—The deed of association of the Waterloo Assurance Company, which bound the policy-holders, contained a power to dissolve, and thereupon the directors were to get from another company an undertaking to pay all future liabilities, and to transfer to such company so much of the funds as should be agreed on between the contracting parties as would be sufficient to enable the latter company to comply with their undertaking:—Held, that the amount to be paid over was a matter of agreement between the two companies, with which the policy-holders had no concern, and that a policy-holder who refused to be transferred had no claim upon the Waterloo Company. *Waterloo Life Assurance Co., In re, Carr, Ex parte*, 33 Beav. 542.

C. insured his life in the T. company, which afterwards made over its business to the A. company. At the time of this transaction circulars were sent to C., informing him that the A. company would be responsible on the policy, and requesting him to pay future premiums to that company, and to send his policy to the company to be endorsed. C. never sent his policy to be indorsed, but paid the premiums to the A. company, and in 1863 accepted a bonus. The A. company having become insolvent shortly after the death of C., his assignee applied for an order to wind up the T. company:—Held, that C. had accepted the A. company as his debtor in place of the T. company, and that his assignee had no locus standi to petition for the winding-up of the company. *Times Life Assurance and Guarantee Co., In re*, 39 L. J., Ch. 527; L. R. 5 Ch. 381; 23 L. T. 181; 18 W. R. 559. S. P., *Merchant's and Tradesman's Assurance Society, In re*, L. R. 9 Eq. 694; 22 L. T. 264; 18 W. R. 725.

The holder of a policy in company A. received a circular stating that it was dissolved, and its business and assets had been transferred to company B., and that he was entitled to have his policy exchanged for a new one in company B., or to have an indorsement by company B. on the

old policy, guaranteeing the fulfilment of the old policy. He accepted the latter alternative, and obtained an indorsement, charging the assets of company B. with the payment of the old policy:—Held, that he had accepted the liability of company B. in lieu of, and not as surety for, that of company A. *International Life Assurance Society and Hercules Ins. Co., In re, Blood, Ex parte*, 39 L. J., Ch. 295; L. R. 9 Eq. 316; 22 L. T. 467; 18 W. R. 370.

A life policy with profits was obtained from the Anchor Company; the Anchor Company afterwards transferred their business to the Bank of London Association under terms which appeared to keep the companies separate; and the association was soon afterwards amalgamated with the Albert Company. Notices of these changes were given to the policy-holders, and the first receipt for a premium paid after the amalgamation with the Albert Company was in a special form; the subsequent receipts were merely receipts by the Albert Company, with the words "Anchor Company" on them. Three years after the amalgamation a bonus was declared by the Albert Company, and a sum of money was received as bonus by the policy-holder:—Held, that there had been a novation of contract with the Albert Company, and that the representatives of the policy-holder could not obtain an order to wind up the Anchor Company. *Anchor Assurance Co., In re*, L. R. 5 Ch. 632; 18 W. R. 1183.

When the holder of a policy, having notice that the N. assurance office, with which the policy was effected, had transferred its business and assets to the A. assurance office, and had ceased to carry on business, paid the premiums on his policy to the A. office for thirteen years, and upon the dropping of the life sent in a claim upon the policy to that office:—Held, that there had been complete novation of the contract, and that the N. office was released from liability on the policy. *National Provincial Life Assurance Society, In re, Fleming, Ex parte*, 39 L. J., Ch. 250; L. R. 9 Eq. 306; 22 L. T. 465; 18 W. R. 398.

M. effected a policy upon his life with the British Nation Life Assurance Association. The association subsequently was amalgamated with the European Society, and ceased to carry on business. Some time afterwards a memorandum under the seal of the European Society, and signed by two of its directors, was indorsed on the policy, declaring that the funds of the European Society should be liable for the payment of the policy-money, provided the future premiums were paid to the European Society. The subsequent premiums were accordingly paid to that society:—Held, that there was a complete novation, and that on the winding-up of the two companies, M. had no right of proof against the British Nation Association. *Miller's Case, European Society Arbitration, In re*, 3 Ch. D. 391—C. A.

A fire assurance company and a life assurance company were amalgamated with the B. assurance company; and a deed of settlement was executed by which the B. company was constituted as a common law partnership. The deed recited the agreement by which the business of the two companies was transferred to the B. company, and the B. company undertook to indemnify them against all liabilities. F. was a policy-holder in the life company and was also a shareholder in the fire company, and as such shareholder executed the deed of settlement of the B. company, and received shares in the B. company in exchange for his shares in the fire company. The B. company and the life company were afterwards ordered to be wound up, and F. claimed to prove as a creditor against the estate of the life company:—Held, that having executed the deed of settlement of the B. company, he had accepted the liability of that company, and could not claim as a creditor against the life company. *National Provincial Life Assurance Society, In re, Fleming's Case*, L. R. 6 Ch. 393; 19 W. R. 663. Affirming 23 L. T. 770.

S. was holder of a policy of the M. society, and entitled under it to participation in profits. The society amalgamated with the A. company, handing over its assets, and the company undertaking its liabilities, a fund, part of the M. assets, being set apart as a trust fund to guarantee certain policies of the M. society, including S.'s policy. Under the arrangement for the amalgamation proposals were made to S. to cancel his policy, and accept in substitution a policy upon similar terms of the A. company. This S. did not accede to; he simply paid his premiums to the A. company, which company was, according to the arrangement between the companies, authorised to receive the premiums. Two years after the amalgamation a division of profit of the three preceding years was declared by the A. company. A bonus was declared upon S.'s policy, notice of which was given to him. He accepted the bonus in the form of a reduction of the premiums upon his policy, and he subsequently paid the reduced premiums. The M. society being (as well as the A. company) ordered to be wound up, S. claimed to prove as a creditor in respect of his policy:—Held, that he had by taking the bonus accepted the A. company as his debtor in lieu of the M. society, and his claim was disallowed. *Medical and Invalid, and General Life Assurance Society, In re, Spencer's Case*, 40 L. J., Ch. 455; L. R. 6 Ch. 362; 24 L. T. 455; 19 W. R. 491.

In October, 1868, an agreement was entered into between two insurance companies, A. and B., by which A. sold its business to B., which was to undertake the liabilities and risks upon existing policies, and if required, issue new policies in exchange. A. was to be wound up voluntarily under liquidators nominated by B., and all its assets and property were to be collected by B. and distributed amongst A.'s creditors, with full power for B. to act in and use the name of A. On the 27th of November, 1868, an order was made on the petition of a creditor for compulsorily winding up A. The transferee of a policy on the life of Z. granted by A., paid the annual premium to A. in October, 1868, by whom it was received as agents for B., pursuant to resolution, and in December, 1868, sent the policy to B. for endorsement. Z. died in January, 1869, and in March the policy was indorsed with a memorandum, duly signed and sealed, that the property of B. should alone be liable for payment of the sum assured, and with a further memorandum that the claim of the transferee on the policy was admitted payable by instalments on specified days with interest. These instalments were paid in part, but an order having been made in November, 1869, to wind up B. compulsorily:—Held, that there was good consideration for the memorandum; and there was complete novation; and that the transferee was entitled to prove against B. for the balance

due upon the policy. *United Ports and General Insurance Co., In re, Evens' Claim*, L. R. 16 Eq. 354; 29 L. T. 22.

By the constitution of the A. life insurance company the policy-holders had votes at the meetings of the company, and shared in the profits; power was also given to the company, under resolutions made at meetings of the company to amalgamate with any other company. Under resolutions duly made, the property and liabilities of the company were by a deed, in which the property and liabilities were specified, transferred to the B. insurance company :—Held, that a policy-holder in the A. company whose policy was specified in the deed of transfer had no claim on the A. company. *Harman's Case, European Assurance Society, In re*, 45 L. J., Ch. 332; 1 Ch. D. 326; 33 L. T. 760—C. A.

By the deed of settlement of the A. insurance company it was provided that the funds and property of the company should alone be answerable for claims on the company; provision was also made for enabling the proprietors to dissolve the company, and thereupon the directors were to obtain from some other company an undertaking to pay the claims on the A. company, and were to transfer to that other company a sufficient amount of the assets of the A. company. The A. company was accordingly dissolved, and a portion of its funds was transferred to the B. company, which covenanted to satisfy the liabilities of the A. company. Full notice of this transaction was sent to the policy-holders of the A. company; and in the policies of that company it had been declared that the funds and property of the company should alone be liable to make good the claims under the policy, and the deed of settlement was also referred to. Both companies were wound up, and came under the European Assurance Society Arbitration Acts :—Held, that the A. company had, without the consent of the policy-holders, a right to dissolve itself and transfer its liabilities to the B. company; and that a policy-holder could claim only against the B. Company. *European Assurance Society, In re, Hort's Case, Grain's Case*, 45 L. J., Ch. 321; 1 Ch. D. 307; 33 L. T. 766.

In cases of so-called novation of an assurance contract the question for decision is one of fact, namely, with what intent was the premium paid to a different company, or into different hands from those intended in the original policy. *Ib.*

The deed of settlement of the Industrial Assurance Company gave power to dissolve the company by means of a resolution passed at a general meeting and confirmed at a second general meeting, and provided that thereupon the directors, after satisfying all immediate claims on the company, should obtain from some other company an undertaking to satisfy the remainder of the claims when the time for payment should arrive, and should transfer to such other company so much of the assets as should be agreed upon as sufficient to meet such claims. In accordance with these provisions, the Industrial Company was in 1855 dissolved, and a portion of its funds transferred to the People's Provident Society, which covenanted to satisfy the liabilities of the Industrial Company. In 1851 C. effected a policy of assurance with the Industrial Company on the non-participating scale. This provided that the subscribed capital, funds and property of the company should alone be liable to answer all claims under the policy, which was made subject to the conditions of the deed of settlement. C., though a non-participating policy-holder not entitled to vote at the meetings of members, received notice of the intended amalgamation, but he received no formal notice of the completion of the amalgamation, nor was his policy endorsed by the People's Provident Society. To that society, however, he paid his premiums for fifteen years, and the receipts were made out in its name:—Held, that the amalgamation was valid and binding upon C., and that he was also bound by acquiescence. *Industrial and General Life Assurance and Deposit Co., In re, Cocker's Case*, 45 L. J., Ch. 822; 3 Ch. D. 1; 35 L. T. 290—C. A.

Held, also, that the deed of settlement did not mean that the assets transferred to the transferee company should be ear-marked and kept separate for the purpose of being applied only to the payment of the liabilities of the transferring company. *Ib.*

An insurance company, which by its deed of settlement had power to transfer its business to another company, granted an annuity by a policy signed and sealed by three of its directors, which declared that the stocks and funds of the company should during the life of the annuitant be liable to pay the annuity. Fifteen years afterwards the company transferred its business to another company, in accordance with the power contained in the deed of settlement. Both companies being in liquidation, the annuitant claimed to prove against the transferring company :—Held, that the omission from the policy of any reference to the deed of settlement did not distinguish the case from *Hort's Case*, supra, and that the annuitant could only prove against the transferee company. *European Assurance Society, Dowse's Case, In re*, 46 L. J., Ch. 402; 3 Ch. D. 384; 35 L. T. 653—C. A.

Where original Company liable.]—In 1862 the business and assets of the Manchester Association were transferred to the Western Society, which was afterwards incorporated with the Albert Company. A policy-holder in the Manchester Association paid his premiums at the different offices and took receipts, which mentioned the successive changes, the last receipts being in the name of the Albert Company alone :—Held, that the receipts did not disclose enough to fix the policy-holder with knowledge of what had taken place between the companies, and that his executors were entitled to obtain a winding-up order against the Manchester Association. *Manchester and London Life Assurance and Loan Association, In re*, L. R. 5 Ch. 640; 23 L. T. 332; 18 W. R. 1185. Affirming 39 L. J., Ch. 595.

A life assurance society granted an annuity, charged upon the assets of the company, to the petitioner. Afterwards the company was dissolved by resolutions of the shareholders, and its assets transferred to company B. By the deed of transfer it was agreed that all the liabilities of company A. should be paid out of the assets of company B., and that company B. should indemnify company A. against them. It was also provided that both companies should use their best endeavours to induce the policy-holders and grantees of company A. to take in exchange policies and grants of company B. The petitioner received his annuity under his grant from company A. before the amalgama-

tion, and afterwards from company B., and gave receipts in the name of company B., until that company stopped payment, but his grant was never exchanged for a grant of company B. :—Held, that he had not accepted company B. as his debtor in place of company A. *Family Endowment Society, In re*, 39 L. J., Ch. 306; L. R. 5 Ch. 118; 21 L. T. 775; 18 W. R. 266.

G. effected three life policies with the M. society, without participation of profit, and it afterwards amalgamated with the A. company, transferring its assets and liabilities to that company. A notice of the amalgamation was sent to G.'s assignees, requesting them to send in their policies to be indorsed by the A. company. To this no reply was made. Afterwards a more specific request was made, asking them to send in the policies to be indorsed. This was done, but upon the company further asking the assignees to sign a memorandum that they agreed to the amalgamation, the assignees refused to do so, and the policies, though they had been sent in to the company, were not indorsed, but returned without any alteration. Meanwhile the premiums were paid to the A. company, which under the terms of the amalgamation was authorised to receive them. The M. company and the A. company having both been ordered to be wound up, the assignees sent in a claim against the M. company in respect of the policies :—Held, that they had not accepted the A. company in place of the M. company, and the claim was allowed. *Medical and Invalid, and General Life Assurance Society, In re, Griffith's Case*, 40 L. J., Ch. 464; L. R. 6 Ch. 374; 24 L. T. 455; 19 W. R. 491.

An insurance company having transferred its business to another company, a person who had purchased an annuity from the former company, declined to accept the liability of the latter company in lieu of his contract with the former :—Held, that the receipt by him of payments in respect of his annuity from the latter company was not evidence of adoption by him of the transfer, or that he regarded that company in any other light than as the agents of the former company. *India and London Life Assurance Co., In re, Dyke's Case*, 41 L. J., Ch. 601; L. R. 7 Ch. 651; 27 L. T. 191; 20 W. R. 790.

In 1861, C., a widow, effected a policy on her own life with the W. society "with profits, such profits to be appropriated, so as to make the policy payable during the lifetime of the assured." In 1863, the society (whose deed contained no power to do so) transferred its business to the B. association, and on this occasion a circular was sent to the policy-holders of the W. society, announcing the union of the two companies, and stating that the terms and conditions contained in the policies would remain unaltered by this arrangement; that the union of companies increases business, bonuses, &c., and that it had been arranged that in all future bonuses they should participate on an equality with the other policy-holders in the conjoint companies. The circular further offered an indorsement on the policy or a new policy in exchange. C. took no notice of this circular, but paid her premiums to the B. association, and accepted receipts from them until 1865, when the B. association transferred its business to the E. society. From that time she paid her premiums to the E. society and accepted receipts from them. In 1867 she received a circular from the E. society, announcing that a bonus had been allotted by the E. society, and that a reversionary sum had been added to her policy. She took no notice of this circular. In the winding-up she and her husband claimed on her policy against the W. society, which contended that her only claim was against the E. society :—Held, that she was entitled to rank as a creditor of the W. society. *European Assurance Society Arbitration Acts, &c., In re, Conquest's Case*, 45 L. J., Ch. 336; 1 Ch. D. 334; 33 L. T. 762—C. A.

V. WINDING UP.

a. Jurisdiction of Court as to.

Petition—Primâ facie Case.]—The 33 & 34 Vict. c. 61, s. 21, allows the winding-up of an insurance company on the ground that it is insolvent, taking into account its prospective liabilities, but provides that no hearing shall be given to the petitioner until a primâ facie case has been established. A petition having been answered by a fiat, the vice-chancellor held that this was equivalent to granting a hearing. On appeal to the Lord Chancellor to withdraw the fiat :—Held, that this was unnecessary, it being still open to the vice-chancellor to consider whether a primâ facie case was made. *European Assurance Co., In re*, 19 W. R. 881.

The practice in future will be to answer such petitions by a fiat, directing the judge to inquire whether a primâ facie case is made, so as to avoid the advertisement of the petition. *Ib.*

A petition was presented by two policy-holders to wind up compulsorily an insurance company which was being wound up voluntarily, containing charges of false representations and insolvency :—Held, that where a company was being wound up voluntarily it was unnecessary to consider whether a primâ facie case was stated, or to order security for costs under the Assurance Companies Act, 1870 (33 & 34 Vict. c. 61). *British Alliance Assurance Corporation, In re*, 9 Ch. D. 635; 38 L. T. 600; 26 W. R. 628.

Held, that policy-holders might present a petition under the act of 1870, although their debts did not amount to 50*l.*; that a statement that under the circumstances the company was "admittedly insolvent" was a sufficient statement that they could not pay their debts; and that the allegations of false representations, and the appointment of the secretary as provisional liquidator, were sufficient to render it just and equitable to make a winding-up order. *Ib.*

Held, also, that upon demurrer to a petition the counsel for the petitioner must open his case. *Ib.*

Under Companies Act, 1862.]—The effect of the 20 & 21 Vict. c. 80, was to leave the 7 & 8 Vict. c. 110 repealed as to insurance companies formed in the interval between the passing of the 19 & 20 Vict. c. 47, and the passing of the 20 & 21 Vict. c. 80; and therefore such companies were not required to be registered; and they may be wound up as unregistered companies under the Companies Act, 1862. *Bank of London and National Provincial Insurance Association, In re*, 40 L. J., Ch. 562; L. R. 6 Ch. 421; 19 W. R. 484.

An insurance company registered under 7 & 8 Vict. c. 110, resolved upon a voluntary winding-up, prior to the 25 & 26 Vict. c. 89, under which the company had never been registered :—Held, that such company was precluded by 25 & 26

Vict. c. 89, s. 209, from presenting a petition to wind up, either solely or in conjunction with a contributory. *Waterloo Life Assurance Co., In re*, 31 Beav. 586.

Under Companies Acts, 1870.]—The court has, by virtue of s. 2 of the Life Assurance Companies Act, 1870, jurisdiction to wind up an unregistered mutual life assurance society under the Companies Act, 1862. *Great Britain Mutual Life Assurance Society, In re*, 51 L. J., Ch. 10; 16 Ch. D. 246; 43 L. T. 684; 29 W. R. 202—C. A.

Liability of Policy-holders.]—But, semble, that the holders of policies in such a society are not liable to contribute to the payment of any debts; and that all that can be done in the winding-up is (after payment of the costs) to distribute the funds of the society among the policy-holders in proportion to the amounts of their respective claims. *Ib.*

Hearing of Petition.]—When a company, respondents to a winding-up petition, dispute the validity of the petitioner's debt they must adduce on the hearing such evidence as will shew the court that there is a question to be tried. If they fail to do this, a winding-up order ought to be made. *Ib.*

Scheme of Liquidation and Arrangement.]—The Albert Life Assurance Company had, during the period of its existence, absorbed a number of other similar companies, undertaking their liabilities. This company and several of the absorbed companies were ordered to be wound up. Numerous policies issued by the absorbed companies were still current, some only of the holders of these having accepted the Albert Company in lieu of the absorbed companies. In order to put an end to the liquidation, a scheme of reconstruction was proposed and accepted by large majorities, at meetings held both of the shareholders and creditors of the Albert Company, and also of the policy-holders of the absorbed companies. The outline of the scheme was, that the contributories of the Albert should pay up something more than the full amount of their shares; the contributories of the absorbed companies should pay such an additional sum as would be sufficient to raise the whole fund to the amount of the claims, less 5 per cent., and that the creditors should give up 5 per cent. of their claims. The fund thus raised was to be handed over to the trustees for a new assurance company, which was to take over all the business, and undertake to fulfil all liabilities, the trust fund being held in trust to secure payment:—Held, that as it was practically impossible to ascertain the true amount of the valid claims upon all the current policies, the court could not be judicially satisfied that majorities, in number representing three-fourths in value of the creditors of the several companies, had respectively assented to the scheme, and therefore the court had no power, under the Joint Stock Companies Arrangement Act, 1870, to sanction the scheme. *Albert Life Assurance Co., In re*, 40 L. J., Ch. 505; L. R. 6 Ch. 381; 24 L. T. 768; 19 W. R. 670.

Held, also, that, as regards the absorbed companies, the 95th, 159th and 160th sections of the Companies Act, 1862, did not apply. *Ib.*

—— **Reduction of Contracts.**]—Two petitions having been presented by policy-holders for the winding-up of a mutual life assurance society, the society admitted their insolvency, and a winding-up order was made on the second petition, on the ground that the validity of the first petitioner's debt was disputed. But liberty was given to the first petitioner to apply for the costs of her petition, if her claim should be ultimately established. She appealed, and before the appeal came on for hearing a committee of policy-holders was formed, who desired that the court should exercise the power given to it by s. 22 of the Life Assurance Companies Act, 1870, of reducing the amount of the contracts of the society instead of making a winding-up order:—Held, that this power could not be exercised so long as the winding-up order remained, and that the order ought to be discharged, and a meeting of the policy-holders summoned in order to ascertain their wishes. *Great Britain Mutual Life Assurance Society, In re*, 51 L. J., Ch. 10; 16 Ch. D. 246; 43 L. T. 684; 29 W. R. 202—C. A.

And the further hearing of the appeal was adjourned until after the meeting should have been held. *Ib.*

A petition having been presented for the winding-up of a life assurance company, an order was made under the Life Assurance Companies Act, 1870, s. 22, directing a scheme to be prepared for the reduction of the contracts of the company:—Held, that in the absence of special circumstances the contracts to be included in a scheme for reduction are to be ascertained not at the time of settling the scheme, nor at the date of the order directing a scheme, but at the date of the presentation of the winding-up petition, so that no persons whose contracts have not matured into debts until after the presentation of the petition are entitled to be paid in full. *Great Britain Mutual Life Assurance Society, In re*, 51 L. J., Ch. 506; 20 Ch. D. 351; 46 L. T. 73, 616; 30 W. R. 374—C. A.

Winding up—Scheme for Reduction of Contracts.]—On a petition for winding up an insolvent life assurance company, it was suggested that there should be an order for the reduction of the amount of the contracts of the company under s. 22 of the Life Assurance Companies Act, 1870, instead of a winding-up order. The matter was referred to chambers, so that steps might be taken, by holding meetings or otherwise, to ascertain what course ought to be adopted, and the petition directed to stand over generally for the meetings to be held, the meetings of the policy-holders and shareholders to be separate. *Briton Medical and General Life Assurance Co., In re*, 54 L. T. 14.

b. Liability of Contributories.

Shareholders.]—An unregistered assurance society issued policies under which the assets of the company alone were liable. The company, being insolvent, was registered as an unlimited company, under the act of 1862, and immediately afterwards ordered to be wound up:—Held, that the shareholders were liable beyond the amount of their shares for the expenses of the winding-up; but that there was no liability beyond the amount of the shares for any breach of contract involved in ceasing to carry on business. *Lethbridge* v. *Adams*, 41 L. J., Ch. 710; L. R. 13 Eq. 547; 26 L. T. 547; 20 W. R. 352.

In the case of an insurance company in liquidation, whose assets are limited as regards policy-holders and unlimited as regards other creditors, s. 38, sub-s. 6, of the Companies Act, 1862, is only intended to protect the contributories as against the claims of the policy-holders, and does not affect the liability of contributories who have not compromised their liabilities, under s. 160, to pay the whole of the costs of the liquidation, although the whole of the nominal share capital has been called up. *Accidental Death Insurance Co., In re*, 47 L. J., Ch. 396 ; 7 Ch. D. 568 ; 26 W. R. 473.

The deed of settlement of an insurance company registered in 1854 under 7 & 8 Vict. c. 110, provided that every policy issued by the company should contain a proviso limiting the claims of the policy-holder to the amount of the share capital, but left the liabilities of the shareholders in other respects unlimited. All the policies issued by the company contained the required proviso. In 1868 the company was ordered to be wound up. During the liquidation the whole of the nominal share capital was called up, and several of the contributories compromised their liabilities by agreements with the liquidator in manner provided by s. 160 of the Companies Act, 1862, and rules of 1862, schedule III., form No. 50. The liquidator having, for the purpose of raising a fund for the payment of the past and future costs of the liquidation, made a further call on those contributories who had not compromised :—Held, that those contributories were not entitled to require that the amounts received under the compromises should be marshalled between the liability for costs and the liability under policies ; and that the contributories who had not compromised alone remained liable for the costs of the liquidation. *Ib.*

By the deed of settlement of an unregistered life assurance company, it was provided that the liability of the shareholders in respect of policies should be limited to the subscribed capital. At the time of the winding-up of the society, which happened in 1869, 9*l.* per share of the subscribed capital remained uncalled up, and in 1870 a call of this 9*l.* per share was made. In 1873 a further call of 12*l.* per share was made, it having been ascertained that a call to that amount would, with the 9*l.* per share, pay the debts of the society. Compromises were entered into by the liquidator with certain of the contributories who were unable to pay the calls in full :—Held, that where the compromise was for 9*l.* per share or less, the whole of the sum received by way of compromise was to be carried to the account of policy-holders, and that where the sum received by way of compromise amounted to more than 9*l.* per share, then a sum equivalent to 9*l.* per share was to be carried to the account of the policy-holders, and the residue was to be applied to the payment of the general creditors of the society. *International Life Assurance Society, In re*, 47 L. J., Ch. 88 ; 36 L. T. 914.

By a policy issued by a company on the life of an individual, it was expressly provided that no shareholder should be liable to any claims under the policy beyond the amount unpaid of his shares in the capital of the company. The company had been ordered to be wound up, and judgment had been recovered against the official manager in respect of the policy. The official manager then applied for an order for a call on those persons who were on the list of contributories of the company, sufficient to pay the amount of the judgment :—Held, that no call should be made upon any shareholders who had paid up the full amount of their shares in the capital of the company, or upon any other shareholders beyond the amount remaining unpaid upon the shares. *Athenæum Life Insurance Society, In re, Prince of Wales Life and Educational Insurance Society, Ex parte*, 3 De G. & J. 660 ; 28 L. J., Ch. 335 ; 5 Jur. (N.S.) 558 ; 7 W. R. 300.

A company granted policies of assurance, by the terms of which the assured had no claim against the shareholders beyond the amount unpaid on their shares. Under the winding-up, the assets of the company, including the full amount payable on the shares, were applied in paying the policy-holders and the general creditors pro ratâ. It was decided by the master of the rolls that the balance remaining due to the general creditors, and the costs of the winding-up, must be raised by a call on the shareholders. On appeal to vary this decision by making the costs of realising the assets a deduction from the assets, so as to throw a share of such costs on the policy-holders :—Held, that the costs of realising the assets, in the course of a winding-up by the court, ought to be treated as part of the costs of the winding-up, and to be borne wholly by the shareholders. *Professional Life Assurance Co., In re*, L. R. 3 Ch. 167 ; 17 L. T. 631 ; 16 W. R. 295.

Priorities.]—The deed of settlement of the company, formed under 7 & 8 Vict. c. 110, contained a provision that each shareholder, as between him and the other shareholders, should be liable to the debts of the company in proportion to his interest in the property of the company, but not further or otherwise, and a covenant that if any shareholder should pay a debt due from the company, the debt should be divided into as many parts as there were shares, and each shareholder should pay one or more such parts in proportion to his interest in the capital of the company, such interest to be determined by the number of his shares. It was also provided that if the company was indebted to a shareholder, the directors should pay him as if he was not a shareholder :—Held, that on the winding-up of the company, the shareholders who were creditors of the company, were entitled to be paid in full like other creditors, by means of a call on the shareholders, they being debited with the call in respect of their own shares, and that if any of the shareholders could not pay the call, the deficiency must be made up by the others. *Professional Life Assurance Co., In re*, supra.

By the terms of the policies granted by a company, the shareholders of the company were not to be liable further than as to their respective shares in the capital of the company. The shareholders had not paid up the full amount of their shares when the company suspended business :—Held, that those who had insured must have a right out of the funds of the company, made up as they ought to be, to receive the value of their present interest in their policies. *Evans* v. *Coventry*, 8 De G. M. & G. 835 ; 26 L. J., Ch. 400 ; 3 Jur. (N.S.) 1225 ; 5 W. R. 436.

An assurance society granted policies both in a participating and non-participating form. The former class stipulated that the funds and property of the society should, subject to the deed of settlement, be liable to pay the sum assured, with such further sum as should, pursuant to

the rules of the society, be appropriated by way of bonus or addition, with a proviso that the funds of the society should alone be liable, and negativing personal liability. The latter class stipulated that the funds and property of the society should, subject to the deed, be liable to pay the sum assured, with a proviso that the funds of the society, by the deed applicable to the payment of policies, should alone, subject to prior claims thereon, pursuant to the deed, be liable, and negativing personal liability. The deed provided that the actuary should estimate the amount of profits, that this estimate might be rejected or reduced by a meeting of shareholders, and that six-tenths of the divisible profits so ascertained should be apportioned by the actuary, as he thought fair, among the participating policy-holders:—Held, that such policy-holders were not partners. *English and Irish Church and University Assurance Society, In re*, 1 H. & M. 85; 8 L. T. 724; 11 W. R. 681.

Held, also, that claimants under both classes of policies were entitled to be paid out of the assets (the company being in course of winding-up) pari passu with general creditors, as to whom the liability of the shareholders was unlimited. *Ib.*

The deed of settlement of an assurance company provided that every policy should contain a reference to the deed, and a proviso that it should take effect only out of the funds which "should, under the provisions of the deed at the time when the liability should accrue, be at the disposal of the directors." It also directed that all sums insured should be paid three months after proof of death, that a capital fund and a life assurance fund should be formed from the subscriptions and the premiums respectively, that the latter was to be applied in payment of management, expenses, and losses on policies, and that any deficiency was to be made up by the capital fund. A policy was granted, stipulating that the funds remaining at the time of any claim or demand unapplied and undisposed of, and inapplicable to prior demands pursuant to the deed, should be liable to answer the demand, and negativing individual liability:—Held, that this constituted a charge on the funds, and that it took priority from the date of proof of death, although not payable until three months later. *Athenæum Life Assurance Society, In re, Prince of Wales Life Assurance Society, Ex parte*, Johns. 633; 6 Jur. (N.S.) 12.

Individual Liability.]—A policy under the seal of a company contained the following proviso: "That the policy or anything therein contained shall in no case extend or be deemed or construed to extend, to charge or render liable the respective proprietors of the company, or any of them," to any claim or demand whatsoever in respect of the policy, or of the assurance thereby made, beyond the amount of their, his or her individual share or shares in the capital stock of the company; but that the capital stock and funds of the company shall alone be charged and liable to answer all claims and demands by virtue of the assurance, or incident thereto:—Held, that the terms of the policy precluded the assured from any remedy at law against individual shareholders, and consequently, that after using due diligence to obtain satisfaction of a judgment recovered against the company in an action on such policy, by execution against their property, he was not entitled to issue execution against an individual shareholder, under 7 & 8 Vict. c. 110, ss. 66, 68. *Halket* v. *Merchant Traders' Insurance Co.*, 13 Q. B. 960; 19 L. J., Q. B. 59; 14 Jur. 222. S. P., *Hassell* v. *Merchant Traders' Insurance Co.*, 4 Ex. 525; 19 L. J., Ex. 183. S. P., *Athenæum Life Assurance Co., In re*, 4 Kay & J. 517; 27 L. J., Ch. 798; 4 Jur. (N.S.) 1137; 6 W. R. 765.

Joint Contract to Pay out of Capital Stock only.]—In an action against five persons on a policy, the declaration alleged that they were shareholders of and partners in the General Maritime Assurance Company; that the plaintiff effected a policy with the company on a ship for twelve months, by which "it was declared and agreed, by and between the company, and the assured, that the capital stock and funds of the company should alone be liable to answer and make good all claims and demands whatsoever under or by virtue of the policy; and that no proprietor of the company should be in anywise subject or liable to any claims, nor in anywise charged, by reason of the policy, beyond the amount of his shares in the capital stock of the company, it being one of the original and fundamental principles of the company that the responsibility of the individual proprietors should in all cases, and under all circumstances, be limited to their respective shares in the capital stock." Averment, that in consideration that the plaintiff paid the premium for the insurance of 1,100*l.*, and undertook to perform all things in the policy on the part of the assured to be performed, the defendants promised him that they would become insurers, and perform all things in the policy on their part as insurers to be performed; and the defendants became insurers, and subscribed the policy. The declaration averred a loss; that the capital stock and funds of the company were sufficient to pay the 1,100*l.*, but that the defendants had not paid. On the trial the plaintiff put in the deed of settlement of the company and the policy, and proved that the defendants were shareholders, and one of them, G., a director in the company. The deed of settlement recited that the company was formed for the purpose of effecting insurances on vessels, and that it was agreed that the capital should consist of 1,000,000*l.* in 100*l.* shares; that the business of the company might be carried on, although the whole of the capital of the company was not subscribed for; that the direction of the affair should be confided to a board of directors, who had power to make calls; that every policy should be signed by three directors, and they should be indemnified out of the funds of the company for all liabilities; that the directors should cause it to be stated in every policy that the subscribed capital of 1,000,000*l.* and the funds of the company should alone be liable to make good all claims upon the company in respect of such policy; that the directors signing the policy should not be responsible to a greater extent than the funds in their hands or power; and that no proprietor should be liable beyond the amount of the unpaid part of his shares. The policy purported to be made between the company and the assured, and was signed by three directors of the company, none of whom were defendants. Evidence was also given that only 75,000 shares had been subscribed for, of which 5,000 were held by the defendants and others at the time of the commencement of the suit, the remainder having become forfeited;

that calls had been made to the extent of 25*l.* per share; and that the company had ceased to underwrite policies. On behalf of G. it was proved that the company had not at the time of the loss, nor since, any available funds in their hands wherewith to satisfy the plaintiff's claim:—Held, first, that the policy amounted to a joint contract that the company should pay out of their capital stock. *Hallett* v. *Dowdall*, 18 Q. B. 2; 21 L. J., Q. B. 98; 16 Jur. 462—Ex. Ch.

Held, secondly, that the declaration shewed a joint promise by the defendants, and was therefore good. *Ib.*

Past Shareholders.]—A company compulsorily registered under s. 209 of the Companies Act, 1862, is in the same position as a company voluntarily registered under that act, and has all the benefits and is subject to all the liabilities which other companies have or are subject to under the act, and is therefore affected by the provisions of s. 38. *Ramsay's Case*, 46 L. J., Ch. 411; 35 L. T. 654; 25 W. R. 279—C. A.

Therefore a shareholder in an insurance company, compulsorily registered under s. 209, who has transferred his shares within a year before the presentation of a petition to wind up the company, is liable to be placed on the B. list of contributories as a past member under s. 38, although that section applies in terms only to companies formed under the act. *Ib.*

Where Transfer.]—The deed of settlement of an insurance society, originally registered under the Industrial and Provident Societies Acts, and established primarily for the purpose of effecting insurances against sickness and infirmity and on lives, after stating the objects of the society, continued as follows: "And generally to make and effect insurances against all and every kind of risk, special or general, which may be effected according to law." The society, after confining its operations to life insurance for twelve years, commenced a fire insurance business in a separate department, the capital of which was raised by the issue of B. shares. Afterwards, under the belief that such issue was ultra vires, the fire business was made over to a new company, the B. shares being cancelled, and shares in the new company being allotted to the B. shareholders in lieu thereof. The new company was subsequently wound up:—Held, that the carrying on of a fire insurance business by the original society was not ultra vires; that the issue of the B. shares was valid; and that the B. shareholders were liable in the winding-up to contribute as past members. *Norwich Provident Insurance Society, In re, Bath's Case*, 47 L. J., Ch. 601; 8 Ch. D. 334; 38 L. T. 267; 26 W. R. 441—C. A.

Exchanging Shares for those in New Company—Other Shares paid in Cash.]—The deed of settlement of an insurance association, dated in 1856, contained clauses empowering the directors, with the sanction of general meetings, to purchase shares on behalf of the association; and to dissolve the association, and transfer the business to any other insurance company. The association was never registered; and, in 1858, it was resolved that the business should be transferred to a company; each proprietor in the association to have the option, either of being repaid in money the amount he had paid upon his association shares, or to have the company's shares allotted to him in lieu of his association shares. The transfer having been effected by deed, and the company and the association being both afterwards in liquidation:—Held, that a shareholder in the association who had for some of his association shares received the company's shares, and for others cash, was liable to be retained on the list of contributories of the association. *Bank of London Assurance Association, In re, Part's Case*, L. R. 10 Eq. 622; 23 L. T. 305; 18 W. R. 977.

Inrolment by Company of Persons ceasing to be Members—Non-inrolment.]—In 1844 the European Life Assurance Company obtained an act conferring on it certain powers, and enacting that when any persons should cease to be shareholders of the company, or when any other persons should be admitted as shareholders of the company, the company should within six months from the happening of such event cause to be inrolled in the High Court of Chancery a memorial of the name, residence, and description of every person so ceasing to be a shareholder, and of every person so admitted to be a member of the company, and that until such inrolment the persons whose names should appear in the then last inrolled memorial should be liable to all legal proceedings under the act as existing shareholders of the company, and should be entitled to be reimbursed out of the funds or property of the company for all losses sustained in consequence. In 1858 arrangements were made for the transfer of the business and assets of the European Company to the People's Provident Society, and a deed of amalgamation was executed, whereby, in pursuance of these arrangements, the European Company transferred its business and assets to the People's Society, which covenanted to pay and satisfy the debts and liabilities of the European Company and to indemnify the shareholders of the European Company in respect thereof. Some of the shareholders of the European Company received 8*l.* per share, and the rest (except five) received shares in the People's Society in respect of their shares in the European Company. In consideration thereof they transferred their shares in the European Company to the general manager of the People's Society. D. was one of the shareholders who thus transferred his four shares, for which he received 8*l.* a share. No memorial of the transfer was ever inrolled in chancery, nor was it registered in the books of the company. The European Company was ordered to be wound up, and D.'s name, which appeared in the last inrolled memorial in respect of the four shares, was placed on the list of contributories:—Held, that there was nothing in the act of 1844 which made D. liable to be a contributory in the winding-up of the company, and that he was entitled to have his name removed from the list of contributories. *European Assurance Society Arbitration Acts, In re, Doman's Case*, 45 L. J., Ch. 801; 3 Ch. D. 21; 34 L. T. 929—C. A.

Company not liable as Shareholder of Company bought up.]—The B. N. company was an insurance company established with 10*l.* shares under a deed of settlement which provided that every instrument whereby the company became liable to pay money should contain a clause limiting the liability of shareholders to the amount payable on their shares. The deed contained a power to the company, with the sanction of an extraordinary general meeting, to purchase the business of any other company of

a similar nature, upon such terms as the meeting should think fit. The company resolved to purchase the business of the B. C. company, an insurance company whose capital was divided into 50*l.* shares, on each of which 5*l.* had been paid, and whose deed of settlement contained no power to sell the business. The transaction was completed by purchasing the shares of the B. C. company, which were transferred to various officers of the B. N. company. Subsequently a deed was executed by which these transferees transferred their shares to the B. N. company, and thereupon that company was entered on the register of shareholders of the B. C. company, and remained so registered for some years. This deed was never sanctioned by a general meeting of the B. N. shareholders. An order having been made for winding up the B. C. company :—Held, that the transfer of the shares to the B. N. company was ultra vires and invalid, and that the B. N. company could not be placed on the list of contributories of the B. C. company. *British Commercial Insurance Co.* v. *British Nation Life Assurance Association*, 48 L. J., Ch. 118 ; 8 Ch. D. 679 ; 39 L. T. 136 ; 27 W. R. 88—C. A.

Liability of Shareholders and participating Policy-holders inter se.]—The articles of association of an unlimited mutual insurance society provided that the company should at first consist of two classes of members, namely, shareholders, so long as there should be any, and assurance members, who were policy-holders with participation in the profits and registered as members ; and that when the shareholders should be paid off under the scheme provided for, then the company should consist of assurance members only. The shareholders were to have 6*l.* per cent. on their paid-up calls, and every three years the profits were to be calculated, and one-fourth paid to the shareholders, and the other three-fourths carried to the assurance fund and appropriated by way of bonus to the policies of the participating policy-holders who had paid five years' premiums. The company was wound up before the shareholders had been paid off, and the participating policy-holders were declared by the court to be contributories :—Held, that although the participating policy-holders were members and contributories under the special terms of the articles, they could not be called upon to contribute until the shareholders had been exhausted. The presumption of law that in the absence of express stipulation, partners must share losses in the same proportion as they share profits, held not to apply to such a case, the assured members having no direct participation in profits. *Albion Life Assurance Society, In re*, 16 Ch. D. 83 ; 43 L. T. 523 ; 29 W. R. 109—C. A.

—— **Policy-holder who has Assigned.**]—Where the constitution of a life insurance society was such that participating policy-holders were liable as contributories after shareholders, it was held on the construction of the articles that a policy-holder who had assigned his policy before the winding-up was not liable as a contributory, although no other person had been made liable to contribute in respect of his policy in his stead. *Albion Life Assurance Society, In re, Brown, Ex parte*, 50 L. J., Ch. 714 ; 18 Ch. D. 639 ; 45 L. T. 269 ; 30 W. R. 30.

—— **Limitation of Liability — Constructive Notice.**]—In consequence of a decision that the N. society (now in course of being wound up) had not been acting ultra vires in entering into "treaty" agreements, and that the R. company were entitled to prove for their claim in respect of a transaction of that nature, the official liquidator of the N. society applied by summons for an order that no call should be made in respect of such claim upon any of the contributories of the N. society who had paid up the full amount of their shares, nor upon any of such contributories beyond the amount unpaid of their shares :—Held, that on the face of the contracts no limitation of liability was expressed, neither could it be inferred by intendment of law ; and that the doctrine of constructive notice could not be extended to cover such a case as the present :—Held, also, that the shareholders in the N. society were liable for the full amount of the claim ; and that not only was the capital stock of the N. society liable for those sums, but that the liability was one which, until those sums were paid, must be without limit. *Norwich Equitable Fire Assurance Society, In re*, 58 L. T. 35.

c. CLAIM AND PROOF OF POLICY-HOLDERS.

Claims—When accruing.]—The policies of a company provided that the funds and property of the company, "after satisfying all assurances granted by the society previously payable, and all other prior charges on such funds on property," should alone be liable for payment of the sum assured, and that no member of the company should be liable for it beyond the amount unpaid on his shares. An order having been made for winding up the company :—Held, that a sum which had become payable on a policy before the commencement of the winding-up, but had not been paid, had no priority over the claims of policy-holders, the moneys assured by whose policies had not become payable. *International Life Assurance Society, In re, M'Iver's Claim*, L. R. 5 Ch. 424 ; 23 L. T. 38 ; 18 W. R. 794.

The holder of a fire policy issued by a fire insurance company is entitled, upon the company being ordered to be wound up, to prove in the winding-up for the full amount of loss covered by the policy and sustained by him through a fire which has occurred in the course of the winding-up although after the date of the winding-up order, and whether the time limited for sending in claims in the winding-up has expired or not :—A fortiori, a claim on account of a fire which has occurred after the presentation of the petition but before the order to wind up, is entitled to proof. *Northern Counties of England Fire Insurance Co., In re, Macfarlane's Claim*, 50 L. J., Ch. 273 ; 17 Ch. D. 337 ; 44 L. T. 299.

The winding-up of an insurance company renders it impossible for the company to perform its contract with the policy-holder, who is therefore entitled to claim damages for the breach of such contract ; and such claim is unaffected by the nonpayment on his part of the premiums payable after the presentation of the petition. *Albert Life Assurance Co., In re, Cooke and Edwards' Case*, 39 L. J., Ch. 257 ; L. R. 9 Eq. 703 ; 22 L. T. 92 ; 18 W. R. 426.

Amount — Terms and Priorities.]— In the winding-up of a life assurance company, a policy-holder will be allowed to prove for such

sums as would be charged for the issue of a policy on the same terms as the old policy was held on, by a company whose rates of premium and circumstances are as nearly as possible similar to those of the company in liquidation. *Albert Life Assurance Co., In re, Bell's Case*, 39 L. J., Ch. 539; L. R. 9 Eq. 708; 22 L. T. 697; 18 W. R. 688. S. P., *Warner's Case*, 39 L. J., Ch. 736; 18 W. R. 1097.

Participating policy-holders are to have the benefit of any bonus declared before the winding-up; but in estimating the value of their policies, they are not to be considered entitled to future gains. *Ib.*

The time of claim being sent in is to fix the value of each debt. If an assured life drops after claim sent in, the death of the assured may be used as evidence of the value of the policy at the time of claim. *Ib.*

A policy-holder whose debt has matured before the winding-up, but has not been paid, is not entitled to priority. *Ib.*

The liability of the shareholders in an insurance company on the policies they issued was limited by the terms of the policies to the subscribed capital:—Held, that the cessation of business and winding-up of the company was not a breach of contract, so as to make the shareholders liable in full as for damages, for the value of such policies. *Ib.*

An assurance company having been ordered to be wound up:—Held, that a policy-holder was entitled to prove for the sum which a solvent assurance office, having the same rate of premiums and the same extent of proprietary capital as the company in liquidation, would require him to pay, in order to obtain a policy of the same amount and under the same conditions at the same premium. *English Assurance Co., In re, Holdich's Case*, 42 L. J., Ch. 612; L. R. 14 Eq. 72; 26 L. T. 415; 20 W. R. 567.

Policy-holders—General Creditors.]—By the policies of an insurance company it was declared that the stock and funds of the company should be subject and liable to pay the sum assured, with a proviso that the stock and funds of the company should be alone liable, and that no member of the company should be individually liable beyond the amount of his share in the capital stock:—Held, that these policies did not give the assured a charge on the funds of the company, so as to entitle them to priority over its general creditors. *State Fire Insurance Co., In re*, 1 De G. J. & S. 634; 2 N. R. 565; 33 L. J., Ch. 123; 11 W. R. 1011.

Set-off of Policy-holders.]—A policy-holder borrowed from the company in which his life was insured a sum of money, and deposited his policy with the company as security for the amount so borrowed. The company was being wound up, and the policy-holder carried in his claim for the ascertained value of his policy. The claim was allowed, and the policy-holder thereby became an admitted creditor of the company for the amount of his claim:—Held, that the policy-holder could not set off his claim against the company against the sum which he had borrowed from the company. *Albert Life Assurance Co., In re, Parlby's Case*, 40 L. J., Ch. 340; 19 W. R. 615—L.JJ.

The official liquidators of an assurance company admitted that a certain amount was due from the company on a claim made before the winding-up order upon the loss of a ship insured:—Held, that the policy-holder was entitled to set off against that amount sums due from him for unpaid premiums. *Progress Assurance Co., In re, Bates, Ex parte*, 39 L. J., Ch. 496; 22 L. T. 430; 18 W. R. 722.

Investment of Premiums to meet Claims.]—A contract by an insurance company with insurers that a certain proportion of their premiums shall be invested and appropriated for payment of their claims in priority to general liabilities of the company is legal and enforceable by the policy-holders upon the company's insolvency. *British Imperial Insurance Corporation, In re, Farr's and Whittall's Claims*, 47 L. J., Ch. 318.

d. OTHER MATTERS.

Appeal under European Arbitration Act.]—By the European Arbitration Act, 1875, it was enacted, that as regards any determination or order given or made before the passing of the act, no appeal should lie therefrom unless the arbitrator expressly certified in writing that by reason of differences between previous decisions on matters of principle it was desirable that an appeal should be brought:—Held, that a formal certificate from the arbitrator, and not a mere expression of opinion, was necessary to give the Court of Appeal jurisdiction; and that differences between previous decisions referred to decisions before the passing of the act. *British Commercial Insurance Co.* v. *British Nation Life Assurance Association*, 48 L. J., Ch. 118; 8 Ch. D. 679; 39 L. T. 136; 27 W. R. 88—C. A.

Amalgamation—Winding-up—Delivery back of Securities.]—By an agreement between three directors of the Albert Company and three directors of the Western Society, it was agreed that the company should take upon itself all the liabilities of the society, and that in consideration of such undertaking the society should transfer to the company all the funds and property of the society. Amongst the latter were a lease which had been taken in the name of a trustee for the society; mortgages which had been made to trustees for the society to secure sums advanced by the society to mortgagors; and re-assurance policies which had been effected by the society with other assurance companies on the lives of their own policy-holders, in order to cover part of their liability. On the execution of the agreement, the lease, mortgage deeds, and re-assurance policies were handed over, but the lease and mortgages were not, and had not since been, assigned to the company. Several policy-holders of the society did not accept the united company as their debtors. In 1869 the company, and afterwards the society, were ordered to be wound up. The indemnity of the company having thus failed:—Held, that the liquidator of the society was not entitled, on the principle of lien for unpaid purchase-money, to have delivered back to him by the liquidators of the company the lease, mortgages, and re-assurance policies which had been handed over to the company. *Albert Life Assurance Co., In re, Western Life Assurance Society, Ex parte*, 40 L. J., Ch. 166; L. R. 11 Eq. 164; 23 L. T. 726; 19 W. R. 321.

Liquidator not entitled to benefit of Re-insurance.]—Held, also, that the liquidator of the society was not entitled, on any principle analogous to the right of a surety who discharges the debt of his principal, to the benefit of the re-assurance policies. *Ib.*

Life Insurance Company—Deposit Money—Change of Investment — Jurisdiction.] — The court has power, under rule 4 of the Board of Trade Rules of 1872, to authorise an investment in annuities (class B) of the East Indian Railway Company of moneys deposited in court by an insurance company under the provisions of the Life Assurance Companies Act, 1870. *Blue Ribbon Life Assurance Co., In re*, 59 L. J., Ch. 276; 61 L. T. 660; 38 W. R. 104.

Deposit of Fund in Court—Payment out.]—Where a petition is presented under the Life Assurance Companies Acts, 1870, 1871, and 1872, for payment out of court to the company of the statutory deposit of 20,000*l.*, the petition must contain a statement of rule 6 of the Board of Trade Rules, 1872, which provides for payment out of the deposit money so soon as it is proved to the satisfaction of the court that the life assurance fund of the company, in respect of which the deposit was made, amounts to the sum of 40,000*l.* *Le Phénix, In re*, 58 L. T. 512.

Letters of Administration—Presumption of Death—Notice to Insurance Company.]—Where the estate of a person whose death the court were asked to presume consisted in part of a policy of assurance on his life, the court ordered that notice of the application should be given to the insurance company. *Barber, In goods of*, 11 P. D. 78; 56 L. T. 894; 35 W. R. 80.

Income Tax—"Profits and Gains"—Bonuses to Participating Policy-holders.]—A life insurance company issued "participating policies," according to the terms of which any surplus which existed at the end of each quinquennial period in the hands of the company, after payment of policies falling due during such period, and provision for outstanding liabilities, was dealt with as follows: two-thirds of the surplus went to the policy-holders, who received payment thereof either by way of bonus or abatement of premiums; the remaining third of the surplus went to the company, who bore the whole expenses of the business, the portion remaining after payment of expenses constituting the only profit available for division:—Held (by Lords Blackburn and Fitzgerald, Lord Bramwell diss.), that the two-thirds returned to the policy-holders were "annual profits or gains" and assessable to income tax. *Last* v. *London Assurance Corporation*, 55 L. J., Q. B. 92; 10 App. Cas. 438; 53 L. T. 634; 34 W. R. 233; 50 J. P. 116—H. L. (E.)

Annual Profits and Gains—Mutual Insurance Company — Bonuses.]—The appellant company carried on the business of a mutual life insurance company. There were no shares or shareholders, and the members of the company were the policy-holders. The premiums paid by them were calculated at a rate which left a surplus after providing for the yearly expenditure, and this surplus was either returned to the assured as bonuses in addition to the sums insured, or was applied in reduction of premiums, or was carried over to the credit of the members of the company:—Held, that this surplus did not constitute profits or gains liable to be assessed to income tax. *New York Life Insurance Co.* v. *Styles*, 14 App. Cas. 381; 59 L. J., Q. B. 291; 61 L. T. 201—H. L. (E.)

—— **"Profits and Gains"—Interest arising from Investments.**]—The amount of interest arising from investments made by an insurance company for the purpose of carrying on their business on which income tax had been deducted at its source amounted to more than the profits of the company for the year of assessment, but the company had during the year received interest from investments on which income tax had not been deducted at its source:—Held, that under s. 102 of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), and schedule D. of s. 2 of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), the company were liable to pay income tax on the interest from which income tax had not been deducted at its source. *Last* v. *London Assurance Corporation* (10 App. Cas. 438) considered. *Clerical, Medical, and General Life Assurance Society* v. *Carter*, 58 L. J., Q. B. 224; 22 Q. B. D. 444; 37 W. R. 346; 53 J. P. 276—C. A.

See also REVENUE.

VI. FOREIGN COMPANIES.

Commencing Business in the United Kingdom—Payment out of Deposit—Accumulation Fund in Foreign Country.]—In the case of a petition presented under the Life Assurance Companies Acts, 1870 and 1872, and the Board of Trade rules made in pursuance of these acts, praying for payment out "to the depositors of 20,000*l.* required to be deposited in court by a foreign life assurance company before commencing business in this country," the court will make the order prayed for, notwithstanding that the Life Assurance Companies Act, 1870, s. 3, enacts that the deposit shall be returned to the company. The life assurance fund of 40,000*l.* required by the section to have been accumulated prior to the return of the deposit may consist of accumulations already existing abroad, and arising from the original business of the company. *Colonial Mutual Life Assurance Society, In re*, 21 Ch. D. 837; 46 L. T. 282; 30 W. R. 458.

VII. ACTIONS BY.

Disqualification of Company.]—A company registered under 7 & 8 Vict. c. 110, established for the following purposes:—The granting of policies upon lives or survivorships, the granting of annuities and sums during sickness, and the granting of loans at a limited rate of interest, was not disqualified, by reason of the enactments contained in 20 & 21 Vict. c. 14, ss. 27, 28, from suing either at law or in equity, unless registered under 19 & 20 Vict. c. 47, and 20 & 21 Vict. c. 14. *London and Provincial Provident Society* v. *Ashton*, 12 C. B. (N.S.) 709, 723; 7 L. T. 530; 11 W. R. 152—Ex. Ch. Overruling *London Monetary Advance Co.* v. *Smith*, 3 H. & N. 543.

Subrogation.]—A vendor contracted with a purchaser for the sale, at a specified sum, of a

house, which had been insured by the vendor with an insurance company against fire. The contract contained no reference to the insurance. After the date of the contract, but before the date fixed for completion, the house was damaged by fire, and the vendor received the insurance money from the company. The purchase was afterwards completed, and the purchase-money agreed upon without any abatement on account of the damage by fire, was paid to the vendor:—Held, in an action by the company against the vendor, that the company were entitled to recover a sum equal to the insurance money from the vendor for their own benefit. *Castellain* v. *Preston*, 52 L. J., Q. B. 366; 11 Q. B. D. 380; 49 L. T. 29; 31 W. R. 557—C. A.

R. G. M.

INTEREST.

A. ALLOWANCE OF.

1. *In General*, 155.
2. *Under* 3 & 4 *Will.* 4, *c.* 42, *s.* 28, 165.
3. *On Judgments—See* JUDGMENT.
4. *On Costs—See* COSTS.
5. *On Solicitor's Bill—See* SOLICITOR.
6. *On Legacies — See* EXECUTOR AND ADMINISTRATOR—WILL.
7. *On Insurance Policies—See* INSURANCE.
8. *On Mortgages—See* MORTGAGE.
9. *On Bonds—See* DEED AND BOND.
10. *On Sales of Land—See* VENDOR AND PURCHASER—LANDS CLAUSES ACT.
11. *On Bills of Exchange—See* BILLS OF EXCHANGE.
12. *On Annuities—See* ANNUITY.
13. *On Taking Accounts—See* PARTNERSHIP—ACCOUNTS AND INQUIRIES.
14. *Parties in Fiduciary Relation — See* EXECUTOR—PRINCIPAL AND AGENT—TRUST AND TRUSTEE.
15. *On Bills of Sale—See* BILLS OF SALE.
16. *In Other Cases*—See respective titles.

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C. COMPOUND INTEREST, 172.

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E. PAYMENT OF, WHEN AN ACKNOWLEDGMENT OF DEBT—*See* LIMITATIONS, STATUTE OF.

F. USURIOUS—*See* FRAUD—USURY.

A. ALLOWANCE OF.

1. IN GENERAL.

The law of England does not allow interest except by statute, or contract, or the law merchant. *Gosman, In re*, 50 L. J., Ch. 624; 17 Ch. D. 771; 45 L. T. 267; 29 W. R. 793—C. A.

Interest is only allowed at common law upon mercantile securities, or where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade (as in case of bills of exchange), or other circumstances. *Foster* v. *Weston*, 4 M. & P. 589; 6 Bing. 709; 8 L. J. (o.s.) C. P. 295. S. P., *Higgins* v. *Sergeant*, 3 D. & R. 613; 2 L. J. (o.s.) K. B. 33.

Interest given at law upon a written undertaking to pay, or notes payable on a day certain: not upon notes payable at a day uncertain, shop debts, &c. *Parker* v. *Hutchinson*, 3 Ves. 135. S. P., *Page* v. *Newman*, 9 B. & C. 378; 4 M. & Ry. 305; 7 L. J. (o.s.) K. B. 267.

No Mention in Contract.] — The contract between a railway company and a contractor provided that payments should be made monthly, as the works proceeded, on the certificates of the company's engineer. There was no stipulation in the contract in reference to the payment of interest to the contractor on any sums due, but not paid to him. The contractor made a demand in writing for a sum as the balance due to him, and claimed interest thereon:—Held, that the contractor was not entitled to interest under the contract, there being no express stipulation on the part of the company to pay any. *Hill* v. *South Staffordshire Ry.*, 43 L. J., Ch. 566; L. R. 18 Eq. 154.

A. gave a warrant of attorney to confess judgment for 2,000*l.* to B., to secure payment of four bills of exchange drawn the same day by him upon, and accepted by, A., and judgment was entered up and registered the next day. The bills were renewed and deposited by B. with a creditor of his own, to secure 1,200*l.*, with a memorandum stating that the bills were secured by a judgment, but not making mention of interest or the rate of interest. Interest was paid to the creditor by B. for ten years at the rate of 12*l.* 10*s.* per cent. per annum:—Held, that as no interest was mentioned in the memorandum, it was to be taken to refer to the principal money alone, and that the memorandum created a new contract. *Hodge, Ex parte*, 26 L. J., Bk. 77—L.J.

No Objection to Notice on Contract—Promise to Pay.]—The fact that a customer makes no objection to an account upon which is a notice that interest will be charged after one year's credit, is not sufficient evidence of a promise to pay the interest charged therein. *Edwards, In re, Williams* v. *Trench*, 61 L. J., Ch. 22; 65 L. T. 453.

On Instalments.]—A., being indebted to B., in 800*l.* on a stated account, entered into articles for the payment of this debt by instalments of 80*l.* per annum; A., afterwards by deed, created a term of years for the payment of his debts out of the rents and profits of his estate, but not by sale or mortgage; only two of these instalments being paid, a bill was brought for recovering the rest, and on a question whether they carried interest, it was held they did; and they were accordingly decreed to be paid with interest, at 4 per cent. *Kildare* (*Countess*) v. *Hopson*, 4 Bro. P. C. 550.

Interest allowed upon a written agreement to pay by instalments. *Parker* v. *Hutchinson*, 3 Ves. 133.

Whether Contract implied.]—There is no rule of law that, upon a contract for the payment of money on a day certain with interest at a fixed rate, down to that day, a further contract for the continuance of the same rate of interest is to be

implied. *Cook* v. *Fowler*, 43 L. J., Ch. 855; L. R. 7 H. L. 27.

An implied contract to pay interest may be raised from the dealings between the parties, as where the debtor has been in the habit of paying interest upon such or similar securities. *Williams, Ex parte*, 1 Rose, 399.

Interest is not allowable by law upon money lent generally, without a contract for it expressed, or to be implied from the usage of trade, or from special circumstances, or from written securities for the payment of the principal at a given time. *Calton* v. *Bragg*, 15 East, 223; 13 R. R. 451. S. P., *Shaw* v. *Picton*, 7 D. & R. 201; 4 B. & C. 715; 4 L. J. (O.S.) K. B. 29; 28 R. R. 455.

A simple contract debt does not carry interest, unless by virtue of some contract express or implied, and, therefore, where one partner was indebted to another for money drawn out of the firm, and there was no evidence of any contract or custom of dealing:—Held, that he could not be charged with interest in a suit for the administration of the latter's estate. *Rhodes* v. *Rhodes*, Johns. 653; 29 L. J., Ch. 418; 6 Jur. (N.S.) 600; 8 W. R. 204.

To an action for money lent and for interest, the defendant pleaded, as to the money lent, that originally no interest was payable to the plaintiff's testator, but that afterwards it was agreed that the defendant should pay interest, and should not be required to pay the principal until the expiration of six months' notice by the testator requiring payment, and that no such notice had been given. The defendant and the testator were merchants, and in 1847 the defendant was indebted to the testator in a balance, which was thus stated, in a letter sent by the testator to the defendant in January, 1847:—

	£	*s.*	*d.*
"Balance, as by my book	749	8	7
Deduct, as allowed	464	16	6
	£284	12	1

The balance settled as due by you to me payable in the course of the present year, without interest." To this statement the defendant assented. There was evidence of a usage amongst merchants to pay interest upon balances. In June, 1848, the testator agreed not to require payment of the principal until the expiration of six months' notice of payment:—Held, that as by the terms of the testator's letter, and by the mercantile usage, interest was payable at the end of 1847, there was no consideration for the testator's agreement not to require payment until after six months' notice, and that the plea was not supported. *Orme* v. *Galloway*, 9 Ex. 544; 2 C. L. R. 480; 23 L. J., Ex. 118; 2 W. R. 263.

The defendant wrote to his receiver and professional agent, "If you will remit the 400*l.*, I can give you a note for it when you come to London"; the money was remitted, but no note given:—Held, that a special contract must be implied, and interest was allowed. *Rhoades* v. *Selsey* (*Lord*), 2 Beav. 359.

—— **Acquiescence.**]—Interest was decreed on the balance of an account not signed by the party charged, where its correctness appeared to have been acquiesced in, and dealings between the parties had continued without impeaching its accuracy. *Dean* v. *Smith*, Wall. Lyn. 261.

—— **Forbearance.**]—An averment that money was forborne at interest implies an agreement to pay interest for the forbearance. *Lawless* v. *Bryce*, Ir. R. 5 C. L. 190.

A declaration against an executor contained, with counts charging him in his representative character, a count which stated that "the defendant, as such executor," "was indebted to the plaintiff in 200*l.* for interest for the forbearance at interest by the plaintiff to the defendant as executor, at his request, of moneys due from the defendant as executor to the plaintiff":—Held, on special demurrer, that the words "at his request" were material, and could not be rejected; that they shewed a personal contract on the part of the defendant with the plaintiff. *Bignell* v. *Harpur*, 7 D. & L. 243; 4 Ex. 773.

A widow, being pressed to pay M. a debt owing from her deceased husband to the deceased husband of M., signed and gave to M.'s attorney the following note, addressed to the attorney: "I beg you will not proceed against me for M. for the sum of 100*l.* and interest, which I owe her; and I will pay the interest, amounting to 9*l.*, due on the 23rd of December, and the principal, as soon as I am able":—Held, that this did not support a count for interest upon, and forbearance by M. to the widow, at her request, of moneys owing from her to M. *Petch* v. *Lyon*, 9 Q. B. 147; 15 L. J., Q. B. 393.

Effect of Delay.]—Where a pecuniary claim has been left by the creditor for years unascertained and unexamined, the debtor having always been ready and willing to meet the demand:—Held, that the right to interest on the principal sum did not commence until after the debt had been established, and the precise amount settled. *Caledonian Ry.* v. *Carmichael*, L. R. 2 H. L. (Sc.) 56.

Interest refused upon a stale demand. *Merry* v. *Ryves*, 1 Eden, 1. See *Purcell* v. *Blennerhassett*, 3 Jo. & Lat. 24; 9 Ir. Eq. R. 103.

If a creditor had been delayed in the recovery of his debt, by another creditor procuring the appointment of a receiver over the debtor's property, such delay will not give him a right to interest. *Stirling* v. *Wynne*, 1 Jones, 51.

Where excessive prices are charged for work, on account of slow and precarious payment, no interest ought to be allowed, for interest is only allowed to supply the want of prompt payment. *Marlborough* (*Duke*) v. *Strong*, 4 Bro. P. C. 539.

Where a creditor, with the view of a speedy payment, agreed to accept 4*l.* per cent. interest:—Held, that mere delay in the payment did not entitle him to charge 5*l.*, the evidence failing to shew that the delay was attributable to misconduct on the part of the debtor. *Scott* v. *Sandeman*, 1 Macq. H. L. 293.

An owner of ironworks engaged a manager, and verbally agreed to pay him 7½ per cent. of the profits, to be made up to 500*l.* in any year in which the profits should be less than that sum. For several years he was paid at the rate of 500*l.*, but it turned out that in some of the years the percentage of profits exceeded 500*l.*; and a sum consisting of the total of these overbalances had been found due to him:—Held, that, in the absence of fraud, he was not entitled to interest on each overbalance as from the year in which it was ascertained, but only to interest from the time of demand. *Rishton* v. *Grissell*, L. R. 10 Eq. 393; 18 W. R. 821.

Where a claim for interest does not rest on the express contract, as in the case of a bill of exchange not carrying interest on the face of it,

diligence to procure payment of the debt seems to be a condition to the claim. *Laing* v. *Stone*, M. & M. 229, n. S. P., *Cameron* v. *Smith*, 2 B. & Ald. 308; 20 R. R. 444.

Statute-barred Debt.]—If a party is barred from recovering the principal, he is equally barred from recovering interest, which is an accessory only, and must follow the nature of the principal. *Clark* v. *Alexander*, 8 Scott (N.R.) 147; 13 L. J., C. P. 133. S. P., *Parkes* v. *Smith*, 15 Q. B. 297; 19 L. J., Q. B. 405; 14 Jur. 761.

Payment of a debt barred by the statute does not revive the party's claim for interest thereon. *Collyer* v. *Willock*, 12 Moore, 557; 4 Bing. 313; 5 L. J. (O.S.) C. P. 181.

By Way of Damages.]—Interest cannot be allowed by way of damages unless it appear on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, and neither alternative applied to the award. *L. C. & D. Ry.* v. *S. E. Ry.*, 63 L. J., Ch. 93; [1893] A. C. 429; 1 R. 275; 69 L. T. 637; 58 J. P. 36—H. L. (E.)

When a person borrows money for a certain period, with interest at a certain rate down to the day named, a contract for payment of interest at that rate after the day named is not to be implied. The principal and interest, if not then paid, become a debt, and any allowance for its detention or nonpayment made by any tribunal before which the payment may be sought, is in the nature of damages, not of interest. *Cook* v. *Fowler*, 43 L. J., Ch. 855; L. R. 7 H. L. 27.

Interest can be demanded only in virtue of a contract, or where the principal money has been wrongfully withheld. Per Lord Westbury. *Caledonian Ry.* v. *Carmichael*, L. R. 2 H. L. (Sc.) 56.

The defendant agreed with the plaintiff, his tenant of a mill, to purchase at a proper valuation at the expiration of the tenancy some machinery which the plaintiff was setting up in the mill, nothing being said about interest on the purchase-money. The tenancy expired at Michaelmas, 1885. The defendant refused to purchase the machinery, and in February, 1887, the plaintiff commenced an action for specific performance, not specifically mentioning in his statement of claim either interest or damages. The action was dismissed, but in November, 1888, the Court of Appeal reversed this decision and gave a judgment directing a reference to an official referee to ascertain the value, and ordering the defendant to pay it when ascertained. The question as to interest was not raised. The plaintiff applied to vary the minutes by directing the defendant to pay the value with interest from Michaelmas, 1885. The court made the order for payment of interest only from the referee's report, and declined to decide anything further on that application, but gave leave to the plaintiff if so advised to apply after the report for payment of prior interest. The report was made in February, 1889, and the plaintiff then applied to the court to order interest from Michaelmas, 1885:—Held, that the plaintiff was entitled, by way of damages for delay, to interest at 4*l.* per cent. on the amount of the valuation from Lady Day, 1886, on which day the defendant had taken possession, the plaintiff having up to that time remained in possession rent free as caretaker. *Marsh* v. *Jones*, 40 Ch. D. 563; 60 L. T. 610—C. A.

By a decree made in 1871 the defendants were declared to be liable in respect of certain minerals removed by them from under adjoining land of the plaintiffs, and an inquiry was directed as to the quantity of minerals taken, and their value, with an allowance for the cost of carrying to the pit's mouth, but none for working. After the decree the defendants died. The inquiry was continued as against their representatives, and the official referee had reported the value of the minerals taken. On the further consideration of the suit the plaintiffs claimed to be entitled to interest on the sum named in the report, with half-yearly rests:—Held, (1) that the action must be treated as in the nature of an action for money had and received, and interest could not be given as damages under s. 29 of 3 & 4 Will. 4, c. 42, which did not apply to such an action; (2) that there was no fiduciary relation between the parties upon which the claim could be based; (3) that the claim ought to have been made at the trial, so that directions might have been inserted in the decree as to how the interest was to be ascertained, and it was too late to make it on the further consideration. *Phillips* v. *Homfray*, 59 L. J., Ch. 547; 44 Ch. D. 694; 62 L. T. 897; 39 W. R. 45.

Where the court holds that an applicant for shares in a company is entitled to have the contract to take shares rescinded on the ground of misrepresentations in the prospectus, the applicant is entitled to a return of the deposit he has paid with interest at the rate of 4 per cent. *Metropolitan Coal Consumers' Association, In re, Wainwright's Case*, 59 L. J., Ch. 281; 62 L. T. 30; 1 Meg. 463.

Interest, if it does not arise from contract, can only be awarded as damages for the wrongful withholding of money. *Webster* v. *British Empire Mutual Life Assurance Society*, 49 L. J., Ch. 769; 18 Ch. D. 169; 43 L. T. 229; 28 W. R. 818—C. A.

In whatever form a debt accrues, whether on a contract bearing interest or otherwise, if it has been wrongfully withheld from the plaintiff, he using means to obtain it, the jury may give interest upon it in the shape of damages for the unjust detention. *Arnott* v. *Redfern*, 11 Moore, 209; 3 Bing. 353; 2 Car. & P. 88; 4 L. J. (O.S.) C. P. 89.

In trover for a bill of exchange, the jury may, if they think fit, include the amount of the interest in the damages, and this although there is no mention of interest in the declaration, and no special damage laid. *Payne* v. *Pritchard*, 2 Car. & P. 558.

Proceedings were taken under the Indian Insolvency Act, 11 & 12 Vict. c. 21, and the proceeds of certain goods claimed by the official assignee were paid by the assignee into the Bank of Bengal. In a suit in the High Court at Calcutta by A. against the assignee, claiming the proceeds of the goods paid into the Insolvent Court:—Held, on the court making a decree in favour of A., that the High Court, being a court of law and equity, had power to award interest on the amount, as against the official assignee. *Miller* v. *Barlow*, L. R. 3 P. C. 733; 8 Moore, P. C. (N.S.) 127.

Interest will as a matter of course be given for the time that execution has been delayed by proceedings in error. *Lancashire and Yorkshire Ry.* v. *Gidlow*, 45 L. J., Ex. 625; L. R. 7 H. L. 517; 32 L. T. 573; 24 W. R. 144.

Interest ordered to be paid upon a debt not

in its nature bearing interest, vexatiously withheld by a husband from the executor of his deceased wife. *Meredith* v. *Bowen*, 1 Keen, 270.

Payment for Goods by Bill of Exchange.]—Where goods are sold and delivered upon an agreement by the vendee to pay for them by a bill at a certain date, as interest would have run upon such bill if given, it may be recovered in an action for the price of the goods brought after the time when such bill would have become due; and it may be recovered as part of the estimated value of the goods upon a count for goods sold and delivered. *Marshall* v. *Poole*, 13 East, 98; 12 R. R. 310. S. P., *Porter* v. *Palsgrave*, 3 Camp. 472.

If goods are sold to be paid for by a bill of exchange, in an action by the vendor against the purchaser for not giving a bill accordingly, interest will be allowed from the time the bill, if given, would have become due, whether the defendant has or has not accepted the goods. *Boyce* v. *Warburton*, 2 Camp. 480.

Where goods are sold and delivered, to be paid for by a bill at a certain date, if the bill is not given, interest on the price, from the time when the bill would have become due, may be recovered as part of the estimated value of the goods, on a count for goods sold and delivered. *Farr* v. *Ward*, 3 M. & W. 25; 6 D. P. C. 163; Mur. & H. 274.

Where goods were sold, to be paid for by a bill at a certain date, the price should bear interest from the day when the bill would have been due, and might be recovered as damages on a count for the nondelivery or nonpayment of the bill. *Slack* v. *Lowell*, 3 Taunt. 157.

In January, 1837, a carriage was sold and delivered by the plaintiff to the defendant. In April following the defendant wrote to the plaintiff as follows:—"The document you have sent me appears to be in the nature of a bill, and being payable to your order, is good in the market; just what I wished to avoid. The document I have wished to give you was simply my promissory note, payable to yourself," &c.:—Held, that this was some evidence to go to the jury of an agreement to pay for the goods by a bill or a note, and therefore that the jury might give interest on the price as part of the damages. *Davis* v. *Smyth*, 8 M. & W. 399; 10 L. J., Ex. 473.

The defendant wrote to his receiver and professional agent as follows:—"If you will remit the 400*l*. I can give you a note for it when you come to London." The money was advanced, but no note was signed:—Held, that a special contract must be inferred; and that interest was payable by the defendant. *Rhoades* v. *Selsey* (*Lord*), 2 Beav. 359.

Agreement to Return Goods or Pay Interest.]—Where a defendant, who had contracted for jewellery, agreed to return it in a year, and if he did not do so, to pay a certain price for it, with interest; and the jewellery not having been returned, the plaintiff brought an action for the amount, and the declaration contained counts for goods sold and delivered, and a count for interest on money due and forborne; and the jury found a verdict for the sum demanded, with interest; the court refused to disturb it, or order the damages to be reduced. *Harrison* v. *Allen*, 2 Bing. 4; 9 Moore, 28; 1 Car. & P. 235; 2 L. J. (o.s.) C. P. 97.

Stakeholder.]—The parties to a suit in equity restrained an insurance company to retain in its possession, during the progress of the suit, moneys due by the company to one of the parties:—Held, that the company was merely acting as stakeholder, and, in such capacity, was not liable to pay interest upon the said sums while so remaining in its possession. *Farmer* v. *Farmer*, 15 W. R. 371.

Deposit at Bank.]—A banker was not (before 3 & 4 Will. 4, c. 42, s. 28) liable to pay interest upon money deposited, although at the time of the deposit it had been declared, that interest should not be payable upon a certain event which did not happen. *Edwards* v. *Vere*, 2 N. & M. 120; 5 B. & Ad. 282; 2 L. J., K. B. 190.

If the balance of a banking account remains overdue after the bankruptcy of the banker, his assignees are entitled to recover interest on such balance, as well for the period which has elapsed since the bankruptcy as for that which had elapsed before it. *Pott* v. *Bevan*, 8 Man. & G. 604; 8 Scott (N.R.) 319; 13 L. J., C. P. 187; 8 Jur. 560. *S. C.*, at Nisi Prius, 1 Car. & K. 335.

Bank Notes.]—Interest was not allowed on the notes of a banking company where the notes were payable on demand, and no demand for payment had been made before the company was ordered to be wound up. *Herefordshire Banking Co., In re*, 36 L. J. Ch., 806; L. R. 2 Eq. 250; 17 L. T. 58; 15 W. R. 1056.

No Postponement of Demand.]—A stipulation to pay interest does not postpone the demand; but it is to compel punctual payment, or to obtain compensation for the delay. *Frankfort* v. *Thorpe*, 2 Ball & B. 381.

Condition Precedent to Further Credit.]—A plaintiff agreed to supply the defendant with a quantity of bricks upon the following terms: terms of payment four months' account, and at the end of four months a settlement shall be made, and eight months longer will be given on your paying interest on the amount, at the rate of 5*l*. per cent.; and if a further three months is required, it will be given on your paying the current rate of interest on the amount:—Held, that the payment of interest was not a condition precedent to the defendant's having the eight months' and three months' further credit. *Dodd* v. *Ponsford*, 6 C. B. (N.S.) 324.

Time of Payment for Goods.]—Though an agreement for the sale of goods, which were afterwards delivered, gives a certain day of payment for the price, interest does not run upon the sum due from that day. *Gordon* v *Swan*, 12 East, 419; 2 Camp. 429; 11 R. R. 758, n. But see *Chalie* v. *York* (*Duke*), 6 Esp. 45.

In a contract for the sale of goods, if any particular time is limited for payment of the price, the vendor is entitled to interest on the price from that time. *Mountford* v. *Willes*, 2 Bos. & P. 337.

Contract of Indemnity.]—Two persons having jointly and severally granted an annuity, and mutually covenanted that each should pay one moiety, and indemnify the other against all "actions, suits, costs, charges, damages, demands, sums of money and expenses," which might be incurred by reason of the nonpayment thereof,

one who on the insolvency of the other had made payments on account of his moiety, is not entitled to interest on such payments. *Bell* v. *Free*, 1 Swan. 90 ; 1 Wils. Ch. 51 ; 18 R. R. 153.

A. covenants to indemnify lands settled on B. from certain debts, the interest of which B. is afterwards obliged to pay; B. is entitled under the covenant to come against the estate of A. for the sums so paid for interest, together with interest thereon. *Fergus* v. *Gore*, 1 Sch. & Lef. 107.

A surety is entitled to interest upon the sum which he has been compelled by the default of his principal to pay. *Petre* v. *Duncombe*, 2 L. M. & P. 107 ; 20 L. J., Q. B. 242 ; 15 Jur. 86.

The plaintiff (as surety) and defendant having covenanted to pay A. an annuity, the defendant, by way of indemnity to the plaintiff, covenanted with him that he would pay A. the annuity, and observe the covenants of the annuity deed, and also conveyed to the plaintiff real estates, with power by sale or mortgage to raise adequate sums to indemnify him against all costs, charges, damages and expenses which he should incur by his being surety. The plaintiff was compelled to pay the annuity, and after several payments, an account containing these was submitted to the defendant, with interest charged upon them at the rate of 5*l.* per cent., and a balance stated, which the defendant acknowledged to be correct, and "recoverable under the trusts of the deed of indemnity." In an action upon the covenant of indemnity, to recover these and subsequent sums paid by the plaintiff :—Held, that interest upon the payments was recoverable as damages. *Ib.*

It being proved to be the common and almost invariable practice of bill brokers in the city of London, not to indorse each bill of exchange which they have discounted for a customer when they rediscount it with their bankers, but to give to the bankers a general guarantee for all bills which they rediscount with them :—Held, that when an accommodation bill is drawn and accepted for the purpose of raising money for the drawer and the acceptor, the drawer in discounting the bill with bill brokers in the city of London has an implied authority from the acceptor to deal with them in the ordinary course of their business, and, consequently, that the bill brokers have an implied authority from the acceptor to make themselves liable on the bill under their guarantee to their bankers, and are, in the event of the bankruptcy of the acceptor, entitled to prove against his estate for what they have paid to the bankers in respect of the bill under their guarantee. Held, also, that the bill brokers are entitled to prove against the estate of the acceptor for interest upon the amount which they have paid under their guarantee. *Petre* v. *Duncombe* (2 L. M. & P. 107) and *Hitchman* v. *Stewart* (3 Drew. 271) approved and followed. *Bishop, Ex parte, Fox, In re*, 50 L. J., Ch. 18 ; 15 Ch. D. 400 ; 43 L. T. 165 ; 29 W. R. 144—C. A.

Agreement for Loan.]—An agreement for a loan, provided that the borrower should pay to the lender interest on the sum agreed to be advanced, from a day specified until the completion of the loan, or until it should be broken off and such interest paid ; the loan having been broken off and the interest left unpaid :—Held, that the borrower was only liable for interest down to the day of the breaking off of the loan. *Cairnes* v. *Lambert*, Ir. R. 7 C. L. 564.

Account stated.]—In an action to recover the balance of an account, interest will not be allowed, unless it appears from the account itself that interest has been allowed on former balances, which proves the mode of dealing between the parties. *Nichol* v. *Thompson*, 1 Camp. 52, n.

Where money due on a balance of accounts, is awarded to be paid on a particular day, at a particular place, if duly demanded there on the day, it carries interest afterwards. *Pinhorn* v. *Tuckington*, 3 Camp. 468.

The mere act of striking the balance of an account between two parties, for goods sold, does not entitle the party in whose favour the balance is, to interest from that time, unless the money then was to be paid. *Chalie* v. *York (Duke)*, 6 Esp. 45.

Interest is due on an account stated for money lent. *Blaney* v. *Hendrick*, 2 W. Bl. 761 ; 3 Wils. 205.

In an action upon an account stated between merchant and merchant the jury may give interest from the day the account was stated. *Ib.*

No interest on the balance of a stated account is provable under a commission, unless by express contract. *Furneaux, Ex parte*, 2 Cox, 219.

Equity will allow interest upon a gross sum laid out by one merchant for another, though there was an account current between them. *Omichund* v. *Barker*, Ridgw. 285.

Work and Labour.]—In an action for work and labour and money paid, the jury may in their verdict calculate interest on the money really advanced, but not on the damages for the work and labour. *Trelawney* v. *Thomas*, 1 H. Bl. 303.

Although the jury on the execution of a writ of inquiry cannot give interest in an action for work and labour, yet, where they have deducted on the whole amount of the plaintiff's demand 10*l.* per cent., in conformity with an agreement between the parties that such deduction should be made for ready money, they may reallow the plaintiff a proportional part of that deduction, on the balance found to be due to him, and which had remained for a considerable time unpaid. *Milsom* v. *Hayward*, 9 Price, 134.

Money had and received.]—Independently of 3 & 4 Will. 4, c. 42, s. 28, interest is not recoverable in an action for money had and received. *Fruhling* v. *Schroeder*, 2 Scott, 143 ; 2 Bing. (N.C.) 77 ; 4 L. J., C. P. 290.

Money Paid.]—Where the plaintiff expends money at the request of the defendant, he cannot recover interest, unless there is a contract to pay it. *Carr* v. *Edwards*, 3 Stark. 132. S. P., *Hicks* v. *Mareco*, 5 Car. & P. 498. And see *Tuppenden* v. *Randall*, 2 Bos. & P. 467 ; 5 R. R. 662.

In Admiralty Division.]—In an action in the Admiralty Division, which could not, prior to the Judicature Acts, have been tried in the Admiralty Court, the defendant made no objection to the jurisdiction, and interest was, according to the practice in the Admiralty registry, allowed on the assessed damages from the time when the plaintiffs' claim arose. In another action transferred by consent, after verdict for the plaintiff, to the Admiralty Division for the assessment of

the damages by the registrar and merchants, the same practice was followed in regard to the interest:—Held, that interest on the damages was properly awarded by the registrar on the ground that the parties, in both cases, having proceeded on the understanding that the Admiralty practice should apply, had impliedly consented to abide by such practice. *The Gertrude, The Baron Aberdare*, 13 P. D. 105; 59 L. T. 251; 36 W. R. 616; 6 Asp. M. C. 315—C. A.

Since the incorporation of the High Court of Admiralty in the High Court of Justice, an award of salvage is a judgment debt, and as such bears interest from the date of entry of judgment, the taxed costs bearing interest from the date of signing of the allocatur. *The Jones Brothers*, 46 L. J., Adm. 75; 37 L. T. 164.

In a collision action in rem not instituted till twelve years after the collision, the court allowed interest for twelve years on the damages awarded. *The Kong Magnus*, [1891] P. 223; 65 L. T. 231.

In all cases where the liability of the owner is limited, the court will give interest on the limited amount from the time of the collision. *The Northumbria*, 39 L. J., Adm. 3; L. R. 3 Adm. 6; 21 L. T. 681; 18 W. R. 188.

2. Under 3 & 4 Will. 4, c. 42, s. 28.

Written Instrument must be the Contract.]—The written instrument must be itself the contract by which the debt is payable, and, therefore, a written application for a loan till a fixed day, is not an instrument by virtue of which money is payable within the 3 & 4 Will. 4, c. 42, s. 28, so as to enable a jury to give interest as damages, though the loan is made on the terms of the application. *Taylor* v. *Holt*, 3 H. & C. 452; 34 L. J., Ex. 1; 11 L. T. 347; 13 W. R. 78.

Sums certain Payable at a certain Time—Demand with Notice that Interest will be claimed.]—An award was made by which it was directed that monthly accounts should be made up and completed within a reasonable period and as early as possible; for example, the February accounts were to be exchanged in May, and payment of not less than 75 per cent. of the balance appearing to be due on the face of the accounts so exchanged was to be made as soon after 1st June as possible, and not later than 15th June. The accounts were to be verified by the end of June, and failing verification within two months from the date of the exchange, the payments on account were to cease until such verification was completed:—Held, that interest could not be allowed under Lord Tenterden's Act (3 & 4 Will. 4, c. 42), s. 28, on the balances appearing to be due on the face of the accounts, as (i.) there was under the award no sum certain payable at a certain time by virtue of a written instrument; (ii.) nothing had been done equivalent to a demand for the amounts with notice that interest would be claimed. *L. C. & D. Ry.* v. *S. E. Ry.*, 63 L. J., Ch. 93; [1893] A. C. 429; 1 R. 275; 69 L. T. 637; 58 J. P. 36—H. L. (E.)

Interest on sums of money cannot properly be allowed by a jury on the trial of an issue, under 3 & 4 Will. 4, c. 42, s. 28, where the sums are not payable by virtue of any written instrument at a certain time, or where no demand of payment in writing within the meaning of the act has been made. *Harper* v. *Williams*, 4 Q. B. 219; 12 L. J., Q. B., 227.

Sum Payable at Time certain.]—By charter-party a ship was to load from the charterer's agents, a full and complete lading, and proceed to London, and discharge there, a lump sum freight of 5,000*l.* to be paid after entire discharge and right delivery of the cargo, in cash, two months after the date of the ship's report inwards at the custom-house:—Held, that the shipowner was not entitled to interest, as the principal sum was not payable at a time certain. *Merchant Shipping Co.* v. *Armitage*, 43 L. J., Q. B. 24; L. R. 9 Q. B. 99; 29 L. T. 809—Ex. Ch. Reversing 22 W. R. 11. S. P., *L. C. & D. Ry.* v. *S. E. Ry.*, supra.

In order to entitle a creditor, under 3 & 4 Will. 4, c. 42, s. 28, to interest on a debt from the time when the debt was payable, "if such debt be payable by virtue of some written instrument at a certain time," it is not necessary that the day for the payment should be mentioned in the instrument; it is sufficient if a time or event be fixed, the date of which can be ascertained afterwards. *Duncombe* v. *Brighton Club and Norfolk Hotel Co.*, 44 L. J., Q. B. 216; L. R. 10 Q. B. 371; 32 L. T. 863; 23 W. R. 795.

Therefore, where a person supplied furniture on the written terms one-third in cash, and bills at six and twelve months for the balance:—Held, that the case was within the section, and he was entitled to interest on the one-third from the time the goods were delivered. *Ib.*

To entitle a jury to give interest as damages under 3 & 4 Will. 4, c. 42, s. 28, it is not necessary that the person claiming interest should have demanded payment of a sum certain at a time certain; it is enough that the demand should be of a sum and at a time which can be reasonably rendered certain. *Geake* v. *Ross*, 44 L. J., C. P. 315; 32 L. T. 666; 23 W. R. 658.

The contract between a railway company and a contractor provided that payments should be made monthly, as the works proceeded, on the certificates of the company's engineer. There was no stipulation in the contract in reference to the payment of interest to the contractor on any sums due, but not paid to him. The contractor made a demand in writing for a sum as the balance due to him, and claimed interest thereon. His accounts were disputed, but on a bill filed by him against the company, the result shewed that he was entitled to a balance less than one-half of the sum which he had claimed to be due from the company:—Held, that the contractor was not entitled to interest under 3 & 4 Will. 4, c. 42, s. 28, the demand in writing for payment not being of a sum certain payable at a certain time. *Hill* v. *South Staffordshire Ry.*, 43 L. J., Ch. 556; L. R. 18 Eq. 154.

An instrument for securing money lent, whereby the borrower promised to pay the creditor 135*l.* in one month after his arrival in England, carries no interest. *Page* v. *Newman*, 4 M. & Ry. 305; 9 B. & C. 378; 7 L. J. (o.s.) K. B. 267.

A sum certain payable under a written instrument so many days after death is a sum payable at a certain time within 3 & 4 Will. 4, c. 42, s. 28, and therefore carries interest after the period fixed for payment has expired. *Horner, In re, Fooks* v. *Horner*, 65 L. J., Ch. 694; [1896] 2 Ch. 188; 74 L. T. 686; 44 W. R. 556.

Demand in Writing—What sufficient.]—In May, 1872, a country solicitor commenced a suit against his London agent, claiming an account

and taxation of the bills of costs between them. The defendant filed his answer in October, 1872, and thereby alleged a large balance due to him, and claimed interest thereon. He had also, in 1869, furnished the plaintiff with an account which contained items for interest. In 1875 a copy of the account was inclosed in a letter which referred to the account, but made no formal demand of payment, and which was signed by a firm of solicitors as his agents:—Held, that neither the answer nor the letter inclosing the account was a sufficient demand in writing or notice within 3 & 4 Will. 4, c. 42, s. 28. *Ward* v. *Eyre*, 49 L. J., Ch. 657; 15 Ch. D. 130; 43 L. T. 525; 28 W. R. 712—C. A.

A claim for interest made in a writ for the first time is not such a demand in writing of interest as is required by s. 28 of 3 & 4 Will. 4, c. 42. *Rhymney Ry.* v. *Rhymney Iron Co.*, 59 L. J., Q. B. 414; 25 Q. B. D. 146; 63 L. T. 407; 38 W. R. 764—C. A.

The plaintiff, having for some years supplied coal to an unregistered mining company, wrote a letter to the defendant, who was a shareholder, containing the following passages: "I feel it my duty to write to you about my claim on this company. They owe me, for balance of coal account and interest, over 1,100*l*. . . . Now, I must ask you the plain question, why is not my account paid? . . . I must now give you notice that if my account with this mine be not settled on or before the 1st day of November next, I shall instruct my solicitor to take the necessary proceedings to recover the money this company owes me":—Held, a sufficient demand within 3 & 4 Will. 4, c. 42, s. 28, to justify a jury giving interest from the date of such letter. *Geake* v. *Ross*, 44 L. J., C. P. 315; 32 L. T. 666; 23 W. R. 658.

Before action brought, the plaintiff, by letter to the defendant, demanded repayment of the whole of the deposits which he had paid on shares in a company, which afterwards proved an abortive undertaking, adding that he should expect to be paid 5*l*. per cent. interest from a time specified, which was prior to the date of the letter:—Held, a sufficient demand of payment within 3 & 4 Will. 4, c. 42, s. 28, to entitle the jury to give interest from the date of the demand until the time of payment. *Londesborough (Lord)* v. *Mowatt*, 4 El. & Bl. 1; 2 C. L. R. 1181; 23 L. J., Q. B. 38; 18 Jur. 1094; 2 W. R. 568—Ex. Ch.

An attorney may give notice that he will claim interest on his bill of costs delivered to his client from the date of the notice. *Berrington* v. *Phillips*, 1 M. & W. 48; 1 Tyr. & G. 322; 4 D. P. C. 758; 5 L. J., Ex. 127.

A notice of a call on a contributory under a voluntary winding-up, under the supervision of the court, stated that, if the call was not paid at the time appointed, interest would be charged thereon at the rate of 5 per cent. The articles provided for interest on calls:—Held, that the notice that interest would be charged came within 3 & 4 Will. 4, c. 42, s. 28; and the court ordered the contributory to pay the call with interest thereon up to the date of payment. *Lintott, Ex parte, Overend, Gurney & Co., In re*, 36 L. J., Ch. 510; L. R. 4 Eq. 184; 16 L. T. 228; 15 W. R. 617.

A general intimation upon a tradesman's account that interest would be charged after one year's credit cannot be considered as referring to each item in the account, and is not a sufficient notice claiming interest within s. 28 of 3 & 4 Will. 4, c. 42. *Edwards, In re, Williams* v. *Trench*, 61 L. J., Ch. 22; 65 L. T. 453.

—— **Rate of.**]—Interest at 4*l*. per cent. will be allowed on the amount for a demand for work and labour in an administration suit in equity, from the time when the demand for interest was made, under 3 & 4 Will. 4, c. 42, s. 28. *Mildmay* v. *Methuen*, 3 Drew. 91.

—— **At what Period to be Given.**]—A declaration, after reciting an agreement, dated 27th of April, 1840, between the plaintiff and the defendant, and that the defendant was indebted to the plaintiff in 60*l*., to be repaid with interest, stated the agreement thus: That the sum of 60*l*. shall remain in the hands of the defendant from the date hereof, for one whole year; that, at the expiration of that period (if the interest shall be then paid, and no notice be then given to call in the same), the 60*l*. shall continue in the hands of the defendant for another year, and so on from year to year, until notice in writing shall be given by the plaintiff to call in the same; that twelve calendar months' notice in writing shall be given to call in the 60*l*., and that, at the expiration of the notice, the same shall be paid by instalments of 10*l*. every third month, until the whole amount be paid, the first payment of 10*l*. to be made at the expiration of fifteen months from the date of the notice, so that the whole amount of 60*l*. shall be paid by the end of two years and six months from the date of the notice. The declaration stated that, on the 29th of May, 1846, a notice in writing of that date was served upon the defendant, to call in the 60*l*., and alleged that, although twelve calendar months from the date of service of the notice had elapsed before action, and although six months from the expiration of the twelve calendar months had also elapsed before the action, and although two instalments had become due and payable from the defendant, yet the defendant had not paid the two instalments:—Held, that the notice to pay the principal sum might be given at any period of the year, and that the payment of the instalments was to be calculated from the date of the notice, and not from the end of the current year, under the agreement. *Brown* v. *Hartill*, 2 Ex. 846; 17 L. J., Ex. 278.

In what Cases.]—By a decree made in 1871, the defendants were declared liable in respect of coal wrongfully removed by them from under the land of the plaintiffs, and an inquiry was directed as to the quantity and value of the coal so taken. After the decree the defendants died, and the inquiry was continued against their representatives. In 1889 the official referee reported the value of the minerals taken. In 1890, on the further consideration of the action, the plaintiffs claimed to be entitled to interest on the amount so found:—Held, first, that the action was not an action for trover or trespass de bonis asportatis, and that interest could not be claimed under s. 29 of 3 & 4 Will. 4, c. 42; secondly, that assuming interest might have been awarded by the decree on the theory that this was an equitable action to compel a wrongdoer to account for benefits accruing to his estate by reason of his wrongful act, the plaintiffs' claim was barred by lapse of time. *Phillips* v. *Homfray*, 61 L. J., Ch. 210; [1892] 1 Ch. 465; 66 L. T. 657—C. A.

3 & 4 Will. 4, c. 42, s. 28, does not apply to suits on bonds given to secure an annuity. *Cross* v. *Bedingfield*, 2 Sim. 35 ; 10 L. J., Ch. 219.

The H. and S. railway company having agreed to let its line to the N. E. company, which had taken possession under the agreement, filed a specific performance bill against it. Rent was due from the N. E. company to the H. and S. company, and the lessee company gave the lessor company notice that the money would be paid into court, whereupon the lessor company gave the lessee company notice that unless the amount were paid, interest would be claimed under the 28th section of the statute 3 & 4 Will. 4, c. 42. The defendants obtained ex parte an order that they might be at liberty to pay the rent into court. The money was paid into court, and the lessor company presented a petition for its payment out, and that the lessee company should pay interest thereupon :—Held, that they thereby obstructed the recovery of interest at law, and that the court had jurisdiction to order payment of interest :—Held, also, that the lessor company was entitled to interest on the amount paid into court, as such payment (which was an abuse of the process of the court) had defeated its right to interest under the statute, the 28th section giving a title to interest in respect of a debt for which an action is brought. *Hull and Selby Ry.* v. *N. E. Ry.*, 5 De G. M. & G. 872 ; 24 L. J., Ch. 109 ; 3 W. R. 129.

When by a contract a sum of money is payable at a time certain, and upon a sum to be ascertained on a certain date, but a dispute occurs as to the amount which is settled by the court, interest is payable under 3 & 4 Will. 4, c. 42. *Mackintosh* v. *G. W. Ry.*, 4 Giff. 683.

Upon the winding-up of a company under the direction of the court, interest will be allowed on simple contract debts from the date of the debt, out of calls made upon contributories, in any case where a jury might have given interest in the shape of damages, under 3 & 4 Will. 4, c. 42. *Times Insurance Co., Ex parte, State Fire Insurance Co., In re*, 34 L. J., Ch. 436 ; 10 Jur. (N.S.) 1176 ; 11 L. T. 489 ; 13 W. R. 152.

Courts of equity are not limited by 3 & 4 Vict. c. 42, s. 28, as to allowance of interest. *Spartali* v. *Constadini*, 20 W. R. 823 ; 21 W. R. 116.

B. RATE AND COMPUTATION.

Rate — Allowance by Court.] — There is no general rule as to the rate of interest the court will allow on repayment of consideration-money expressed in an absolute assignment, which is treated only as a security for such consideration-money ; and where the assignee of a reversionary interest in a trust fund was the solicitor to the trust estate, and there was evidence of the assignment having been at an under value, the court allowed interest at 5 per cent. *Unsworth, In re*, 2 Drew. & Sm. 337 ; 13 W. R. 448.

Where default has been made in performance of a covenant to pay a sum of money, the court will allow interest at 5*l.* per cent. *Knapp* v. *Burnaby*, 30 L. J., Ch. 844 ; 5 L. T. 52 ; 9 W. R. 765.

The usual rate at which interest ought to be calculated in administration proceedings is now 3 per cent. per annum. The old rate of 4 per cent. ought to be abandoned. *Goodenough, In re, Marland* v, *Williams*, 65 L. J., Ch. 71 ; [1895] 2 Ch. 537 ; 13 R. 454 ; 73 L. T. 152 ; 44 W. R. 44. And see *Cleveland's (Duke) Estate, In re*, 65 L. J., Ch. 29 ; [1895] 2 Ch. 542 ; 13 R. 715 ; 73 L. T. 313. *S. P., Lambert, In re, Moore* v. *Middleton*, 66 L. J., Ch. 624 ; [1897] 2 Ch. 169 ; 76 L. T. 752 ; 45 W. R. 661.

Interest directed to be computed at 5 per cent., the Lord Chancellor Bacon observing he had always been of opinion that a party withholding money from a person entitled to it ought to pay the person thus injured the interest which he might have made of it if it had been paid before. *Burnell* v. *Brown*, 1 Jac. & Walk. 175 ; 21 R. R. 136.

Though by a deed 5*l.* per cent. per annum was agreed to be allowed, yet it appearing that the money had been placed in the government funds, which yielded but 4 per cent., the court reduced the interest to 4 per cent. *Lechmere* v. *Carlisle*, 3 P. W. 227.

A debt by covenant in marriage articles, and no mention of interest, the court would not reduce it lower than 5 per cent. *Swynfen* v. *Scawen*, 1 Ves. 99 ; Dick. 117.

The testator covenanted to pay a sum of money to trustees, on the trusts of his settlement. He made default :—Held, that his estate was liable to pay 4 and not 5 per cent. interest. *Smith* v. *Copleston*, 11 Beav. 482.

Interest decreed to the full amount produced by a fund wrongfully withheld from the proprietor, at 4 per cent. upon a demand, established as a debt against the funds of others. *Orford (Earl)* v. *Churchill*, 3 Ves. & B. 59.

Where a creditor, with the view of a speedy payment, agreed to accept 4*l.* per cent. interest : —Held, that mere delay in the payment did not entitle him to charge 5*l.* ; the evidence failing to shew that the delay was attributable to misconduct on the part of the debtor. *Scott* v. *Sandeman*, 1 Macq. H. L. 293.

—— **Special Rate for certain Time.**] — An owner of a vessel mortgaged it as a security for a debt, with a proviso for redemption, on payment of the principal and interest at the rate of 10*l.* per cent. in six months. The principal not having been paid at that time :—Held, that interest continued payable at the rate of 10*l.* per cent. *Morgan* v. *Jones*, 8 Ex. 620 ; 22 L. J., Ex. 232.

In an action against the drawer of a bill for 200*l.*, with 10*l.* per cent. interest :—Held, that the holder might recover interest at 10*l.* per cent. from the time when the bill became due, as well as for the time during which it was running. *Keene* v. *Keene*, 3 C. B. (N.S.) 144 ; 27 L. J., C. P. 88.

Although the rate of interest agreed on for the time certain is usually adopted as the proper measure of the damages for the subsequent delay, the tribunal may look at all the circumstances of the case, and award such a rate of interest as shall appear fair and reasonable. *Cook* v. *Fowler*, 43 L. J., Ch. 855 ; L. R. 7 H. L. 27.

When the holder of a warrant of attorney to enter judgment for a fixed sum on a day named, with interest at the rate of 5*l.* per cent. per month and costs, did not enter up judgment, and did not, the grantor of the instrument having died, make any definite claim against his debtor's estate for the space of four years and upwards :—Held, that the tribunal before whom the claim at last came, was justified in awarding by way of damages such a rate of interest as the holder of the warrant of attorney would have been entitled to, according

to the ordinary rule of the Court of Chancery, had he entered up judgment on the day named in the defeasance to the warrant of attorney, namely, at the rate of 4 per cent. *Ib.*

There is no rule of law that, upon a contract for the payment of money on a day certain, with interest at a fixed rate, down to that day, a farther contract for the continuance of the same rate of interest is to be implied. *Ib.*

—— **Admission of Rate by Debtor.**]—Where a surety had been compelled to make certain payments through default of the principal debtor, and an account containing these was submitted to the debtor with interest charged upon them at the rate of 5*l.* per cent., and a balance stated which the debtor acknowledged to be correct and recoverable "under the trusts of the deed of indemnity":—Held, in estimating the damages, that the jury might take into consideration the rate of interest stated in the account approved of by the debtor. *Petre* v. *Duncombe*, 2 L. M. & P. 107; 20 L. J., Q. B. 242; 15 Jur. 86.

—— **3 & 4 Will. 4, c. 42, s. 28.**]—Rate of interest payable under 3 & 4 Will. 4, c. 42, s. 28, discussed. *L. C. & D. Ry.* v. *S. E. Ry.*, 61 L. J., Ch. 294; [1892] 1 Ch. 120; 65 L. T. 722; 40 W. R. 194—C. A. See *S. C.*, in H. L. ante, col. 165.

Interest at 4 per cent. will be allowed on the amount of a demand for work and labour in an administration suit in equity, from the time when the demand for interest was made, under 3 & 4 Will. 4, c. 28. *Mildmay* v. *Methuen*, 3 Drew. 91.

—— **Judgment Debt.**]—The effect of s. 17 of 1 & 2 Vict. c. 110, is that interest at the rate of 4 per cent. is a debt necessarily attached to every judgment debt, and recoverable at law as a debt; and the judgment creditor is not confined to the remedy by execution mentioned in the section. Therefore, where, in the case of a deceased insolvent debtor who became insolvent before 1869, a sum of money subsequently came to the hands of the assignee, out of which the principal of all the debts entered in the debtor's schedule was paid, it was held that the judgment debts were not satisfied within the meaning of s. 92 (since repealed) of that act until interest was paid, and the assignee was ordered to pay interest before handing over any surplus to the representatives of the insolvent. *Lewis, Ex parte, Clagett, In re*, 36 W. R. 653—C. A.

From Demand of Debt.]—Under a written contract for a sum of money, payable on demand, or a day certain, interest is in equity, as at law, payable from the time of demand made, or from the fixed period of payment; interest at 5 per cent. under a contract to give promissory notes. *Lowndes* v. *Collens*, 17 Ves. 27.

On dividend being withheld, assignees ordered to pay it, with 5 per cent. interest from time of application to them for payment. *Story, Ex parte, Johnson, In re*, 4 Deac. & C. 504; 2 Mont. & Ayr. 54; 4 L. J., Bk. 11.

Where debt becomes due, and demand is made, and refusal, equity will give interest, although not a penal bill. *Anon.*, 2 Eq. Abr. 470.

An owner of ironworks engaged a manager, and verbally agreed to pay him 7½ per cent. of the profits, to be made up to 500*l.* in any year in which the profits should be less than that sum. For several years he was paid at the rate of 500*l.*, but it turned out that in some of the years the percentage of profits exceeded 500*l.*; and a sum consisting of the total of these overbalances had been found due to him:—Held, that, in the absence of fraud, he was not entitled to interest on each overbalance as from the year in which it was ascertained, but only to interest from the time of demand. *Rishton* v. *Grissell*, L. R. 10 Eq. 393; 18 W. R. 821.

A written undertaking to pay at a day certain, or on demand as a promissory note, carries interest from the day, or the demand, as at law, it is given by way of damages. *Upton* v. *Ferrers (Lord)*, 5 Ves. 801.

Action on Covenant—Date of Writ.]—A. covenanted to pay B. 270*l.* on the 15th December, with interest up to that time. He did not do so, and B. brought an action laying his damages at 10*l.*:—Held, that B. could not recover any more than the principal, the interest up to the 15th December, and 10*l.* more, although the interest up to the time of the action amounted to a larger sum. *Watkins* v. *Morgan*, 6 Car. & P. 661.

On Scotch Judgment.]—Where a Scotch decree adjudged interest to be paid but did not fix the time from which it was to run:—Held, that it was payable from the day of citation. *Douglas* v. *Forrest*, 1 M. & P. 663; 4 Bing. 686; 6 L. J. (o.s.) C. P. 157; 29 R. R. 695.

C. COMPOUND INTEREST.

Contract or Custom.]—There cannot be a title to compound interest without a contract express or implied, or custom. *Fergusson* v. *Fyffe*, 8 Cl. & F. 121.

Validity of Contract.]—By the law of England, a contract for compound interest is not valid, except in mercantile accounts current for mutual transactions. *Ib.*

Though compound interest cannot be taken under an antecedent contract, accounts may be settled even half-yearly upon that principle, except as to real securities. *Bevan, Ex parte*, 9 Ves. 223.

An agreement à priori that interest should bear interest, is void; but if made at the end of the year, it is valid. *Clancarty* v. *Latouche*, 1 Ball & B. 430.

Course of Business.]—If a party shews in an action for money lent, that it was the course of dealing between him and the defendant to calculate the interest every year and add that to the principal, and the next year to calculate upon the total, he may recover interest calculated in the same way for the years subsequently to the striking of the last balance between the parties. *Newell* v. *Jones*, 4 Car. & P. 124.

In an action to recover interest upon moneys advanced to the defendant by a banking-house, it is not sufficient to shew that it was the custom of the house to charge interest calculated upon half-yearly rests, without also shewing that the defendant knew that such was the practice. *Moore* v. *Voughton*, 1 Stark. 487. And see *Dawes* v. *Pinner*, 2 Camp. 486, n.

An agent who has advanced money for his principal in effecting insurances and other mercantile business is entitled to charge interest; and at the end of every year to make a rest, and

add the interest then due to the principal. *Bruce* v. *Hunter*, 3 Camp. 467.

In 1847 the customer of a bank gave a mortgage to the bankers to secure with interest at 5*l.* per cent., money due and to become due to them upon a running account, on which it had been usual to make annual rests, and charge compound interest upon the balances:—Held, that the bankers had no right to make rests after the relation of banker and customer had ceased, and that the mortgage was a security only for the balance due at the date of the assignment, with simple interest from that time at 5*l.* per cent. per annum. *Crosskill* v. *Bower*, 32 Beav. 86; 32 L. J., Ch. 540; 9 Jur. (N.S.) 267; 8 L. T. 135; 11 W. R. 411.

After an acquiescence in accounts annually furnished by bankers, an agreement, that the balance of principal and interest shall bear interest will be presumed. *Clancarty* v. *Latouche*, 1 Ball & B. 429.

The mode of taking bankers' accounts with their customers is by charging interest on their advances, in a separate column up to the day of lodgment made, deducting the lodgment from the principal, and so on to the end of the year, when a rest is made; the balance of principal and interest constituting the first item in the next account; and from the long acquiescence in the accounts thus furnished, the annual balances directed to carry interest. *Id.* 420.

A Scotchman in Calcutta opened an account with a banking and agency house there in 1786, and died in 1810, having been insane from 1793. A partner in the house, being in Scotland in 1812, enclosed, in a letter to the customer's relatives there, an account current with him from 1787 to 1810, signed by the firm, bringing out annual balances in his favour, composed of annual accumulations of Indian interest, the last balance expressed "to bear interest at 9 per cent. per annum." In 1835 the customer's relatives obtained administration of his estate, and prosecuted actions which had been before commenced in the Scotch courts, on the footing of the account, against another partner who joined the firm in 1793, and continued a partner through several changes till 1820, when he retired to his estates in Scotland, and they claimed interest at 9 per cent. upon the last balance in 1810, and upon the annual accumulations thereof since:—Held, that a debt was sufficiently constituted against the firm by the account rendered by them, together with interest at 9 per cent. on the last balance in 1810, down to final decree, and that one partner was bound by the act of the firm; but that the debt did not carry compound interest. *Fergusson* v. *Fyffe*, 8 Cl. & F. 121.

S. opened an account with a bank and was allowed to overdraw on signing the following agreement:—"In the event of my account being overdrawn it is understood that the account is to be subject to all charges and interest which may be charged by the bank from time to time on such account, and in the event of my death such interest and charges are to continue until the account be paid off." Compound interest was regularly charged by the bank with half-yearly rests and paid by S. for more than nine years until his death, accounts being regularly stated and settled between him and the bank:—Held, that there was an express contract that compound interest should be paid by S.'s executors on the balance due at his death, and that as the accounts were regularly stated and settled by S. with full knowledge of his rights, his executors could not be allowed to open the settled transactions. *Stewart* v. *Stewart*, 27 L. R., Ir. 351.

Where a deed is given as security for a fixed and definite sum, at a fixed rate of interest, and not for the general balance of a banking account, it is not open to the bank in the absence of express contract, contained in the deed itself or in some instrument of equal degree, to charge compound interest upon this sum or include it in the general banking account. *Mosse* v. *Salt* (32 Beav. 269), followed. *Ib.*

In the course of accounts taken upon the footing of an agreement allowing interest, a balance was struck of the sum acknowledged to be due, including an item for compound interest:—Held, that this was not sufficient evidence of a settled dealing between the parties to found a charge for compound interest in the subsequent parts of the account. *Page* v. *Broom*, 4 Cl. & F. 436.

When allowed by Court.]—B. was a surety for A., in a joint bond to C. and D., for 180,000*l.*, conditioned to pay 90,000*l.*, with interest at 5 per cent. By a counter bond of equal date, A. was bound to B. in a like penalty, with condition to indemnify B., his heirs, executors, &c., from payment of the said 90,000*l.* and interest, and from all damages he might sustain on account of the nonpayment of the said sum and interest. After the deaths of A. and B., the executors of B. were called upon and did pay to C. and D. 22,000*l.*, on account of the principal, and several large sums for interest on A.'s death. In a suit for the administration of A.'s estate, the court allowed the executors of B. to come in as creditors for the several sums so paid by them, and for interest on the 22,000*l.*, but not for interest on the several sums of money paid for interest on the original debt. *Rigby* v. *Macnamara*, 2 Cox, 415; 2 R. R. 92.

Interest upon interest not given. *Waring* v. *Cunliffe*, 1 Ves. J. 99; 1 R. R. 88.

Compound interest allowed by the court on sums paid by the tenant for life on renewals. *Nightingale* v. *Lawson*, 1 Bro. C. C. 440.

Rule as to accumulation of interest upon interest, not to be broken through. *Combe* v. *Acland*, Dick. 436.

Interest computed on various sums reported due, and also small arrears (on other sums) and on costs. *Bickham* v. *Cross*, 2 Ves. 471. S. P., *Neal* v. *Att.-Gen.*, Mos. 246.

Where a party holding property subject to a charge had been ordered, with his consent, to pay the amount into court, with the interest, on a certain day, and made default on the day, he was ordered to pay further interest on the principal only. *Wilkinson* v. *Charlesworth*, 2 Beav. 470.

Interest not to be allowed upon the interest of a bond debt computed in a report. *Turner* v. *Turner*, 1 Jac. & Walk. 39.

The sale of a reversionary interest in chancery considered as the case of an expectant heir, forms an exception to the general rule, that for mere inadequacy of value a contract is not to be set aside. During the continuance of the same situation, acquiescence has no effect; and the value is to be estimated at the time of the transaction, not according to the event. Interest at 5*l.* per cent. upon the money advanced: compound interest refused. *Gowland* v. *De Faria*, 17 Ves. 20; 11 R. R. 9.

Creditor's suit proving fruitless, no assets appearing to satisfy his demand, representatives of the executrix held trustees for representatives of assignee of creditor, of personal estate of the testator, consisting of securities taken in her own name, and afterwards received; and decreed to account with interest for more than forty years upon the balance of a settled account, composed partly of interest, without proof being required of any agreement that such balance of principal and interest should carry interest. *Browne* v. *Taite*, 1 Moll. 397.

On Legacies.]—The testator gave to each of certain infant nephews and nieces, by name, 400*l.*, "with compound interest at 5 per cent. per annum, from the day of their birth, to be settled on their marrying or attaining twenty-one years, whichever may first happen":—Held, that compound interest at 5 per cent. was to run on each of the legacies from the birthdays of the several legatees till their marriage or majority respectively, and not merely to the day of the testator's death. *Arnold* v. *Arnold*, 2 Myl. & K. 365.

Against Accounting Party.] — Compound interest will only be given against an accounting party when he has employed the money in business. *Burdick* v. *Garrick*, 39 L. J., Ch. 369; L. R. 5 Ch. 233; 18 W. R. 387.

Mixing the money with the ordinary account of a firm of solicitors at a bankers' is not such employment in business as will render a member of the firm liable to compound interest. *Ib.*

Under Awards.]—An award is not to be impeached for allowing compound interest, for it may be allowed in case of a contract for it either express, or to be inferred from the nature of the dealings between the parties. *Morgan* v. *Mather*, 2 Ves. J. 15; 2 R. R. 163.

Construction.]—Interest at the rate of 1 per cent. per mensem to be calculated at the end of each year, means interest calculated per mensem, but payable per annum without compound interest on monthly receipts. *Rajunder Narian Rae* v. *Bijai Govind Sing*, 2 Moore, P. C. 253.

A correspondence took place between a mortgagee and a mortgagor extending over a series of years, in which the mortgagee stated his intention, if the interest upon the mortgage debt was not paid, to add it to the principal, and to charge the same interest upon the amount as the mortgage bore. The mortgagor replied from time to time that he could not pay the interest, and that it must be added to the claim of the mortgagee:—Held, that it did not amount to an agreement to pay compound interest, and the claim of the mortgagee was not allowed. *Thompson* v. *Leith*, 4 Jur. (N.S.) 1091.

D. BY WHAT LAW GOVERNED.

Lex Loci Contractus.] — Where a bill of exchange drawn at one place on a party at another, and in which no mention is made of interest, is dishonoured, the amount of interest recoverable is to be calculated according to the lex loci contractus, i.e. of the place where the bill was drawn; and the rate of interest to be adopted in such a case is matter of law, for the direction of the judge to the jury. *Gibbs* v. *Fremont*, 9 Ex. 25; 22 L. J., Ex. 302; 17 Jur. 820; 1 W. R. 482.

Indian interest for money, when made principal here, carries English interest. *Bodily* v. *Bellamy* 2 Burr. 1094; 1 W. Bl. 267.

The rate of interest for loans advanced within the dominions of native and independent Indian sovereigns, by British subjects domiciliated and residing within such dominions, is not limited to 12*l.* per cent. *Anon*, 3 Bing. 193.

Interest allowed for a ship and cargo wrongfully taken by the defendant, and this being done in the Indies, Indian interest allowed, deducting the charge of the return. *Ekins* v. *East India Co.* 1 P. W. 395.

Money charged on estate in Nevis, held to carry only English interest. *Stapleton* v. *Conway*, 1 Ves. 427.

Debt contracted in England but secured by a bond executed in Ireland, shall bear Irish interest. *Connor* v. *Bellamont* (*Earl*), 2 Atk. 382.

The East India Company having compelled payment from a surety in India, by their power over him as one of their servants, without an account or proceeding against the principal, though solvent, and otherwise under harsh circumstances, he was restored to the same situation by a decree for re-payment, with interest at 5 per cent. upon giving security for repayment, in case, in a future suit by the company he should be held liable; the court would not, upon the circumstances, give Indian interest. *Law* v. *East India Co.*, 4 Ves. 825.

A bill of exchange was drawn and accepted in Paris, and made payable in England. The drawer and acceptor were living there. No rate of interest was expressed to be payable on the bill:—Held, that the default being made in England, interest was payable according to the English, and not the French law. *Cooper* v. *Waldegrave* (*Earl*), 2 Beav. 282.

As to the allowance of interest according to the laws of other countries, see *Anon.*, 1 Eq. Abr. 288.

At the time of his death a testator was indebted to a Hindoo banker for advances made for the purposes of the business in India, such advances carrying interest at 12 per cent. In 1861 the testator died, and in 1865 the usual administration decree was made in an administration suit instituted in England by a legatee. The Indian Statute of Limitations provides, that no suit for the recovery of money lent or interest shall be maintained in any court within the British territories in India unless the same be instituted within three years from the time when the debt became due. In 1870 the banker carried in a claim for the balance and principal due to him in 1861, with interest at 12 per cent. On summons to disallow the claim:—Held, that the question must be governed by the lex fori, and that, as the decree had operated as a judgment in favour of creditors to the extent of preventing the time limited by the English statute from running, the claim must be allowed, but with interest only at 4 per cent. *Finch* v. *Finch*, 45 L. J., Ch. 816; 35 L. T. 235.

J. M.

INTERLOCUTORY PROCEEDINGS.

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I. SOVEREIGN STATES, THEIR RULERS AND OFFICERS.

a. Sovereign States and Sovereigns.

Sovereignty — Definition.] — In considering what power and jurisdiction is conceded to Great Britain within the territories of a foreign state, it must be borne in mind that in transactions, whether political or mercantile, a difference subsists between oriental and christian states. *Papayanni* v. *Russian Steam Navigation and Trading Co.*, or *The Laconia*, 11 Moore P. C. (N.S.) 161 ; 33 L. J., Adm. 11 ; 3 N. R. 219 ; 9 Jur. (N.S.) 1160 ; 9 L. T. 37 ; 12 W. R. 90.

No state can claim jurisdiction as a matter of right within the territorial limits of another independent state. *Ib.*

Between two christian states all claim to jurisdiction of any kind, or exemption from jurisdiction, must be founded on treaty, or engagements of similar validity ; but the same strict forms would not be required in the intercourse between a christian and an oriental nation. Any mode of proof by which it was shewn that a privilege is conceded would be sufficient for the purpose. *Ib.*

Consent may be expressed in various ways ; by constant usage, permitted and acquiesced in by the authorities of the state ; active assent, or silent acquiescence, where there is full knowledge. *Ib.*

The Ottoman government has acquiesced in allowing to the British government, within the Ottoman dominions, jurisdiction between British subjects and the subjects of other christian states. *Ib.*

Political treaties between a foreign state and subjects of the Crown of Great Britain, acting as an independent state under powers granted by charter and act of parliament, are not a subject of municipal jurisdiction ; therefore, a bill founded on such treaties by the Nabob of Arcot, against the East India Company, was dismissed. *Carnatic* (*Nabob*) v. *East India Co.*, 2 Ves. J. 56. And see *Glasse* v. *Marshall*, 15 Sim. 71 ; 15 L. J., Ch. 25.

Sovereignty—How Proved.]—A judicial court cannot take notice of a foreign government, not acknowledged by the government or country in which that court sits ; and the fact of acknowledgment is matter of public notoriety. *Berne*

(*City*) v. *Bank of England*, 7 Ves. 347; 7 R. R. 218.

A certificate from the foreign or colonial office, as the case may be, is conclusive as to the status of sovereignty. *Mighell* v. *Johore* (*Sultan*), 63 L. J., Q. B. 593; [1894] 1 Q. B. 149; 9 R. 447; 70 L. T. 64; 58 J. P. 244—C. A. Cp. *Yrissarri* v. *Clement*, 3 Bing. 432; 11 Moore, 308; 2 Car. & P. 223; 4 L. J. (O.S.) C. P. 128. *See further* tit. REVOLT AND RESTORATION, col. 192, post.

Immunity from Process—In general.]—A foreign sovereign coming to England cannot be made responsible in the courts there for acts done by him in his own country and elsewhere abroad, even if he is also a British subject who has taken the oath of allegiance, and is in England exercising his rights as such subject. *Brunswick* (*Duke*) v. *Hanover* (*King*), 2 H. L. Cas. 1. Affirming 6 Beav. 1; 13 L. J., Ch. 107; 8 Jur. 253.

The courts of this country have no jurisdiction over an independent foreign sovereign, unless he submits to the jurisdiction. *Mighell* v. *Johore* (*Sultan*), 63 L. J., Q. B. 593; [1894] 1 Q. B. 149; 9 R. 447; 70 L. T. 84; 58 J. P. 224.—C. A.

An action cannot be maintained in any English court against a foreign potentate for anything done or omitted to be done by him in his public capacity as representative of the nation of which he is the head; and no English court has jurisdiction to entertain any complaints against him in that capacity. *De Haber* v. *Portugal* (*Queen*), *Wandsworth* v. *Spain* (*Queen*), 17 Q. B. 171; 20 L. J., Q. B. 488; 16 Jur. 164.

The courts of this country cannot interfere with the prerogative rights of the sovereign of another country; and where, therefore, a concession had been granted by the Turkish government, for the formation of a company for the purpose of issuing notes in Turkey, and the Turkish government had granted another concession for the formation of another company with similar privileges:—Held, that although the proceedings of the second company in England might be in derogation of the rights and privileges granted by the contract with the first company, yet, as it would be an interference with the sovereign rights of the government of Turkey, the court would not interfere by injunction to restrain the proceedings of the second company. *Gladstone* v. *Ottoman Bank*, 1 H. & M. 505; 1 N. R. 512; 32 L. J., Ch. 228; 9 Jur. (N.S.) 246; 8 L. T. 162; 11 W. R. 460.

Action against—Procedure—Lex fori.]—Where a foreign prince is defendant, he stands on the same footing with ordinary suitors as to the rules and practice of the court. *Spain* (*King*) v. *Hullet*, 1 Cl. & F. 333; 1 Dow & Cl. 169. S. P., *Columbian Government* v. *Rothschild*, 1 Sim. 94; 5 L. J. (O.S.) Ch. 43; 27 R. R. 171; *Rothschild* v. *Portugal* (*Queen*), 3 Y. & C. 594.

To attempt to make a foreign sovereign or state amenable to the jurisdiction of our courts would be offensive to the spirit and principles of international law, and, therefore, a foreign sovereign or state cannot be served with a writ or other process of our courts. The only apparent exceptions to this rule are—(1) where a foreign sovereign or state has come into our courts to seek redress against a defendant; in which case the defendant may assert any claim he has by way of counterclaim or cross action, in order that complete justice may be done; (2) where both the plaintiff and a foreign sovereign or state have claims upon funds in the hands of third persons within the jurisdiction of the English courts; in which case the foreign sovereign or state may be joined as a defendant, in order to be enabled to assert any claim to the funds in question. *Strousberg* v. *Costa Rica* (*Republic*), 44 L. T. 199; 29 W. R. 125—C. A.

—— **Pleading.**]—In a suit against a sovereign prince, who is also a subject, the bill ought, upon the face of it, to shew a cause rendering the sovereign prince liable to be sued as a subject. *Brunswick* (*Duke*) v. *Hanover* (*King*), supra.

Action on a deed. Plea to the jurisdiction because the defendant, at the time of making the deed, was a sovereign prince; that the deed was made by him within his dominions, and that, at the time of the commencement of the action, he was and still is entitled to all the rights, prerogatives and privileges appertaining to him as such; and that, by reason thereof, he ought not to be compelled to answer before any court whatsoever:—Held, that the plea was bad for not stating that he was a sovereign prince at the time of commencing the action, or of plea pleaded. *Munden* v. *Brunswick* (*Duke*), 10 Q. B. 656; 16 L. J., Q. B. 300; 11 Jur. 801.

Plea by the East India Company to a bill for an account filed by the Nabob of Arcot, that by charters confirmed by act of parliament, they had certain powers, by virtue of which the acts were done, overruled; as it did not set forth the contents of the charters and acts of parliament, and shew what court had the proper jurisdiction. *Carnatic* (*Nabob*) v. *East India Co.*, 3 Bro. C. C. 292. *And see* 1 Ves. J. 371.

—— **Submission to Jurisdiction—Appearance.**]—A foreign sovereign prince, who was also an English peer, was made defendant to a suit, and served with a letter missive. The Lord Chancellor refused to recall it. The defendant then appeared, and filed a demurrer for want of jurisdiction:—Held, first, that the Lord Chancellor had not decided that the defendant was liable to the jurisdiction of the court; and, secondly, that the defendant had not, by appearing, waived any defence to the bill. *Brunswick* (*Duke*) v. *Hanover* (*King*), supra.

—— **Effect of.**]—A foreign sovereign who, for the purpose of obtaining his property, submits to be made a defendant in an action, does not thereby lose his rights. *Vavasseur* v. *Krupp*, 9 Ch. D. 351; 39 L. T. 273; 28 W. R. 642—C. A.

Where a foreign government applies here for the appointment of new trustees of a fund, they are treated as only having submitted to jurisdiction as regards matters properly raisable in that action, and, consequently, a counterclaim for damages for libel will be struck out. *South African Republic* v. *La Compagnie Franco-Belge*, 66 L. J. Ch. 747; [1897] 2 Ch. 487; 77 L. T. 241; 46 W. R. 67—C. A.

—— **Acting as Private Individual.**]—Submission to the jurisdiction cannot take place until the jurisdiction is invoked. The fact that a foreign sovereign has been residing in England, and has entered into a contract there, under an assumed name, does not amount to a submission to the jurisdiction, so as to render him liable to be sued in English courts for the breach of such

contract. *Mighell* v. *Johore* (*Sultan*), 63 L. J., Q. B. 593; [1894] 1 Q. B. 149; 9 R. 447; 70 L. T. 64; 58 J. P. 244—C. A.

Action by Foreign Sovereign.]—A foreign sovereign prince may sue in this country in equity as well as at law in his political capacity. *Spain* (*King*) v. *Hullet*, 1 Cl. & F. 333; 1 Dow & Cl. 169. S. P., *Austria* (*Emperor*) v. *Kossuth*, 3 De G. F. & J. 217; 30 L. J., Ch. 690; 7 Jur. (N.S.) 639; 4 L. T. 274; 9 W. R. 712.

—— **Parties.**]—To a bill filed by the chargé d'affaires of the Brazilian government in this country, in his own name, to restrain judgment creditors from issuing execution against certain furniture, upon which a sum of money had been advanced by the Brazilian government, secured by an unregistered bill of sale of the furniture, a demurrer on the ground that the minister could not sue in his own name was allowed. *Penedo* (*Baron*) v. *Johnson*, 29 L. T. 452; 22 W. R. 103.

—— **Procedure—Lex fori.**]—To attempt to make a foreign sovereign or state amenable to the jurisdiction of our courts would be offensive to the spirit and principles of international law, and, therefore, a foreign sovereign or state cannot be served with a writ or other process of our courts. The only apparent exceptions to this rule are—(1) where a foreign sovereign or state has come into our courts to seek redress against a defendant; in which case the defendant may assert any claim he has by way of counterclaim or cross action, in order that complete justice may be done; (2) where both the plaintiff and a foreign sovereign or state have claims upon funds in the hands of third persons within the jurisdiction of the English courts; in which case the foreign sovereign or state may be joined as a defendant, in order to be enabled to assert any claim to the funds in question. *Strousberg* v. *Costa Rica* (*Republic*), 44 L. T. 199; 29 W. R. 125—C. A.

A foreign sovereign may sue in this country, both at law and in equity; and, if he sues in equity, he submits himself to the jurisdiction, and a cross-bill may be filed against him, which he must answer on oath; but a foreign sovereign does not, by filing a bill in chancery against A., make himself liable to be sued in that court for an independent matter by B. *Brunswick* (*Duke of*) v. *Hanover* (*King*), 2 H. L. Cas. 1. *Prioleau* v. *United States*, 36 L. J., Ch. 36; L. R. 2 Eq. 659; 12 Jur. (N.S.) 724; 14 L. T. 700; 14 W. R. 1012.

A foreign prince, who comes voluntarily as a suitor into a court of law in England, becomes subject as to all matters connected with that suit to the jurisdiction of a court of equity. *Rothschild* v. *Portugal* (*Queen*), 3 Y. & C. 594.

Staying Action till Appointment of Person to give Discovery.]—The proceedings in an original suit by a foreign government were stayed until the plaintiff in that suit had given the name or names of persons who could be made defendant or defendants in a cross-suit by the same parties against the foreign government, for the purpose of making upon oath the discovery required. *Peru* (*Republic*) v. *Weguelin*, 44 L. J., Ch. 583; L. R. 20 Eq. 140; 32 L. T. 426; 23 W. R. 776.

A defendant to a suit, brought by a sovereign state or corporation, has no right to a stay of proceedings in the original suit until a person selected by him for the purposes of discovery, and made a co-defendant to a cross-suit, appears to such cross-suit. *Costa Rica* (*Republic*) v. *Erlanger*, 45 L. J., Ch. 145; 1 Ch. D. 171; 24 W. R. 151—C. A. Reversing 33 L. T. 632.

Transactions between.]—Transactions of independent sovereign states between each other are governed by other laws than those which municipal courts administer. Such courts have neither the means of decreeing what is right, nor the power of enforcing any decision which they may make. *Secretary of State for India* v. *Kamachee Boye Sahaba*, 13 Moore P. C. 22; 7 Moore Ind. App. 476; 7 W. R. 722. S. P., *Carnatic* (*Nabob*) v. *East India Co.*, 2 Ves. J. 56.

A bill filed by Charles, ex-Duke of Brunswick, against the King of Hanover (a subject of this realm), stated, that by a decree of the Germanic Diet, followed by a declaration of his Agnati, he had been deposed, and his brother appointed successor, and that by an instrument signed by the reigning Duke, and by William IV. and his brothers, the Duke of Cambridge had been appointed guardian of the plaintiff's fortune, and the guardianship "was to be legally established in Brunswick, where it was to have its locality." That on the death of William IV. the King of Hanover was appointed guardian, and possessed himself of the private property of the plaintiff. The bill alleged that the instrument was void, and prayed a declaration to that effect, and for an account:—Held, that the alleged acts, under the instrument, were not such as rendered the defendant liable to be sued, or subject to the jurisdiction of the court. *Brunswick* (*Duke*) v. *Hanover* (*King*), 2 H. L. Cas. 1.

—— **Conventions between Nations as to Compensation.**]—A., a British subject, claimed to be entitled to compensation for losses suffered by him through confiscation of his property in the first French revolution. The governments of England and France entered into conventions respecting compensation to be afforded to British subjects. The English government received all the money agreed upon between the two governments as the amount of compensation, and undertook to satisfy all the claimants. The 59 Geo. 3, c. 31, declared how claims were to be preferred and liquidated. B. presented his claim to the commissioners, and adopted the modes of proceeding provided by the act. His claim was rejected. After payment of the claims, which were established to the satisfaction of the commissioners, a surplus remained, which, in accordance with the act, was paid over to the lords of the treasury. B. proceeded to make his claim afresh, under a petition of right:—Held, that he had no remedy except under the provisions of the statute. *De Bode* v. *Reg.* 3 H. L. Cas. 449.

By 6 & 7 Vict. c. 79, s. 1, the articles of a convention between her majesty and the King of the French, concerning the fisheries in the seas between the British islands and France, are declared to have the force of law. By s. 11, all offences against the articles committed by British subjects are to be determined by justices of the peace, who are also empowered to award compensation for the loss or damage caused by the breach of any of the articles. By art. 25, trawl boats shall keep at a distance of three miles from boats fishing with drift-nets. By art. 69, all transgressions of the regulations shall in

both countries be submitted to the exclusive jurisdiction of the tribunal or the magistrates designated by law, who are to settle all differences and decide all contentions between fishermen of the same country, or between fishermen of the two countries; and by art. 70, the trial and judgment shall always take place in a summary manner. By art. 75, this tribunal may award damages for injuries, over and above all penalties:—Held, that no action could be maintained for an injury caused by a breach of art. 25, as exclusive jurisdiction was given to the tribunal specified in the act. *Marshall* v. *Nicholls*, 18 Q. B. 882; 21 L. J., Q. B. 343; 16 Jur. 1155.

Rights of—Protecting.]—Courts of law cannot take cognizance of acts of power exercised by governments in matters of state arising out of war, but they will preserve the private rights of sovereign princes, if by so doing the sovereign acts of the state are not interfered with. *Veer Rajundar Wadeer* v. *East India Co.*, 30 L. J., Ch. 226; 7 Jur. (N.S.) 350; 9 W. R. 247.

—— **Circulating Medium.**]—The sovereign power of every state has the right of issuing notes for payment of money, as part of the circulating medium therein. *Austria* (*Emperor*) v. *Kossuth*, 3 De G. F. & J. 217; 30 L. J., Ch. 690; 7 Jur. (N.S.) 639; 4 L. T. 94; 9 W. R. 712.

Where, therefore, certain persons resident in this country, had manufactured documents which purported to be the notes of a foreign state, the court upon a bill filed by the sovereign of that state, alleging that the introduction of such notes into it would cause great detriment to his subjects, directed the manufacturers to deliver up to be destroyed the notes, and the plates from which the notes had been manufactured, and granted an injunction to restrain such persons from manufacturing documents purporting to be notes of that state. *Ib.*

—— **Sovereign Rights—User of Royal Arms.**]—Semble, the court will not interfere to protect the invasion of a mere sovereign right of a foreign sovereign. *Ib.*

Held, also, that the court will not interfere to prevent the use in this country of the royal arms of a foreign state. *Ib.*

Property of.]—The court will, at the instance of a foreign sovereign in amity with this country, protect the property to which he is entitled as sovereign, or of his subjects, being represented by him, where a damage to such property is done or threatened by persons resident within the jurisdiction of the court, and such injury is alleged in the bill. *Austria* (*Emperor*) v. *Kossuth*, 3 De G. F. & J. 217; 30 L. J., Ch. 690; 7 Jur. (N.S.) 639; 4 L. T. 274; 9 W. R. 719.

—— **National Vessel of War—Salvage—Non-Liability to Arrest.**]—A vessel of war commissioned by the government of a foreign state, and engaged in the national service of her government, was stranded on the coast of England. She had a cargo of machinery on board her, alleged to belong to private individuals, of which her government had for public purposes charged itself with the care and protection. Important and efficient salvage services were rendered to the ship and her cargo. A suit was instituted on behalf of certain of the salvors against the ship and her cargo. The court refused to order a warrant to issue for the arrest of the ship or cargo, and held it had no jurisdiction to entertain the suit. *The Constitution*, 48 L. J., P. 13; 4 P. D. 39; 40 L. T. 219; 27 W. R. 739.

—— **Ship, not being a Ship of War.**]—An unarmed mail-packet belonging to a foreign sovereign, and officered by him, cannot be proceeded against in the Admiralty Court, even by action in rem, though the vessel is employed in commerce by carrying passengers and goods for hire. As a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each state declines to exercise by means of any of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador, or over the public property of any other state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction. An action in rem, being an indirect method of impleading the owner, cannot be brought against the property of a foreign sovereign. The immunity of a public ship is not lost by her being used subordinately and partially for trading purposes. *The Parlement Belge*, 5 P. D. 197; 42 L. T. 273; 28 W. R. 642—C. A.

—— **Removal of.**]—The court has no jurisdiction to prevent a foreign sovereign from removing his property in this country. *Vavasseur* v. *Krupp*, 9 Ch. D. 351; 39 L. T. 437; 27 W. R. 176—C. A.

A foreign sovereign bought shells, made in Germany, according to an invention patented in England. The shells were brought to England to be shipped on board of ships of war belonging to the foreign sovereign. The patentee brought an action and obtained an injunction restraining the agents of the foreign sovereign and the wharfingers in whose custody the shells were from removing the shells. The foreign sovereign applied to be made a defendant in the action. An order was then made by the master of the rolls and affirmed on appeal, that, notwithstanding the injunction, the foreign sovereign should be at liberty to remove his shells. *Ib.*

—— **Property in hands of Agent.**]—The court has jurisdiction in a suit by an English citizen against another English citizen, in whose hands a fund is placed subject to the sole control at law of a foreign ambassador or government, to restrain the defendant from parting with the fund upon the order of such foreign ambassador or government. *Gladstone* v. *Musurus Bey*, 1 H. & M. 495; 32 L. J., Ch. 155; 9 Jur. (N.S.) 71; 7 L. T. 477; 11 W. R. 180.

Though a foreign government cannot be sued in this country without its own consent, yet the agent of a foreign government may be restrained from transmitting to it securities which the bill alleges should be deposited in this country. *Foreign Bondholders Corporation* v. *Pastor*, 31 L. T. 567; 23 W. R. 109. Cp., *Larivière* v. *Morgan*, 41 L. J. Ch. 746; L. R. 7 Ch. 550; 26 L. T. 859; 20 W. R. 731.

Grants of.]—The right of a foreign government to revoke a concession cannot be questioned in

any legal proceedings in this country. *National Bolivian Co.* v. *Wilson*, 5 App. Cas. 176; 43 L. T. 60—H. L. (E.)

The court has no jurisdiction to interfere with the sovereign acts of a foreign government. *Gladstone* v. *Ottoman Bank*, 1 Hem. & M. 505; 32 L. J., Ch. 228; 9 Jur. (N.S.) 246; 8 L. T. 162; 11 W. R. 460.

In the case of two inconsistent grants of the same subject-matter, by the same foreign sovereign authority, the court cannot aid parties claiming under the first grant, against claimants, though within the jurisdiction, acting under the second. *Ib.*

Perpetual injunction to restrain proceedings against a Dane, for the seizure of property of English subjects in Iceland, the seizure being sanctioned by the Danish authorities. *Blad* v. *Bamfield*, 3 Swan. 604; 19 R. R. 285.

Contracts of—Loan.]—The bond of a foreign government creates nothing but a debt of honour, and the promise contained in it cannot be enforced in the courts of this country against English agents of the government who have funds belonging to it in their hands, even though the government, after notice of an action by the bondholder against the agents, makes no claim to the funds. If such an action against the agent could be maintained, it would amount to an assumption of a jurisdiction over the foreign government. As the foreign government cannot be sued in the courts of this country, neither can its agents be sued in the absence of the principals. *Twycross* v. *Dreyfus*, 46 L. J., Ch. 510; 5 Ch. D. 605; 36 L. T. 752—C. A.

By a convention between the government of Peru and a Peruvian company, all guano to be exported from Peru to Great Britain and Ireland was consigned to the company, and it was agreed that the company should sell the guano, and hold a portion of the proceeds at the disposal of the government. The Peruvian government afterwards contracted a loan in England upon the terms, that all the Peruvian guano to be imported into Great Britain and Ireland and Belgium should be hypothecated for the repayment of the loan, and that out of the proceeds of the guano a certain sum should be applied half-yearly in redemption of the loan:—Held, in a suit by the bondholders of the loan (to which the Peruvian government was made a defendant, but did not appear), that the court had no jurisdiction to compel the company or its agents to apply the proceeds of the guano in the hands of the agents in England to the redemption of the loan. *Smith* v. *Weguelin*, 38 L. J., Ch. 465; L. R. 8 Eq. 198; 20 L. T. 724; 17 W. R. 904.

When the government of a state contracts a loan in another country, the contract is governed by the law of the state whose government contracts the loan, and not by the law of the country in which the contract is made. *Ib.*

An English court of equity has no jurisdiction to enforce the contracts of a foreign government against the property of such government in England. *Ib.*

A foreign government contracting a loan in London agreed to apply a certain sum of money half-yearly in the redemption of the loan, to be made by payment off at par of bonds to be drawn by lot when the bonds should be above par, and by purchase at the market price when the bonds should be at or below par:—Held, that the government complied with this contract by cancelling half-yearly bonds, which had been given up to it in exchange for bonds of a subsequent loan, to the stipulated amount at the price at which the subsequent loan was contracted, being a higher price than the price of the bonds of the first loan as quoted on the London Stock Exchange. *Ib.*

The Mexican government having issued bonds by which they gave to the holders certain specified security for the due payment of capital and interest, and the interest upon these bonds having become in arrear, issued new bonds in lieu of the payment of the overdue interest, but without any specified security:—Held, that the new bonds were mere accretions of the old, and that the holders of the former were entitled to the same security as the holders of the latter. *Guedalla* v. v. *Baring*, 19 L. T. 597; 17 W. R. 253.

Employment of Agent.]—In the case of scrip issued by a foreign government on negotiating a loan (which scrip promises to give to the bearer, after all instalments have been duly paid, a bond for the amount paid, with interest), and the scrip is circulated in England by means of an agent here, who is to receive the instalments, and give acknowledgments for their payment, and to deliver the bonds when they are issued, the contracting party is the foreign government, and not the English agent. *Goodwin* v. *Robarts*, 45 L. J., Ex. 748; 1 App. Cas. 476; 35 L. T. 179; 24 W. R. 987—H. L. (E.)

—— **Sale of Goods—Proceedings against Agent.**]—When a foreign government has made a contract in this country, and has lodged money in the hands of agents in this country for payment of the sums to become due under the contract, the court will not refuse relief to the contractor because the contract was with a foreign government, nor because the foreign government does not appear before the court. *Larivière* v. *Morgan*, 41 L. J., Ch. 746; L. R. 7 Ch. 550; 26 L. T. 859; 20 W. R. 731.

When goods are agreed to be purchased by a sovereign state, and are to be paid for when received, and money is lodged for payment on the production of certificates from an agent of a sovereign state, the court, if certificates are refused, may direct an inquiry what goods have been delivered under the contract, and order payment of what is due to the contractor who has supplied the goods. *Ib.*

Other Matters.]—The King of Hanover, after his accession, renewed his oath of allegiance to the Queen of England, and claimed the right of an English peer:—Held, that he was exempt from the English courts for acts done by him as sovereign prince, but was liable to be sued in those courts in respect of matters done by him as a subject. Held, also, that the sovereign character prevailed where the acts were done abroad, and also where it was doubtful in which of the two characters they had been done. *Brunswick (Duke)* v. *Hanover (King)*, 6 Beav. 1; 13 L. J., Ch. 107; 8 Jur. 253.

b. OFFICERS.

1. Ambassador.

In General.]—A public minister of a foreign state, accredited to and received by the sovereign of this country, having no real property in England, and having done nothing to disentitle

him to the general privileges of such public minister, cannot, while he remains such public minister, be sued against his will, in this country, in an action; although such action may arise out of commercial transactions by him here, and although neither his person is nor his goods are touched by the suit. *Magdalena Steam Navigation Co.* v. *Martin*, 2 El. & El. 94; 28 L. J., Q. B. 310; 5 Jur. (N.S.) 1260; 7 W. R. 598.

An ambassador, who has not submitted to the jurisdiction, cannot be retained before the court as a defendant. *Gladstone* v. *Musurus Bey*, 1 H. & M. 495; 32 L. J., Ch. 155; 9 Jur. (N.S.) 71; 7 L. T. 477; 11 W. R. 180.

Submission to Jurisdiction.]—An ambassador, who voluntarily appears to an action against him and others in this country as joint contractors, and who thus submits to the jurisdiction of the court, is not entitled to have the proceedings set aside or the action stayed, on the ground of his being privileged as an ambassador, if no step has been taken to interfere with his person or property. *Taylor* v. *Best*, 14 C. B. 487; 2 C. L. R. 1717; 23 L. J., C. P. 89; 18 Jur. 402; 2 W. R. 259.

Extent of Privilege. — Money in Agent's hands.]—Securities were deposited by the plaintiffs in the Bank of England in the name of the ambassador of a foreign state, in order to secure the performance of a contract between the plaintiffs and the foreign government. The ambassador threatened to withdraw the deposit on the ground of an alleged breach of contract by the plaintiffs, which they denied under the circumstances to be such breach:—Held, that it was not competent for the plaintiffs to move against the ambassador; but that an interim injunction might be granted against the bank, to restrain them from parting with the fund, and that, under this order, the bank would be protected against any proceedings by the ambassador. *Gladstone* v. *Musurus Bey*, 1 H. & M. 495; 32 L. J., Ch. 155; 9 Jur. (N.S.) 71; 7 L. T. 477; 11 W. R. 180.

—— **Security for Costs.**]—The court will not compel a foreign ambassador to give security for costs. *De Montebliano* (*Duke*) v. *Christin*, 5 M. & S. 503; 17 R. R. 418.

Duration of Privilege.—Recall.]—Where a foreign minister had been dismissed, and a successor had been appointed several months before his arrest, held, that the privilege did not apply, notwithstanding he had not received any official notification of his dismissal. *Marshall* v. *Critico*, 9 East, 477; 14 R. R. Preface, VIII., n.

Statute of Limitations.]—An action cannot be commenced here against, and therefore the Statute of Limitations does not commence to run in favour of an ambassador whilst he is accredited to this country, or during such time after his recall as is reasonably occupied by him in winding up the affairs of his embassy and leaving the country. *Musurus Bey* v. *Gadban*, 63 L. J. Q. B. 621; [1894] 2 Q. B. 352; 9 R. 519; 71 L. T. 51; 42 W. R. 545—C. A.

2. Other Officers.

In General.]—A British subject, who is accredited to Great Britain by a foreign government as a member of its embassy, and who has not been received by the British government upon the express condition that he shall be subject to the local jurisdiction of his own country, is exempt therefrom. *Macartney* v. *Garbutt*, 24 Q. B. D. 368; 62 L. T. 368; 38 W. R. 559; 54 J. P. 437.

Privileges.]—The privilege from arrest of an ambassador's servant is the privilege of the ambassador and not of the servant. *Fisher* v. *Begrez*, 2 C. & M. 240; 3 Tyr. 184; 2 D. P. C. 279; 4 Tyr. 35; 2 L. J., Ex. 13.

Where there is Fraud in Appointment.]—An honorary attaché of the embassy, whose appointment has in no way been recognised by the British government, is not entitled to claim privilege if his appointment has been obtained for the purpose of protecting him against his creditors, and has been inadvertently made by the ambassador. *Clvete, Ex parte, Clvete, In re*, 65 L. T. 102; 55 J. P. 758; 8 Morrell 195—C.A. S. P., *Delvalle* v. *Plomer*, 3 Camp. 47; 13 R. R. 746; *Lockwood* v. *Coysgarne*, 3 Burr. 1676.

Who entitled—Councillor of Legation.]—A councillor of legation of a foreign sovereign, who has the charge of the executive of the legation, subject to the directions of the minister plenipotentiary, and who acts as chargé d'affaires in the absence of such minister, is entitled as such to the privileges of an ambassador. *Taylor* v. *Best*, 14 C. B. 487; 2 C. L. R. 1717; 23 L. J., C. P. 89; 18 Jur. 402; 2 W. R. 259.

—— **Secretary.**]—The secretary of a foreign minister is privileged, though his name is not registered at the office of either of the secretaries of state. *Hopkins* v. *De Roebeck*, 3 Term Rep. 79; 1 R. R. 650.

Protection to the English secretary of an ambassador was disallowed, because it appeared he was purser of a ship of war. *Darling* v. *Atkins*, 3 Wils. 33.

But in another case it was allowed, although formerly he had been a trader, and the case arose under very suspicious circumstances. *Triquet* v. *Bath*, 3 Burr. 1478; 1 W. Bl. 471.

Attaché.]—An attaché to an ambassador in this country of a foreign state is not liable for rates assessed on his private residence. *Parkinson* v. *Potter*, 55 L. J., Q. B. 153; 16 Q. B. D. 152; 53 L. T. 818; 34 W. R. 215; 50 J. P. 470.

—— **Interpreter.**]—An ambassador's interpreter, who does not live in the house, is not protected from arrest. *Carolino's Case*, 1 Wils. 78.

—— **Chaplain.**]—A chaplain to an ambassador is not protected from arrest if he does no duty in the house. *Seacomb* v. *Bownley*, 1 Wils. 20.

—— **Chorister at Chapel.**]—A British-born subject employed as first chorister at the Portuguese ambassador's chapel is not protected. *Novello* v. *Toogood*, 2 D. & R. 833; 1 B. & C. 554; 1 L. J. (O.S.) K. B. 181; 25 R. R. 507.

But semble, that a chorister, bonâ fide employed by an ambassador in the performance of religious worship in his chapel, is privileged. *Fisher* v. *Begrez*, 1 C. & M. 117; 1 D. P. C. 588. *S. C.*, 2

C. & M. 240 ; 3 Tyr. 184 ; 2 D. P. C. 279 ; 4 Tyr. 35 ; 2 L. J., Ex. 13.

—— **Land-waiter at Custom-house.**]—A land-waiter at the custom-house cannot claim protection as such domestic servant. *Masters* v. *Manby*, 1 Burr. 401.

—— **Wife of Officer.**]—Where the wife of a foreign ambassador's secretary was arrested upon a writ issued against husband and wife, the court refused to quash the writ, though the husband swore that before and at the time of the arrest, he was in the actual employment of the ambassador, and in daily attendance upon him, in writing despatches and other official documents. *English* v. *Caballero*, 3 D. & R. 25.

Appointment—How proved.—The certificate of a foreign ambassador under the seal of the legation is sufficient evidence of the law of the country by which he is accredited. *Klingemann, In goods of*, 3 Sw. & Tr. 18 ; 32 L. J., P. 16 ; 8 L. T. 172 ; 11 W. R. 218.

The secretary of a foreign minister is privileged, though his name is not registered at the office of either secretary of state. *Hopkins* v. *De Roebeck*, 3 Term Rep. 79 ; 1 R. R. 650.

Semble, if there is evidence that a certain person is treated at the embassy of a foreign nation in England as a member of the legation, and is employed from time to time by the ambassadors of that nation, it is not for the court to measure the quantum of the services either required from or rendered by him. *Parkinson* v. *Potter*, 55 L. J., Q. B. 153 ; 16 Q. B. D. 152 ; 53 L. T. 818 ; 34 W. R. 215 ; 50 J. P. 470.

It is not sufficient to shew that the servant's name is in the list transmitted by the secretary of state to the sheriff's office, of persons privileged as attached to an embassy, but it must be clearly shewn that the person is in the actual and bonâ fide service of the ambassador. *Fisher* v. *Begrez*, 1 D. P. C. 588 ; 1 C. & M. 117 ; 3 Tyr. 184 ; 2 L. J., Ex. 13.

Extent of Privilege.]—Although an ambassador's servant may be privileged as to his person, it does not follow that all his goods are privileged also, so as to enable the sheriff to apply to set aside a fi. fa. issued against them ; and a clear case of privilege must be made out to the satisfaction of the court, or else they will not interfere, either on behalf of the sheriff or the person privileged. *Fisher* v. *Begrez*, 1 D. P. C. 588 ; 1 C. & M. 117 ; 3 Tyr. 184 ; 2 L. J., Ex. 13.

—— **Liability for Rates.**]—A British subject, accredited to Great Britain by a foreign government as a member of its embassy, is, unless he has been received by the British government upon the express condition that he shall be subject thereto, exempt from the local jurisdiction of his own country, and therefore, where this condition has not been imposed on him at the time of his reception, his household furniture is privileged from seizure for non-payment of parochial rates. *Macartney* v. *Garbutt*, 24 Q. B. D. 368 ; 62 L. T. 656 ; 38 W. R. 559 ; 54 J. P. 437.

An attaché to an ambassador in this country of a foreign state is not liable for rates assessed on his private residence. *Parkinson* v. *Potter*, 55 L. J., Q. B. 153 ; 16 Q. B. D. 152 ; 53 L. T. 818 ; 34 W. R. 215 ; 50 J. P. 470.

—— **Security for Costs.**]—The servant of an ambassador will not be ordered to give security for costs. *Davies* v. *Solomon*, Tidd, Prac. 535, n. (s), 9th ed. Contra, *Goodwin* v. *Archer*, 2 P. Wms. 452 ; 1 Eq. Cas. Ab. 350, pl. 4 ; *Anon.*, Moseley, 175.

Domicil.]—A foreigner having gained a British domicil does not lose it by becoming chargé d'affaires in this country for his own sovereign. *Att.-Gen.* v. *Kent*, 1 H. & C. 12 ; 31 L. J., Ex. 391 ; 6 L. T. 864 ; 10 W. R. 722.

Bringing Action on behalf of Foreign Government.]—To a bill filed by the chargé d'affaires of the Brazilian government in this country, in his own name, to restrain judgment creditors against certain furniture, upon which a sum of money had been advanced by the Brazilian government, secured by an unregistered bill of sale, a demurrer on the ground that the minister could not sue in his own name was allowed. *Peneda (Baron)* v. *Johnson*, 29 L. T. 452 ; 22 W. R. 103.

c. Consul.

How far protected from Process.]—The 7 Ann. c. 12, s. 2, does not extend to consuls, who are therefore liable to arrest. *Viveash* v. *Becker*, 3 M. & S. 284 ; 15 R. R. 488. And see *Clarke* v. *Critico*, 1 Taunt. 106 ; *Barbuit's Case*, Cas. t. Talb. 281.

The judge of a consular court, vested by treaty with plenary civil jurisdiction over all British subjects within the limits of the jurisdiction, while sitting and acting as judge of such consular court, is entitled to the same degree of protection which is accorded by the law of England to a judge of a court of record, and no action will lie for an act done by such judge within his jurisdiction in his judicial capacity. *Haggard* v. *Pélicier*, 61 L. J., P. C. 19 ; [1892] A. C. 61 ; 65 L. T. 769—P. C.

Remuneration.]—A foreign consul resident in this country, and receiving a salary as an officer from his own government, cannot maintain an action for any trouble or labour to which he may have been put in transacting business for merchants here, in which he acted in conformity to the express instructions of his own government. *De Lema* v. *Haldimand*, Ry. & M. 45 ; 1 Car. & P. 183.

But when he acts as between one individual and another, though he acts as consul, he may receive fees. *Ib.*

Consular Court—Jurisdiction.]—The supreme consular court at Constantinople has, by virtue of 6 & 7 Vict. c. 94 and orders in council of August, 1860, jurisdiction in cases of collision within Turkish waters, and can exercise such jurisdiction both in rem and in personam. *Passayanni* v. *Russian Steam Navigation and Trading Co.*, or *The Laconia*, 2 Moore P. C. (N.S.) 161 ; 3 N. R. 219 ; 33 L. J., Adm. 11 ; 9 Jur. (N.S.) 1160 ; 7 L. T. 164 ; 12 W. R. 90.

A railway company and partnership, completed and existing in a foreign country, is not within the purview of the English Joint Stock Companies Acts of 1856 and 1857, so as to enable her majesty's consular court in Egypt to issue a sequestration against such of the members of the company as were resident within the jurisdiction of that

court, for not complying with the order of that court to register the company as one of limited liability under the English statutes. *Bulkeley* v. *Schutz*, 8 Moore, P. C. (N.S.) 170; L. R. 3 P. C. 676.

Previously to the protocol of June, 1867, permitting British subjects to hold land in Turkey, in their own names, they were permitted only to hold land in the name of some female relative, or of some native subject of the Ottoman empire. Two partners who owned land before 1868 had not availed themselves of the protocol, but continued to hold the land in the name of a subject of the sultan. A suit was instituted by one of the partners in the supreme consular court of Constantinople for the dissolution of the partnership and for taking the accounts. An order was made in the suit that the receiver should sell the land by auction:—Held, that the order was not ultra vires of the court. *Abbott* v. *Abbott*, L. R. 6 P. C. 220.

Where a treaty provides that the British sovereign may establish a consular court in a foreign state, and that all complaints against British subjects shall be heard in the consular court, and all complaints against subjects of the foreign state in the courts of that country, a subject of the foreign state, when bringing an action in the consular court against a British subject, cannot be met with a counterclaim in the nature of a cross action. The sovereign of the foreign state, although not specially mentioned in the treaty, is not in a worse position in this respect than his subjects. The orders in council of 1865 and 1881, relating to the administration of justice of China and Japan, do not confer upon the British consular court in Japan a jurisdiction wider than was acquired by the treaty with Japan in 1858, but only prescribe the manner of exercising the jurisdiction which is exercisable under that treaty. *Japanese Government* v. *Peninsular and Oriental Steam Navigation Co.*, 64 L. J., P. C. 107; [1895] A. C. 644; 11 R. 493; 72 L. T. 881; 8 Asp. M. C. 50—P. C.

—— **Procedure—Joinder of Parties.**]—Where the language of a rule regulating the procedure of British consular courts, and giving power to a court to dismiss actions in which there has been a joinder of distinct causes of action by and against the same parties, is permissive in form, and it is provided by a subsequent rule that, in matters not covered by the rules, the procedure of the English courts is to be followed, the language of the rule with regard to the dismissal of such suits cannot be construed as authorising their institution, nor is such a joinder of parties authorised by any rules of the courts in England. *Peninsular and Oriental Steam Navigation Co.* v. *Tsune Kijama*, 64 L. J., P. C. 146; [1895] A. C. 661; 11 R. 508; 73 L. T. 37; 8 Asp. M. C. 23—P. C.

—— **Mode of Trial.**]—In countries in which "by treaty, capitulation, grant, usage, sufferance and other lawful means" the Queen has obtained jurisdiction within the meaning of the Foreign Jurisdiction Act, 1890, by which she is empowered to exercise such jurisdiction "in the same and as ample a manner as if she had acquired it by the cession or conquest of territory," she is by Order in Council empowered to establish courts and regulate procedure in the manner prescribed in such order. The Japan Order in Council, 1865, constituted a court with a jury of five, and in the court so established the appellant was convicted of the murder of her husband:—Held, that the order was not ultra vires, and that the appellant was not entitled as a British subject to a jury of twelve. *Carew* v. *Japan Crown Prosecutor*, 66 L. J., P. C. 95; [1897] A. C. 719; 77 L. T. 1—P. C.

—— **Judgment—Effect.**]—A plea of judgment recovered in an action brought in a consular court at Constantinople established under 6 & 7 Vict. c. 94, and payment by the defendant of the amount is a bar to an action brought in this country for the same cause. *Barber* v. *Lambe*, 8 C. B. (N.S.) 95; 29 L. J., C. P. 234; 6 Jur. (N.S.) 981; 8 W. R. 461.

A defendant relying on a judgment of a tribunal summoned by a foreign consular court, as a bar to a party proceeding in this country, is bound to prove that the tribunal had jurisdiction by treaty, usage, or voluntary submission. *The Griefswald*, Swabey, 430.

Proceedings in the consular court of Alexandria debar the plaintiff in this country from recovering from the captain of a ship, plaintiff in the consular court, the amount paid to him in excess of what he is entitled to demand in respect of freight payable on unloading and right delivery. *Tamvaco* v. *Simpson*, 13 L. T. 160.

—— **Ultra Vires and Irregularity.**]—Orders of the consular court at Constantinople set aside as ultra vires and irregular on the grounds (1) that they were made in a suit to which the appellant was not a party, and in which many of the issues which they purported to decide could not properly be raised or determined; (2) that although the appellant's wife was a bare trustee of the property, the suit was defective in not making the appellant also a party; (3) that assuming the court had jurisdiction to make an order in personam against the appellant's wife regarding the property, the order could not extend to bind the appellant's interest therein; (4) that so far as the orders affected land, the rights of the appellant and the other beneficial owners could only be determined in a suit properly framed and instituted in the proper forum; (5) that the appellant's wife, on a decree being made against her as trustee, would, according to the usual course of justice, be entitled to her costs, instead of being condemned to pay the costs of the proceedings against her. *Pitts* v. *La Fontaine*, 5 App. Cas. 564—P. C.

II. REVOLT AND RESTORATION.

In General.]—Upon the suppression of a rebellion, the restored legitimate government is entitled, as of right, to all moneys, goods and treasure which were public property of the government at the time of the outbreak; such right being in no way affected by the wrongful seizure of the property by the usurping government. *United States of America* v. *M'Rae*, 38 L. J., Ch. 406; L. R. 8 Eq. 69; 20 L. T. 476; 17 W. R. 764.

But with respect to property which has been voluntarily contributed to, or acquired by, the insurrectionary government in the exercise of its usurped authority, and has been impressed in its hands with the character of public property, the legitimate government is not, on its restoration, entitled by title paramount, but as successor

only (and to that extent recognising the authority) of the displaced usurping government; and in seeking to recover such property from an agent of the displaced government can only do so to the same extent and subject to the same rights and obligations as if that government had not been displaced, and was itself proceeding against the agent. *Ib.*

The recognised sovereign of a foreign country, who has been displaced by a usurping government de facto, is held here to succeed, upon the restoration of his authority, to all the rights of the usurping government, and to the public property which it has acquired, and he is the proper person to sue in respect of it. *United States of America* v. *Prioleau*, 2 Hem. & M. 559; 35 L. J., Ch. 7; 11 Jur. (N.S.) 792; 13 L. T. 92; 13 W. R. 1062.

Semble, that the recognised sovereign so succeeds to the property, subject to all the contracts entered into here by the Government de facto, whether with foreigners or natural-born subjects. *Ib.*

Therefore, in such a case the court refused, upon an interlocutory application, at the instance of a foreign government, to appoint a receiver against persons claiming a lien upon public property under a contract made in this country with the usurping government while in existence. *Ib.*

The government formed during a revolution in Sicily seized upon the king's treasure, and remitted part of it to persons in this country, to purchase steam-ships, and they applied the remittance accordingly:—Held, that the king, who had re-established his authority, was entitled to sue for one of the ships, which remained in the port of London. *Two Sicilies (King)* v. *Willcox*, 1 Sim. (N.S.) 332; 19 L. J., Ch. 202; 14 Jur. 163.

Where the revolutionary or de facto government of a country has been recognised by the government of a foreign state, a subject of such foreign state may safely contract with that de facto government; and if, by subsequent revolution, the previously existing government of the country is restored, the restored government is bound by international law to treat any such contract as valid, and in a litigation with the foreigner, party to the contract, must adopt the contract, merely taking such rights as the de facto government might have had under it:—Semble, that even in the case of a contract by a foreigner with a rebel state which has not been internationally recognised, property acquired under it cannot be recovered from him in violation of the contract. *Peru Republic* v. *Dreyfus*, 57 L. J., Ch. 536; 38 Ch. D. 348; 58 L. T. 433; 36 W. R. 492. And see *Berne (City)* v. *Bank of England*, 9 Ves. 347; 7 R. R. 218: and *Dolder* v. *Huntingfield (Lord)*, 11 Ves. 283; 8 R. R. 139.

To a bill filed by the United States of America, alleging that they had succeeded to the rights of the late Confederate States of America, and praying an account and relief in respect of money received by the defendant, as agent for the Confederate States, the defendant pleaded that by a law of the United States the property of all persons who had acted as agents for the Confederate States was liable to confiscation, and that proceedings were actually pending in America for confiscation of his property there on the ground of his having so acted as agent, and that he could not answer without exposing himself to such confiscation, and that the plaintiffs could not have relief without waiving the right to confiscate:—Held, that the plea was bad so far as related to the relief, but good as to the discovery, and that the plaintiffs must be allowed to proceed and prove their case if they were able to do so without the answer of the defendant. *United States of America* v. *McRae*, 37 L. J., Ch. 129; L. R. 3 Ch. 79; 17 L. T. 428; 16 W. R. 377.

Jurisdiction of Courts to prevent.]—The Court of Chancery has no jurisdiction to interfere merely with a view to prevent revolution; it is only to prevent an injury to property that its aid can be invoked. *Austria (Emperor)* v. *Kossuth*, 3 De G. F. & J. 217; 30 L. J., Ch. 690; 7 Jur. (N.S.) 639; 4 L. T. 494; 9 W. R. 712.

Revolted State—Purchase of Securities of.]—It is illegal to purchase obligations or securities purporting to be granted by the government of a foreign country, which government is not recognised by the English executive. *Thompson* v. *Barclay*, 6 L. J. (O.S.) Ch. 93. S. P., *Thompson* v. *Powles*, 2 Sim. 194. And see *Jones* v. *Garcia del Rio*, Turn. & R. 298; 24 R. R. 64.

Recognition of Revolted States.]—If a foreign state is recognised by this country, it is not necessary to support an allegation which describes it as a state, to prove that it is in fact an existing state; but if it is not so recognised, then such proof becomes necessary, and may be admitted. *Yrisarri* v. *Clement*, 3 Bing. 432; 11 Moore, 308; 2 Car. & P. 223.

If a body of persons assemble together to protect themselves and support their own independence, and make laws, and have courts of justice, that is evidence of their being a state; and it makes no difference whether it formerly belonged to another country or not, if they do not continue to acknowledge it, and are in possession of a force sufficient to support themselves in opposition to it. *Ib.* Cp. *Berne City* v. *Bank of England*, 7 Ves. 347; 7 R. R. 218; *Mighell* v. *Johore (Sultan)*, 63 L. J., Q. B. 593; [1894] 1 Q. B. 149; 9 R. 447; 70 L. T. 64; 58 J. P. 244—C. A.

Effect of Re-Conquest.]—A country re-conquered from an enemy reverts to the same state that it was in before its conquest. The British inhabitants of a part of the French dominions which was conquered by the Dutch and afterwards re-conquered by the French, ought therefore to have had, after its re-conquest, the same protection that they were entitled to under the treaty of commerce of 1786; and were awarded compensation in respect of losses, after the re-conquest, by sequestration of their property in contravention of that treaty by the French government. *Gambe's Case*, 2 Knapp, 369.

III. CONQUERED STATES AND COLONIES.

What Law applicable.]—The laws of a conquered country continue until altered. *Campbell* v. *Hall*, Lofft, 655; Cowp. 204.

Englishmen establishing themselves in an Uninhabited Country.]—Where Englishmen establish themselves in an uninhabited or a barbarous country, they carry with them not only the laws, but the sovereignty, of their own state;

and those who live amongst them, and become members of their community, become partakers of and subject to the same laws. *Bengal* (*Adv.-Gen.*) v. *Ranee Surnomoye Dossee*, 9 Moore, Ind. App. 387; 2 Moore, P. C. (N.S.) 22; 2 N. R. 530; 9 Jur. (N.S.) 877; 8 L. T. 843; 12 W. R. 21.

But this rule does not apply to the early settlement of the English in India, as the permission to the settlers to use their own laws within the factories did not extend those laws to natives associated with them within the same limits. *Ib.*

English Subjects visiting Colonies.]—When English settlers go out to a province conquered by the English, they carry with them, so far as may be applicable to their purpose, all the immunities and privileges of the law of England as the law of England was at that time—Per Blackburn, Lord. *Lauderdale Peerage, The*, 10 App. Cas. 692.

—— **Alienage.**]—The introduction of the English law into a conquered country, does not draw with it that branch which relates to aliens, if the acts of the power introducing it shew that it was introduced, not in all its branches, but only sub modo, and with the exception of this portion. The English law incapacitating aliens from holding real property to their own use, and transmitting it by descent or devise, has never been introduced into the East Indies. *Lyons Corporation* v. *East India Co.*, 1 Moore, P. C. 175; 1 Moore, Ind. App. 175.

—— **Statutes of Mortmain.**]—Lands in a country conquered by or a colony settled by Englishmen, are not ipso facto subject to the English statutes of mortmain. *Att.-Gen.* v. *Stewart*, 2 Mer. 143; 16 R. R. 162: *Jex* v. *McKinney*, 58 L. J., P. C. 67; 14 App. Cas. 77; 60 L. T. 287; 37 W. R. 577—P. C.

—— **Marriage Laws.**]—With respect to marriage, the law which existed here before the Marriage Act, viz. the canon law, is the law applicable to British subjects resident in a British settlement. *Lautour* v. *Teesdale*, 2 Marsh. 243; 8 Taunt. 880; 17 R. R. 518. And see *Rex* v. *Brampton Inhabitants*, 10 East, 282; 10 R. R. 299.

Proposal to establish Colony—Undertaking Fictitious — Scrip Certificates.]—Where the defendant had been employed as the plaintiff's agent in raising a loan for establishing a colony on the coast of Honduras, and in that capacity had received deposits from various subscribers, to whom he gave scrip certificates, on which it was stated that the loan was for the use of the Poyais state:—Held, that it was incumbent on the plaintiff to prove the existence of such a state, on the ground that one of two parties to a mere bubble to deceive the public could not maintain an action against the other. *M'Gregor* v. *Lowe*, Ry. & M. 57; 1 Car. & P. 200.

Rights over a Conquered Country.]—The king has a legislative authority over a conquered country, although he may preclude himself from the exercise of that authority, by a proclamation that he has commissioned the governor to call an assembly of the people for the purpose of enacting laws. *Campbell* v. *Hall*, Lofft, 655; Cowp. 204.

The king, before he has published a proclamation, promising a legislative assembly, might have laid a tax upon Grenada as a conquered country, without either the consent of parliament or the people of Grenada in their assembly or otherwise; but that by such a proclamation he had precluded himself from so doing. *Ib.*

A country conquered by the British arms becomes subject to the Crown, and therefore to the legislative power of parliament; and its inhabitants become British subjects. *Ib.*

And see further, tit. COLONY.

IV. PERSONS.

a. ALIENAGE.

1. General Principles.

Who is an Alien.]—A neutral residing in an enemy's country, as consul of a neutral state, and who also trades there as a merchant, is to be regarded as an enemy. *Sorensen* v. *Reg.*, 11 Moore, P. C. 141.

An alien is a subject of a foreign state who has not been born within the allegiance of the Crown of this kingdom. *Reg.* v. *Burke*, 11 Cox, C. C. 138.

Alien carrying on trade in an enemy's country, though resident there also in the character of consul of a neutral state, considered an alien enemy, and as such disabled to sue, and liable to confiscation. *Albrecht* v. *Sussmann*, 2 Ves. & B. 323; 13 R. R. 110.

The character of an alien and a British subject cannot be united in one person. *Reg.* v. *Manning*, 1 Den. C. C. 467; T. & M. 155; 2 Car. & K. 887; 19 L. J., M. C. 1; 13 Jur. 962; 4 Cox, C. C. 31.

A native of a neutral state taken in an act of hostility on board an enemy's ship, and brought to England as a prisoner of war, is not disabled from suing while in confinement, on a contract entered into as a prisoner of war. *Sparenburgh* v. *Bannatyne*, 1 Bos. & P. 163; 2 Esp. 581; 4 R. R. 772.

An inhabitant of an island ceded by Great Britain, who, immediately after its cession, comes over to England, and finding the climate not agree with his health, returns to the ceded island, in which he had left his family, and resides with them there for upwards of six years, and then emigrates with them to another country under the government of Great Britain, retains the character of a British subject; and one of his children, born after the capitulation of the island, and before its final cession by treaty, is not an alien. *Jephson* v. *Riera*, 3 Knapp, 130.

A natural-born subject of this country may also be a citizen of America for the purposes of commerce, and entitled to all the advantages of an American, under a treaty between this country and the United States: the circumstance of his coming over here for a temporary purpose does not deprive him of those advantages. *Wilson* v. *Marryat*, 8 Term Rep. 31; 1 Bos. & P. 430.

By what Law determined.]—The status of a man, as whether alien or not, is to be determined by the law of this country; but the rights and liabilities incident to that status are fixed by the law of the colony where he has been or is a resident. Accordingly, it was determined, 1st, that a Frenchman who had resided in the Mauritius, and had filled the office of assignee of insolvent estates, and been admitted to take the oath of allegiance, was clearly an alien; 2nd,

that according to the French law, which, by the treaty of cession in 1810, prevails in the Mauritius, the circumstances of the case did not constitute that "authorisation by the government," in the absence of which, according to the French law, an alien may be removed without cause shewn. *Adams, In re*, 1 Moore, P. C. 460.

Descendants born Abroad of Natural-born British Subjects.]—The status of natural-born British subjects, which by the acts 7 Ann. c. 5, 4 Geo. 2, c. 21, and 13 Geo. 3, c. 21, is conferred on children and grandchildren born abroad of natural-born British subjects, is a merely personal status, and is not by those acts made transmissible to the descendants of the persons to whom that status is thereby given. There is no foundation for the notion that by the common law of England the posterity of a natural-born British subject, though born abroad, must be treated as British subjects for ever. The rule that the children born abroad of ambassadors in the service of the Crown of England abroad, are treated as natural-born British subjects, does not apply to the children born abroad of officers in the military service of the Crown in foreign parts. *De Geer* v. *Stone*, 52 L. J., Ch. 57; 22 Ch. D. 243; 47 L. T. 434; 31 W. R. 241.

Status of Son of Alien before 7 & 8 Vict. c. 66, s. 4.]—The son of an alien father and English mother, born out of the king's allegiance, could not inherit to his mother in this country, before 7 & 8 Vict. c. 66, s. 4. *Doe* d. *Durouré* v. *Jones*, 4 Term Rep. 300; 2 R. R. 390. *And see further*, col. 212, post.

Persons born in the United States of America, since the treaty of 1783, by which the independence of those states was acknowledged by this country, are aliens, and cannot take lands by descent, or inherit them in this country. *Doe* d. *Thomas* v. *Acklam*, 4 D. & R. 394; 2 B. & C. 779; 2 L. J. (O.S.) K. B. 129; 26 R. R. 544.

—— **Electoral Status of Persons born in Hanover before the Queen's Accession.**]—At a parliamentary election in 1885 the following persons voted:—(1) Persons born in the kingdom of Hanover before 1837 and not naturalised; (2) persons born in that kingdom since 1837 of parents born there before that date and not naturalised; (3) a person born in Prussia since 1837 of parents born in Hanover in 1802 and not naturalised:—Held, that such persons are aliens in the contemplation of the law relating to parliamentary elections, and as such disentitled to vote though upon the register. *Isaacson* v. *Durant*, 55 L. J., Q. B. 331; 17 Q. B. D. 54; 54 L. T. 684; 34 W. R. 547.

Partnership with Alien Enemy—Respective Rights.]—Two American citizens and a French subject being in partnership, and owners of certain ships captured by British cruisers, and the commissioners under the treaty in 1794 between this country and America, for awarding compensation to American subjects who had suffered losses by capture, for which they could obtain no redress in the ordinary tribunals, having awarded in compensation of the ships captured, certain sums to the two Americans, with express exclusion of the French citizen, as an alien enemy:—Held, the sums so awarded are not partnership property; and the creditors of the partnership have no claim on them, as against the separate creditors of the Americans. *Campbell* v. *Mullett*, 2 Swan. 551; 19 R. R. 127.

A debt due to two partners is good to support a commission of bankruptcy, notwithstanding one of the partners is resident in an enemy's country, such residence not being shewn to be an adhering to the enemy. *Roberts* v. *Hardy*, 3 M. & S. 533; 16 R. R. 347.

Women.]—A native-born Irishman, a British subject, married a Frenchwoman domiciled in France. They resided in France till the breaking out of the French revolution, when they emigrated to Germany. The wife died in the lifetime of her husband, without having ever come within the territory of Great Britain:—Held, that she did not by her marriage become a British subject, for that, while she remained abroad, she was not within the allegiance of the Crown of England. *Wall's Case*, 6 Moore, P. C. 216; 12 Jur. 145.

By the common law of England, before 7 & 8 Vict. c. 66, s. 16, an alien woman married to an Englishman was not entitled to dower. *Ib.*

In an ejectment by M. and Sarah his wife, Joyce Child, and Armand Shallon and Eleanor his wife, the females made out their title as co-heiresses of Jonah Child. The husband of Eleanor was an Egyptian:—Held, that the fact of Shallon being an alien would not prevent the plaintiffs from recovering. *Doe* d. *Miller* v. *Rogers*, 1 Car. & K. 390.

—— **Since 7 & 8 Vict. c. 66.**]—The 7 & 8 Vict. c. 66, s. 16, by which an alien woman, married to a natural-born subject, is naturalised, is not a declaratory act. *Wall's Case*, 6 Moore, P. C. 216; 12 Jur. 145.

A female alien, who has married a natural-born subject of this realm, is, by virtue of 7 & 8 Vict. c. 66, s. 16, naturalised, and acquires the status of a natural-born subject. *Reg.* v. *Manning*, 1 Den. C. C. 467; T. & M. 155; 2 Car. & K. 887; 19 L. J., M. C. 1; 13 Jur. 962; 4 Cox, C. C. 31.

By 7 & 8 Vict. c. 66, s. 16, any foreign woman married, or who shall be married to a natural-born subject, or person naturalised, shall be deemed and taken to be herself naturalised, and to have all the rights and privileges of a natural-born subject:—Held, that a woman indicted for murder, who was a native of Lausanne, in Switzerland, and was married to a British subject in 1847, was not entitled to a jury de medietate linguæ, as by her marriage her civil and political status was changed, she having ceased to be an alien, and having to all intents and purposes become a British subject. *Ib.*

Effect of return of Peace.]—Choses in action belonging to an alien enemy are forfeited to the Crown; but there must be a commitment and inquisition to entitle the king; and a peace before inquisition discharges the cause of forfeiture. *Att.-Gen.* v. *Weedon*, Park, 267.

A right of a foreigner by contract is generally only suspended by a subsequent war, and may be enforced upon the restoration of peace. In bankruptcy, therefore, a claim admitted, reserving the dividend. Contract with alien enemy void. *Boussmaker, Ex parte*, 13 Ves. 71; 9 R. R. 142.

English Acts apply to Ireland.]—The English acts relating to aliens apply to Ireland since the Act of Union as far as they are acts affecting

the status of persons in allegiance to the king of the United Kingdom. *Davies* v. *Lynch*, 16 W. R. 1207 (Ir.).

Pleadings relating to.]—A plea, that the plaintiff was an alien enemy residing in this kingdom without the licence, safe conduct, or permission of the sovereign, is good, though it does not expressly negative a certificate from one of the secretaries of state under 7 & 8 Vict. c. 66, ss. 6, 8. *Alcenius* v. *Nygren*, 4 El. & Bl. 217 ; 24 L. J., Q. B. 19 ; 1 Jur. (N.S.) 16 ; 3 W. R. 25.

Proof of Alienage.]—The mere production of a passport found on a prisoner, which is proved to be granted by the authorities of a foreign state to natural-born subjects only, is not evidence of his being an alien. *Reg.* v. *Burke*, 11 Cox, C. C. 138.

To prove a replication of licence to a plea of alien enemy, it is not enough to prove that a licence was granted to the plaintiff with an allowance to undertake a voyage, which did not terminate until the commencement of hostilities, and that after the termination of the voyage he was at large here without molestation. *Boulton* v. *Dobree*, 2 Camp. 163.

To prove that a person was an alien enemy at the time of the action, it is not enough to shew that he was some time before domiciled in a territory which has become hostile, without shewing that he was a native of that territory. *Harman* v. *Kingston*, 3 Camp. 152 ; 13 R. R. 775.

2. Alien Friend.

Rights of—Right to enter British Territory.]—An alien friend has no legal right enforceable by action to enter British territory. *Musgrove* v. *Chung Teong Toy*, 60 L. J., P. C. 28 ; [1891] A. C. 272 ; 64 L. T. 378—P. C.

—— **Lands—Agreement for a Lease.**]—An agreement for a lease to an alien artificer was void, by 32 Hen. 8, c. 16, s. 13, as much as an actual demise. *Lapierre* v. *M'Intosh*, 1 P. & D. 629 ; 9 A. & E. 758 ; 8 L. J., Q. B. 112 ; 3 Jur. 123.

—— **Assignment of Lease.**] — But the 32 Hen. 8, c. 16, s. 13, did not make void an assignment of a lease to an alien artificer. *Wootton* v. *Steffenoni*, 12 M. & W. 129 ; 13 L. J., Ex. 72.

—— **Dower.**]—By the common law of England, before 7 & 8 Vict. c. 66, s. 16, an alien woman, married to an Englishman, was not entitled to dower. *Wall's Case*, 6 Moore, P. C. 216 ; 12 Jur. 145.

—— **Trusts of—Before Naturalisation Act.**]—In March, 1862, L. & S. (the wife of an alien) conveyed land of which they were tenants in common to a trustee, upon trust to sell and stand possessed of the proceeds for L. & S. in equal shares, the share of S. to be for her separate use. In April, 1862, L. & S. entered into an agreement to allot the lands in severalty, and that the trustee should stand possessed of each such respective allotment on the respective trusts declared by the deed of March, and that nothing in the agreement should prejudice or affect any of the powers or trusts of the deed. No sale was ever effected, and S. died in 1866, having by her will given to her husband, the alien, her personal estate absolutely and a life interest in her real estates :—Held, first, that the land was not in equity converted into money. *Sharp* v. *De St. Sauveur*, 41 L. J., Ch. 576 ; L. R. 7 Ch. 343 ; 26 L. T. 142 ; 20 W. R. 269.

—— **Rights of Crown.**] — Held, thirdly, that the trust for the alien could be enforced for the benefit of the Crown. *Ib.*

A devise of lands was made to English subjects, in trust to sell, and after payment of mortgages to invest the surplus moneys in the funds in trust for persons, some of whom were aliens :—Held, that the Crown was not entitled to the share of the aliens either in the land or the produce. *Du Hourmelin* v. *Sheldon*, 1 Beav. 79 ; 8 L. J., Ch. 133 ; 3 Jur. 69. Affirmed 4 Myl. & Cr. 525 ; 9 L. J., Ch. 25 ; 4 Jur. 116.

A court of equity will enforce for the benefit of the Crown, a trust of real estate created in favour of an alien. The devise being valid, and there being a cestui que trust, who can take but not hold, the Crown becomes entitled beneficially, and not the trustee or heir-at-law. *Barrow* v. *Wadkin*, 24 Beav. 1 ; 3 Jur. (N.S.) 679 ; 5 W. R. 695.

A devise to trustees in trust for a person who is an alien is a trust incapable of taking effect, either for the benefit of the alien or of the Crown, and the beneficial interest results to the heir of the testator. *Rittson* v. *Stordy*, 3 Sm. & G. 230 ; 3 Eq. R. 1039 ; 1 Jur. (N.S.) 771 ; 3 W. R. 627. See *S. C.* on appeal, 2 Jur. (N.S.) 410 ; 4 W. R. 438.

—— **Effect of Naturalisation Act, 1870.**]—Where the title of the alien having accrued before the passing of the Naturalisation Act, 1870, that act does not remove his disability to hold land. *Sharp* v. *De St. Sauveur*, supra.

—— **Copyright.**] — An alien friend who, during the time of his temporary residence in a British colony, publishes, in the United Kingdom, a book of which he is the author, is, under 5 & 6 Vict. c. 45, entitled to the benefit of English copyright. *Routledge* v. *Low*, 37 L. J., Ch. 454 ; L. R. 3 H. L. 100 ; 18 L. T. 833 ; 16 W. R. 1081. *See further*, title COPYRIGHT.

—— **Fraudulent Use of Trade Mark.**] — A foreign manufacturer has a remedy by suit in this country, for an injunction and account of profits against a manufacturer who has committed a fraud upon him by using his trade mark for the purpose of inducing the public to believe that the goods so marked are manufactured by the foreigner. *Collins Co.* v. *Brown*, 3 Kay & J. 423 ; 3 Jur. (N.S.) 929 ; 5 W. R. 676.

An alien can in the courts of this country sue to restrain the fraudulent appropriation of his trade mark, although the goods on which such trade mark is affixed are not usually sold by him in this country. *Collins Co.* v. *Reeves*, 4 Jur. (N.S.) 865 ; 6 W. R. 717.

—— **Libel.**]—An alien friend, though resident abroad, is entitled to sue in the courts at Westminster for a libel published concerning him in England. *Pisani* v. *Lawson*, 6 Bing. (N.C.) 90 ; 8 Scott, 180 ; 8 D. P. C. 57 ; 9 L. J., C. P. 12 ; 3 Jur. 1153.

—— **Patent.**]—A patentee applied to the Court of Chancery to stay all proceedings on a scire

facias to repeal the patent, or that a nolle prosequi might be entered, on the ground that the prosecutor was an alien:—Held, that the court had no authority to interfere in the matter. *Reg.* v. *Prosser*, 11 Beav. 306; 18 L. J., Ch. 35; 13 Jur. 71.

An illegal monoply is a public grievance, and the Crown having been informed of such a grievance, and having the power and duty to remove it, if it be such, ought not to be disabled from directing the necessary proceedings to ascertain the truth, because the information was given by an alien. *Ib.*

—— **Will of—Execution.**]—A will made according to the forms of English law by an alien, who though her domicil of origin was English, was domiciled abroad at the time of making her will and of her death, is not entitled to probate in this country. In determining what is the valid will of an alien, the general principles of law prior to the passing of the Naturalisation Act, 1870, are still applicable. *Bloxam* v. *Favre*, 53 L. J., P. 26; 9 P. D. 130; 50 L. T. 776; 32 W. R. 673.

Other Matters—Bastardy Orders.]—An order in bastardy cannot be made in respect of an illegitimate child born abroad of a foreign woman. *Reg.* v. *Blane*, 13 Q. B. 769; 3 New Sess. Cas. 597; 18 L. J., M. C. 216; 13 Jur. 854.

3. Alien Enemy.

a. Contracts by and with.

Generally.]—Commerce by a person resident in an enemy's country, even as a representative of the Crown of this country, is illegal, and the subject of prize, however beneficial to this country, unless authorised by licence. *Baglehole, Ex parte*, 18 Ves. 528; 1 Rose, 271. S. P., *M'Connell* v. *Hector*, 3 Bos. & P. 113; 6 R. R. 724.

Trading with an enemy without the king's licence is illegal; and it is illegal for a subject in time of war, without the king's licence, to bring even in a neutral ship goods from an enemy's port, which were purchased by his agent resident in the enemy's country, after the commencement of hostilities, although it may not appear that they were purchased from an enemy. *Potts* v. *Bell*, 8 Term Rep. 548; 2 Esp. 612; 5 R. R. 452.

A contract with an alien enemy made in time of war cannot be enforced in the courts here. *Willison* v. *Pattison*, 7 Taunt. 439; 1 Moore, 133; 18 R. R. 525.

An action may be maintained here by a neutral on promissory notes given to him by a British subject in an enemy's country for goods sold there. *Houriet* v. *Morris*, 3 Camp. 303.

Though a bill drawn by a prisoner of war in France upon a person resident in England in favour of an alien enemy, could not have been originally enforced, the drawer is liable on a subsequent promise in time of peace. *Duhammel* v. *Pickering*, 2 Stark. 90; 19 R. R. 686.

A., a native of America, and B., a native of England, had dealings by mutual consignments previous to 1812. In June, 1812, war was declared between the two countries, and on the 24th December, 1814, preliminaries of peace were signed at Ghent. A cargo of goods consigned on account by A. to B. arrived in England in November, 1814, and were sent by B. to France and there sold, and he received bills for the amount which he got discounted. Another cargo so consigned arrived in England in January, 1815, and was sold by B. before the 15th February. In March, 1815, B. became bankrupt, and was appointed by his assignees their agent to wind up his affairs, in the course of which employment he received the proceeds of the second cargo, and transmitted accounts to A., in which he admitted him to be his creditor for a balance in respect of the proceeds of both cargoes. In an action by A. against the assignees of B., to recover such balance:—Held, that A. was entitled to prove under B.'s commission for the balance due to him upon the second cargo only. *Ogden* v. *Peele*, 8 D. & R. 1; 29 R. R. 472.

Crown can enforce Contract made by Alien Enemy.]—If an alien enemy, a prisoner of war, makes a contract, it may be enforced by the king for the benefit of the Crown. *Maria* v. *Hall*, 1 Taunt. 33, n.; 9 R. R. 696.

And if the Crown does not enforce it, the prisoner may sue on it after the return of peace. *Ib.* Contra, *Anthon* v. *Fisher*, 2 Dougl. 649, n.

Ransom.]—The ransom of British ships or goods taken by the enemy was made void, and prohibited under a penalty of 500*l.* by 22 Geo. 3, c. 25. *Anthon* v. *Fisher*, 2 Dougl. 649, n. And see *Woodward* v. *Larking*, 3 Esp. 286.

The ransom acts are remedial laws, and must be construed liberally to meet the mischief. *Havelock* v. *Rockwood*, 8 Term Rep. 277.

An action was maintainable by an alien enemy upon a ransom bill. *Ricord* v. *Bettenham*, 3 Burr. 1734; 1 W. Bl. 563.

Even when the hostage given died in prison. *Ib.*

An enemy's ship which has ransomed a British vessel, being retaken with the hostage and ransom bill on board, but the bill secreted, and not delivered up to the recaptor, the first captor may recover upon the ransom bill. *Corme* v. *Blackbourne*, 2 Dougl. 641.

The plaintiff and defendant being taken prisoners in Portugal, jointly solicited and obtained the liberation of themselves, and the ransom of the defendant's ship, contrary to 45 Geo. 3, c. 72; to effect which the plaintiff lent money to the defendant, who afterwards gave him a bill for the amount:—Held, that the plaintiff could not recover on the bill. *Webb* v. *Brooke*, 3 Taunt. 6.

b. Trading in time of War.

In General.]—A contract between two subjects of a neutral state to export contraband of war to a belligerent is not unlawful in the neutral state. *Chavasse, Ex parte, Grazebrook, In re*, 4 De G. J. & S. 655; 34 L. J., Bk. 17; 11 Jur. (N.S.) 400; 12 L. T. 249; 13 W. R. 627.

The carrying on trade with a blockaded port is not a breach of municipal law, nor illegal, so as to prevent a court of the loci contractûs from enforcing the contract of which it is the subject. *The Helen*, 35 L. J., Adm. 2; L. R. 1 Adm. 1; 11 Jur. (N.S.) 1025; 13 L. T. 305; 14 W. R. 136.

A neutral state is not bound by the law of nations to impede or diminish its own trade by municipal restrictions. *Ib.*

A natural-born subject of this country, domiciled in a foreign country in amity with this, may lawfully exercise the privileges of a subject of the country where he is domiciled to trade

with another country in hostility with this. *Bell* v. *Reid*, 1 M. & S. 726; 14 R. R. 557.

The king having, by orders in council, declared certain ports in St. Domingo not hostile, which had formerly been but were no longer in the possession or under the dominion of France; though such declarations were made for collateral and limited purposes, not covering in their terms the trading in question; yet a trading to such ports from parts of the king's dominions, not named in such prior limited orders, was legalised, as if it had been to an ordinary neutral port, by such authoritative recognition of those ports in St. Domingo not being hostile: and the inference as to the legality of such neutral trade was not rebutted by a subsequent order of council opening the trade generally (so as to cover in its terms the particular adventure) to all ports of St. Domingo not in the possession of France. And such trade to neutral ports, requiring no licence from the Crown, is not restricted by the fact of a British ship carrying a licence for trading to them from Great Britain with a certain specified cargo; but the British trader may, notwithstanding, carry other lawful goods, and insure his whole adventure, and may recover from the underwriter a loss arising from capture by a British cruiser, though induced by the fact of such trading with goods not being covered by the licence which was produced to the captor; for the licence itself not being necessary, the carrying of goods not included in it was no legal cause of seizure, however it might operate upon the question of costs in the Prize Court. *Blackburne* v. *Thompson*, 15 East, 81; 3 Camp. 61; 13 R. R. 382.

Enemies' goods coming into this country may be seized for the use of the Crown. *Land* v. *North* (*Lord*), 4 Dougl. 266.

What is a State of War.]—Though a state may be in the military possession of one or two belligerents, that will not constitute her subjects enemies to the other belligerent, if the sovereign power of the latter chooses to permit a continuance of commerce with them; therefore, where an insurance was effected on property shipped in this country on account of persons who were domiciled at Hamburg, at a time when that country was in the possession of French troops, the senate continuing to exercise the powers of civil government in the same manner as before:—Held, that the assured were entitled to recover for a loss which happened in the course of a voyage permitted by his majesty's orders in council. *Hagedorn* v. *Bell*, 1 M. & S. 450; 14 R. R. 497.

c. Licence to Trade.

i. Construction.

Licences to trade with an enemy are to be construed liberally, and not, like grants of property from the Crown, strictly. *Flindt* v. *Scott*, 5 Taunt. 674; 15 R. R. 615—Ex. Ch.

A misdescription of a party applying to the Crown for a licence to trade with an enemy, if made without fraud, does not vacate the licence, or vitiate a policy effected upon it. *Vaughan* v. *Lemeke* (in error), 7 D. & R. 236; 8 Moore, 646; 1 Bing. 473; 25 R. R. 691.

Licence—Non-assignable.]—A licence from the king to B., to import in neutrals, from an enemy's country, goods, being the property of B., cannot be assigned so as to authorise the importation of goods the property of the assignee. *Feise* v. *Thompson*, 1 Taunt. 121.

Subject to a Condition.]—A licence was granted for the exportation of gunpowder on the petition of the manufacturer, on behalf of himself and others, provided the merchant exporter should first give a security by a bond, with two sureties, under a certain condition. The manufacturer of the powder sold it to the plaintiff, and contracted to ship it free on board:—Held, that the condition of this licence was not complied with by the manufacturer's giving the required security, as he was not the merchant exporter within the meaning of the licence. *Camels* v. *Britten*, 4 B. & Ald. 184.

ii. Operation.

It is legal to trade with the subjects of an enemy's country by the king's licence. *Vandyck* v. *Whitmore*, 1 East, 475.

A Licence to Trade not equivalent to Licence to Reside.]—An order in council, licensing a person to export and import certain goods to and from an enemy's country, does not authorise his residence and trading there. *Baglehole, Ex parte*, 1 Rose, 271; 18 Ves. 525.

Prospective Licence.]—A prospective licence from the Crown for a voyage from an enemy's country, granted after the voyage has commenced, is insufficient to render it legal. *Henry* v. *Staniforth*, 4 Camp. 270; 17 R. R. 293.

—— Licence obtained before Contract executed.]—The 43 Geo. 3, c. 153, s. 15, having enabled the king, by order in council, to license the importation of certain goods, being British or neutral property from the enemy's country, in neutral ships; a contract made by A. and B., British subjects, for the purchase of brandy from a house of trade in France (an enemy), to be shipped thence in a neutral ship, on account of A. and B., which contract was made in contemplation of obtaining a licence for that purpose, which licence was accordingly obtained soon after the making of such contract, and before it was begun to be executed, is a legal contract, and may lawfully be guaranteed in the first instance by C. and D., other British subjects; and after such licence obtained, the guarantees are liable in damages for non-shipment of the goods by the house in France, on board a neutral ship sent there for that purpose. *Timson* v. *Merac*, 9 East, 35.

As to Persons.]—A licence to trade to an enemy's country, granted to one set of British merchants, cannot be used to cover a trading by other British merchants, without connecting them together. *Bush* v. *Bell*, 16 East, 3; 14 R. R. 270.

In an alien enemy, commorant here under the king's licence to reside here, purchases goods for exportation, the exportaton by him, after his licence to reside has ceased, is not protected by a licence to trade, also obtained after his licence to reside has ceased, and authorising the exportation of the identical goods by B. and K. or other British merchants. *Warind* v. *Scott*, 4 Taunt. 605; 13 R. R. 698.

A licence to export goods to certain places within the influence of the enemy, interdicted to British commerce, granted to N. on behalf of himself and other British merchants, is sufficient to legalise an insurance on such an adventure, if it appears that N. was the agent employed by the British merchants really interested in it to get the licence, though he had no property in the goods himself. *Rawlinson* v. *Janson*, 12 East, 223.

A licence to a British merchant, that a ship may go to a hostile port, and bring home a cargo of goods, authorises the importation of such goods, being the property of an alien enemy, a subject of that hostile country; and therefore authorises him to insure, and enforce his contract of insurance in our courts. *Morgan* v. *Oswald*, 3 Taunt. 554. See *Flindt* v. *Scott*, 15 R. R. 615, 620.

Under a licence to a British merchant, by name, on behalf of himself and others to export to P., and to import a cargo thence, an alien enemy may lawfully be interested in the export cargo as well as in the import cargo. *Feise* v. *Bell*, 4 Taunt. 4; 13 R. R. 549.

A native Spaniard domiciled here in time of war between this country and Spain, having been licensed in general terms by the king to ship goods in a neutral vessel hence to certain ports of Spain, such commerce is legalised for all purposes of its due and effectual prosecution, either for the benefit of the party himself or of his correspondents, though residing in the enemy's country. *Usparicha* v. *Noble*, 13 East, 332; 12 R. R. 360.

If a licence is obtained from the British government by A. to import from an enemy's country in six ships such goods as shall be specified in his bill of lading, and goods are imported on board one of the six ships on account of B., C. and D., to whom several bills of lading are sent with their respective goods, and one general bill of lading for the whole cargo is sent to A., the whole cargo will be protected. *Defflis* v. *Parry*, 3 Bos. & P. 3. But see *Feise* v. *Waters*, col. 206.

A licence to F. & Co., obtained by them as the plaintiff's agents, permitting them to export in a ship named, bearing any flag except the French, specified goods from London to Dantzig, or any port in the Baltic not blockaded, though the documents might represent her destination to any neutral or hostile part, and to whomsoever the property might appear to belong, protects a consignment made by a Prussian neutral alien, resident here by licence, to a hostile Russian port of the Baltic. *Schmakoeg* v. *Andrews*, 5 Taunt. 716. See *Flindt* v. *Scott*, 15 R. R. 615.

Two neutral Prussians, one of them resident in England, the other at Konigsberg, having a licence to export to all Baltic ports, some whereof were hostile, were not precluded from recovering on an insurance of goods exported, and confiscated by an act of the Prussian government, then neutral. *Anthony* v. *Moline*, 5 Taunt. 711.

A licence to trade with an enemy granted to F. & Co. and others, may be used by the person for whom F. & Co. were the acting agents in procuring such licence, and in carrying on the adventure, though the person was a foreigner residing here under an alien licence at the time. *Feise* v. *Newnham*, 16 East, 197.

If a merchant, British by domicil, and two neutral merchants, his partners, export goods from London to a hostile port, under a licence granted to their broker on behalf of several British merchants, and insure, although the neutrals become enemies before action brought, the broker may, upon a loss incurred, maintain an action against the underwriters to recover the value of the joint interest of the three. *De Tastet* v. *Taylor*, 4 Taunt. 233; 13 R. R. 585.

Although a licence "to the plaintiff, of London, merchant, on behalf of himself and other British and neutral merchants, to export on board a certain vessel, bearing any flag except the French, a specified cargo from London to any port in the Baltic not under blockade, and to whomsoever the property may appear to belong," did not protect a part of the cargo which was the property of Russian subjects at the time of the shipment, Russia being then at war with this country, so as to entitle the plaintiff to recover in respect of that part upon a policy effected by him as the agent for and by the orders of those Russian subjects, the loss being occasioned by seizure, and confiscation in a Russian port by commissioners appointed by the Russian government; yet, as the licence was also obtained, and the policy effected by the plaintiff on his own account, and as agent for certain Hamburghers, who were respectively interested in separate and distinct proportions of the cargo:—Held, that he was entitled to recover in respect of his own interest, and that of the Hamburghers: Hamburgh being in a state of permissive neutrality with this country. *Hagedorn* v. *Bazett*, 2 M. & S. 100.

Under a licence to British brokers resident here, that a ship bearing any flag may import from an enemy's country to whomsoever the property may appear to belong, three British subjects not named in the licence, one of whom resides in a hostile country, may import from another hostile country to this. *Fayle* v. *Bourdillon*, 3 Taunt. 546.

A licence granted under an order in council to H. S. (a British resident merchant) permitting a vessel, bearing any flag except the French, to proceed in ballast from any port north of the Scheldt to Archangel, there to load a cargo of such goods as were permitted by law to be imported, and proceed with the same to a port in the United Kingdom, was considered as not confined personally to H. S. or any particular class of persons; and therefore, where Russian subjects at Archangel, who were alien enemies, had shipped goods under such licence for the purpose of being brought into this country:—Held, that they were protected by it; and an insurance made for their benefit was legal. *Robinson* v. *Touray*, 1 M. & S. 217; 3 Camp. 160; 13 R. R. 781; *and see* 16 R. R. 284, n. S. P., *Robinson* v. *Cheesewright*, 1 M. & S. 220.

As to Goods.]—Under a licence to A. to import goods the property of A., as specified in his bill of lading, if the goods are consigned to others with particular bills of lading, a general bill of lading signed to A., without proof of some special interest in A. in the goods, will not entitle the consignment to the benefit of the licence. *Feise* v. *Waters*, 2 Taunt. 248. But see *Defflis* v. *Parry*, col. 205.

A licence granted by the secretary of state under an order in council by virtue of 48 Geo. 3, c. 126, s. 2, to P., B. and C. (who were in fact British merchants residing here, but were not so expressed to be in the licence), on behalf of themselves and others, to export goods on board a vessel bearing any flag except the French,

from London to any port in the Baltic (of which most were at that time hostile, but some were neutral), will not warrant an export of goods which were the property at the time of the shipment, of an alien enemy, a Russian subject residing at St. Petersburg, then a hostile port of the Baltic, to which place the cargo was consigned, and at whose desire the licence was obtained by P., B. and C. *Mennet* v. *Bonham*, 15 East, 477. See *Vaughan* v. *Lemcke*, 25 R. R. 692, 694.

A licence to British merchants, by name, to export goods in a certain ship to any port in the Baltic, not blockaded, and to whomsoever the property might appear to belong, authorizes an enemy, subject of the hostile country to which the ship is licensed, legally to export from London. *Flindt* v. *Scott*, 5 Taunt. 674; 15 R. R. 615—Ex. Ch.

Importation of more Goods than Licence warrants.]—If a vessel brings under a licence a cargo of enumerated goods from a hostile country hither, and also certain other goods not licensed, the insurance on the licensed goods is not thereby vitiated. *Pieschell* v. *Allnutt*, 4 Taunt. 792. And see *Hagedorn* v. *Bell*, 14 R. R. 500.

A quantity of gunpowder was exported, for a part of which only a licence had been obtained:—Held, that the exportation of the excess only was illegal; and, therefore, that an insurance effected on the whole cargo might be supported as to so much for which the licence was obtained, whether the property of the same or of different persons. *Keir* v. *Andrade*, 2 Marsh. 196; 6 Taunt. 498; 16 R. R. 660.

Licence as to Goods in Ship will Legalise Insurance on Ship.]—Where a certain trading with an alien enemy for specie and goods, to be brought from the enemy's country in his ships into our colonial ports, was licensed by the king's authority:—Held, that an insurance on the enemy's ships, as well as on the goods and specie put on board for the benefit of the British subjects, was incidentally legalised; and that it was competent for the British agent of both parties, in whose name the insurance was effected, to sue upon the policy in time of war; the trust not contravening any rule of law or public policy, and there being no personal disability in the plaintiff on the record to sue. *Kensington* v. *Inglis*, 8 East, 273; 9 R. R. 438. S. P., *Flindt* v. *Scott*, 5 Taunt. 674; 15 R. R. 615—Ex. Ch.

A licence to H. of London, merchant, on behalf of himself and other British or neutral merchants, to import a cargo from certain limits within which an enemy's port is situate, in any vessel bearing any flag except the French, will protect a ship trading from that port, in which ship H. and an alien enemy are jointly interested. *Hagedorn* v. *Reid*, 1 M. & S. 567; 3 Camp. 377.

As to Ship.]—An importation from a hostile port by an alien enemy there resident, may be legalised by a licence to R., on behalf of a British merchant, for a ship not named; but in order so to legalise it, it is not sufficient that the ship's name should be indorsed at the hostile port of loading on the licence; the assured must also prove by what authority he applies the licence so obtained to that adventure. *Robinson* v. *Morris*, 5 Taunt. 730.

Insurance on Goods on Ship with Licence—Seizure after Transfer to Launches.]—Insurance on goods on board a Spanish ship from Nassau to Campeachy, to continue on the goods till discharged and safely landed. The ship having a licence from the British government at Nassau, sailed from Campeachy, arrived off that port, and made signals for launches, in which the goods were put for the purpose of being run ashore. In this situation the goods were seized by two Spanish government brigs, it being contrary to the Spanish law to import British goods into the Spanish Main. The goods were protected by the policy while on board the launches, such being the usual method of carrying on that trade. *Matthie* v. *Potts*, 3 Bos. & P. 23.

As to Places.]—A licence granted upon the representation of U. on behalf of different British merchants, for permitting a ship (by name) to proceed under any colours, except the French, with a cargo of such goods as were permitted by an order in council to be exported from London to any ports within certain limits, the whole of the country within those limits being in hostility with this country, was held to protect the property of an alien enemy residing in the hostile country, shipped on his account in this country; and therefore an insurance for his benefit was legal. *Hullman* v. *Whitmore*, 3 M. & S. 337; 15 R. R. 283.

A licence to ship-brokers in London on behalf of themselves and British or neutral merchants, to load and export a cargo on board a Russian ship from London to any port in the Baltic not under blockade, protected Russian property exported from this country on a voyage to a Russian port, Russia being at war with Great Britain. *Rucker* v. *Ansley*, 5 M. & S. 25; 17 R. R. 251.

A licence to sail in ballast from any port north of the Scheldt to Archangel, or any other port of the White Sea, there to take in a cargo of permitted goods, and import them into the United Kingdom, legalises a vessel which had sailed from Great Britain to St. Petersburg with colonial produce, in bringing home a return cargo of the specified goods. *Staniforth* v. *Coombe*, 5 Taunt. 726.

A licence to import direct from any port in Norway or to sail in ballast from any port north of the Scheldt to any port in Norway, and in either case to import thence, authorises by the first clause a sailing from a British port, whether north or south of the Scheldt, to Norway to fetch the cargo. *Le Cheminant* v. *Pearson*, 4 Taunt. 367; 13 R. R. 636.

iii. Limitation of Time.

Expiration of Licence after Shipment but before Sailing.]—If a licence to export and deliver goods to an enemy's country is granted for a limited time, it is not sufficient that the goods were shipped before the expiration of the time, the ship not sailing till afterwards. *Vandyck* v. *Whitmore*, 1 East, 475.

A licence to export to a hostile country was to continue in force for exporting till the 10th September. The ship cleared at the custom-house on the 9th September, and on the 12th received her clearing note at Gravesend:—Held, that the ship had not exported the cargo before the 10th, and that the insurance was void. *Williams* v. *Marshall*, 6 Taunt. 390; 2 Marsh. 92; 1 Moore, 168; 7 Taunt. 468; 18 R. R. 542.

A vessel is not protected under a licence for six months which was to be renewed on application by the parties on the return of the vessel from her voyage, if it appears that the licence expired on the 2nd January, and that the ship cleared at the custom-house on the 19th December preceding, but did not receive her clearance at Gravesend till the 20th January, being detained by the exporter, who feared a capture by French privateers. *Tulloch* v. *Boyd*, 1 Moore, 174; 7 Taunt. 472; Holt, 487; 18 R. R. 546.

Voyage not completed within Time — No Default—Perils of the Sea.]—A licence to trade, which is to expire on a certain day, will protect the adventure beyond that day, if it be protracted by events which the licensed party cannot control. And where a homeward cargo, shipped without laches after the licence had expired, was, through perils of the sea, necessarily unladen in the course of the voyage, and destroyed by fire on shore:—Held, that the licence protected a cargo of the specified goods substituted for the cargo burnt. *Siffkin* v. *Glover*, 4 Taunt. 717.

Where a licence was granted to the plaintiff on the 25th of May, 1810, to take a cargo from London to Archangel, and to return thence with a cargo of grain and other goods, permitted by law to be imported to any port of the United Kingdom, and the licence was limited to the 29th of September following, which time was afterwards extended to the 1st of January, 1811; and the ship, after taking in a cargo of pitch and tar at Archangel, sailed on her homeward voyage on the 13th of October, 1810, but was driven back to Archangel, and there unloaded, and the cargo sold, and the ship laid up for the winter, and did not sail again from thence with a cargo of wheat until the 1st of August, 1811:—Held, that the licence was not exhausted by taking in the first cargo of pitch and tar, but would cover the cargo of wheat also, notwithstanding the time limited for its continuance had elapsed, provided it appeared that the voyage was prosecuted with all reasonable despatch, which was a question for the jury. *Siffkin* v. *Allnutt*, 1 M. & S. 39.

If a licence to trade is limited in duration to a certain day, and the vessel has not completed her voyage before the licence expires, it is incumbent on the licensed person to prove that such due diligence has been used by the master of the vessel that the adventure is still protected within the spirit of the licence. But if there has been no default in the conduct of the vessel, the licence, though expired, still protects the adventure till its completion. *Freeland* v. *Walker*, 4 Taunt. 478; 13 R. R. 651.

A voyage legalised in its commencement by a licence for four months, which expired during the voyage may be legally finished, if special circumstances, not in the power of the licensed person to control, clear of fraud and laches on his part, have protracted the voyage. *Leevin* v. *Cormac*, 4 Taunt. 483, n; 13 R. R. 654.

A license by the king in council legalises the prosecution of the intended adventure, after the time specified in the licence has expired, if the delay was caused by unavoidable necessity whether the voyage protected commence after the licence expired or before. *Effurth* v. *Smith*, 5 Taunt. 329.

Date not truly Indorsed.]—If the defence upon a policy is, that the licence requires the date of the ship's clearance from a hostile port to be indorsed thereon, and that it is not truly indorsed, it is incumbent on the defendant to prove what a clearance is, and the discrepancy between the real date of the clearance and the date indorsed. *Morgan* v. *Oswald*, 3 Taunt. 554.

iv. How proved.

When Lost.]—If a licence to trade is lost, the next best evidence is the register of it in the books of the secretary of state. *Rhind* v. *Wilkinson*, 2 Taunt. 237; 11 R. R. 551.

Where a ship insured is captured in a voyage to an enemy's country, and the British licence legalising the voyage is lost, to shew that she had such a licence, it is necessary to prove the loss of the paper purporting to be a licence which was on board the ship, and to produce examined copies of the order in council for granting the licence, and the copy of the licence preserved in the secretary of state's office. *Eyre* v. *Palsgrave*, 2 Camp. 605; 12 R. R. 751.

Where a licence to trade with an enemy, granted abroad, had been returned after being used, to the secretary of the governor by whom it was issued, who had, as he believed, thrown it aside amongst the waste papers of his office, and did not know what was become of it, having afterwards searched for, but not recollecting the finding it, and thinking that he had not found it; this is reasonable and probable evidence of the loss of such licence, so as to let in parol evidence of its contents. *Kensington* v. *Inglis*, 8 East, 273; 9 R. R. 438.

A licence having been deposited in the custom-house, and accidentally destroyed, it is to be presumed that the time of clearance, as required by the order in council, was indorsed upon it, upon its being shewn that without such indorsement the custom-house would not have permitted the entry to have been made. *Butler* v. *Allnutt*, 1 Stark. 222.

As to Possession of Licence.]—Where an assured British merchant, in an action on a policy of insurance in goods bound to an enemy's port in Holland, seeks to protect the adventure under the king's licence to trade with the enemy, it is not sufficient to give in evidence at the trial, and to prove his possession in fact before the voyage commenced, of a general licence dated three months before, licensing six neutral vessels under certain neutral flags to pass unmolested to or from any port of Holland, from or to any port of this kingdom, with certain goods (including the goods insured), which licence was directed to S. and other British merchants, with a condition annexed that they should cause the licence to be delivered up to them or their agents when the ship should enter any port of this kingdom; without also giving probable evidence to account for his possession of the licence, and to shew that his use of it was lawful; as by shewing from whom and when he received it, and thereby connecting his own particular adventure with such general licence. *Barlow* v. *M'Intosh*, 12 East, 311.

d. Proceedings by and against.

In general.]—An alien enemy cannot, by the municipal law of this country, sue for the recovery of a right claimed to be acquired by him in actual war. *Anthon* v. *Fisher*, 2 Dougl. 649, n. Contra *Maria* v. *Hall*, 1 Taunt. 32, n.

No action can be maintained either by or in favour of an alien enemy. *Brandon* v. *Nesbitt*, 6 Term Rep. 23 ; 3 R. R. 109.

An alien, to whom a bill, drawn on England by a British subject detained prisoner in France during war, payable to another British subject detained there, is there indorsed by the latter, may sue on it in this country after the return of peace. *Antoine* v. *Morshead*, 1 Marsh. 558 ; 6 Taunt. 237 ; 16 R. R. 610.

Feme Covert — Husband Alien Enemy.]—A feme covert cannot sue alone on a contract made with her before or after marriage, though her husband is an alien enemy. *De Wahl* v. *Braune*, 1 H. & N. 178 ; 25 L. J., Ex. 343 ; 4 W. R. 646.

Neutral taken in Act of Hostility.]—A native of a neutral state taken in an act of hostility on board an enemy's fleet, and brought to England as a prisoner of war, is not disabled from suing while in confinement, on a contract entered into as a prisoner of war. *Sparenburgh* v. *Bannatyne*, 1 Bos. & P. 163 ; 2 Esp. 580 ; 4 R. R. 772.

Action by Trustee for.]—It is no defence to an action on a bill of exchange that the plaintiff sues in trust for an alien enemy. *Daubuz* v. *Morshead*, 6 Taunt. 332 ; 16 R. R. 623.

Action by Agent for.]—A plea of alienage to an action on a policy brought in the name of an English agent for his principal, an alien, whose interest appears on the record, is a good plea ; and a replication to such plea, that the alien is indebted to the agent in more money than the value of the property insured, cannot be supported. *Brandon* v. *Nesbitt*, 6 Term Rep. 23 ; 3 R. R. 109.

A British agent effecting a policy on behalf of alien enemies, who became enemies after the loss happened, but before the action commenced, is entitled to recover against the underwriter, who had only pleaded the general issue ; for such temporary suspension during the war, of the assured's right of suit upon a contract, legal at the time, and liable to be enforced upon the return of peace, cannot be taken advantage of under a plea of perpetual bar, there being no legal disability in the plaintiff on the record to sue. *Flindt* v. *Waters*, 15 East, 260 ; 13 R. R. 457.

Pleadings relating to.]—In a plea of alienage, the defendant must state that the plaintiff was born in a foreign country, at enmity with this country, and that he came here without letters of safe conduct from our king. *Casseres* v. *Bell*, 8 Term Rep. 166.

In an action on a policy of insurance, it is no defence under the general issue that the persons interested, who were neutrals when the policy was effected and the loss happened, had become alien enemies before action. *Harman* v. *Kingston*, 3 Camp. 152 ; 13 R. R. 775.

Where an alien amy, at the time of the action brought, became an alien enemy before plea pleaded, and the defendant pleaded that the plaintiff ought not to have or maintain his action, because he was before and at the time of exhibiting his bill, and that he now is, an alien enemy ; concluding that, therefore, the plaintiff ought to be barred from having or maintaining his action ; to which the plaintiff replied, that, at the time of exhibiting his bill, he was an alien amy ; wherefore he prayed judgment and his damages : to which there was a demurrer :—Held, that the plea was ill pleaded. But yet, as the court was ex-officio bound to give such judgment as appeared upon the whole record to be proper, without regard to the issues found or confessed, or to any imperfection in the prayer of judgment on either side ; and as it appeared upon the whole that the plaintiff was now an alien enemy, and therefore incapable of maintaining further his suit, judgment was given that he be barred from further having or maintaining his action. *Le Bret* v. *Papillon*, 4 East, 502 ; 7 R. R. 618.

—— **Since 7 & 8 Vict. c. 66.**]—A plea, that the plaintiff was an alien enemy residing in this country without the licence, safe conduct, or permission of the sovereign is good, although it does not expressly negative a certificate from one of the secretaries of state under 7 & 8 Vict. c. 66, ss. 6, 8. *Alcenius* v. *Nygren*, 4 El. & Bl. 217 ; 24 L. J., Q. B. 19 ; 1 Jur. (N.S.) 16 ; 3 W. R. 25.

Proof of Alien Enemy.]—*See* col. 199, supra.

4. Naturalisation.

Generally.]—A person naturalised in this country becomes to all intents and purposes a British subject, and ceases to be an alien. *Reg.* v. *Manning*, 1 Den. C. C. 467 ; T. & M. 155 ; 2 Car. & K. 887 ; 19 L. J., M. C. 1 ; 13 Jur. 962.

An alien domiciled and naturalised in this country, is subject to the same disabilities as is a natural-born subject. *Mette* v. *Mette*, 28 L. J., P. 117 ; 1 Sw. & Tr. 416 ; 7 W. R. 543.

Marriage.]—He is incapable of contracting a marriage, which would have been void if contracted by a natural-born subject, although valid by the law of his domicil of origin, and by the lex loci contractûs. *Ib.*

Qualified Naturalisation—Infants—Guardian —Jurisdiction.]—In 1861, B., a Frenchman, came to England, and in 1871 obtained from the British Home Office a certificate of naturalisation, declaring that he was thereby naturalised as a British subject, and that upon taking the oath of allegiance he should in the United Kingdom be entitled to all political and other rights, powers, and privileges, and be subject to all obligations to which a natural-born British subject was entitled or subject in the United Kingdom, with this qualification, "that he shall not, when within the limits of the foreign State of which he was a subject previously to his obtaining his certificate of naturalisation, be deemed to be a British subject unless he has ceased to be a subject of that State in pursuance of the laws thereof, or in pursuance of a treaty to that effect." In 1870 B. married an Englishwoman. Two children were born in Paris, and their births registered at the British Embassy. In 1886 B. died at Neuilly, having by will made in French form given the residue of his property to his two children. Half the property was in France and half in England. In June, 1887, B.'s widow died. On summons by an English half-brother of the children for the appointment of himself as guardian :—Held, that the certificate

was not a certificate of naturalisation absolutely to all intents and purposes, but that the naturalisation was qualified, and did not deprive B. of his status as a French subject :—Held, that, as B. was at the time of his death a French subject, and his children were French subjects, the English court had no jurisdiction. *Bourgoise, In re*, 41 Ch. D. 310 ; 58 L. T. 431 ; 37 W. R. 563. See *S. C.* in C. A., 41 Ch. D. 310 ; 60 L. T. 553 ; 37 W. R. 563.

Bastard.]—To be within the 4 Geo. 4, c. 21, the child must be born of a British father ; but a bastard, filius nullius, can have no father. *Shedden* v. *Patrick*, 1 Macq. H. L. 535.

A child born of a bastard in a foreign country, not recognising the doctrine of legitimation per subsequens matrimonium, is an alien, although his putative father was a Scotchman domiciled all his life in Scotland, and although such putative father afterwards married the mother of the bastard for the express purpose of rendering the bastard legitimate. *Ib.*

7 Anne, c. 5 ; 4 Geo. 2, c. 21 ; and 13 Geo. 3, c. 21.]—The status of natural-born British subjects, which by the acts 7 Ann. c. 5 ; 4 Geo. 2, c. 21, and 13 Geo. 3, c. 21, is conferred on children and grandchildren born abroad of natural-born British subjects, is a merely personal status, and is not by these acts made transmissible to the descendants of the persons to whom that status is thereby given. *De Geer* v. *Stone*, 52 L. J., Ch. 57 ; 22 Ch. D. 243 ; 47 L. T. 434 ; 31 W. R. 241.

4 Geo. 2, c. 21, and 13 Geo. 3, c. 21.]—The children of an American loyalist, who continued his allegiance to the Crown of Great Britain after the colonies were separated from the mother country, and settled in America, are entitled to take lands by descent in England, within the operation of 4 Geo. 2, c. 21, as natural-born subjects of the Crown of Great Britain. *Doe* d. *Auchmuty* v. *Mulcaster*, 8 D. & R. 593 ; 5 B. & C. 771 ; 4 L. J. (o.s.) K. B. 311 ; 29 R. R. 390.

A., who was by birth an Englishman, emigrated to the United States of America, after the recognition of their independence by the treaty of 1783, and took the oaths of obedience to the American government, and of abjuration of all other allegiance, married an American woman, and had a son of that marriage (B.), born in the United States. B. had a son (C.), who was also born in America, out of the Queen's dominions : —Held, that C. was capable of inheriting real estate as a British subject, within 13 Geo. 3, c. 21, and 4 Geo. 2, c. 21. *Fitch* v. *Weber*, 6 Hare, 51 ; 17 L. J., Ch. 73 ; 12 Jur. 76.

The privileges which 4 Geo. 2, c. 21, and 13 Geo. 3, c. 21, confer, are the privileges of the children and not of the father ; and, therefore, acts intended by a British-born subject to have the effect of abandonment or abjuration of his rights in that character, do not deprive his children of the benefit of 4 Geo. 2, c. 21, and 13 Geo. 3, c. 21, unless such acts bring them within the disqualifying provisions of those statutes. *Ib.*

The words in the 13 Geo. 3, c. 21, s. 3, are to be read "aliens' duties, customs and impositions," and not "aliens, duties, customs, and impositions," and therefore the grandchild of a natural-born subject, born out of the Queen's allegiance, is entitled to the benefit of that statute, in regard to holding lands as a natural-born subject, although he has not complied with the formalities specified in the 3rd section. *Barrow* v. *Wadkin*, 24 Beav. 327 ; 27 L. J., Ch. 129 ; 3 Jur. (N.S.) 679 ; 5 W. R. 695.

The 13 Geo. 3, c. 21, ss. 3 and 4, annex certain provisoes as to the time within which a claim is to be made, to enable grandchildren to claim or demand any estate in pursuance of the right given them by s. 1 :—Held, that these provisoes apply to Ireland, as qualifying the status of the English subject which the Act of Union transferred. *Davies* v. *Lynch*, 16 W. R. 1207.

The 3rd section, which requires for its purpose that the person naturalised should subscribe to the Church of England, applies solely to fiscal matters, and does not exclude dissenters from the operation of the remainder of the act. *Ib.*

The children of natural-born subjects, who, under 4 Geo. 4, c. 21, are to be considered natural-born subjects of this kingdom, must have been legitimate from their birth, and not rendered so by the subsequent marriage of their parents. *Shedden* v. *Patrick*, 1 Macq. H. L. 535.

13 Geo. 2, c. 3.]—An alien who has served on board a British man-of-war for four years in time of war, is a natural-born subject under 13 Geo. 2, c. 3. *Giraud, In re*, 32 Beav. 385.

37 Geo. 3, c. 97, s. 24.]—A. resided in Pennsylvania before the declaration of American independence, and he had a son, B., born there also before that period. In 1783, A. came to England to get compensation for his loss as an American loyalist. In 1785, he returned to Pennsylvania, where he died. B. was never in England. Semble, that both A. and B. were American subjects, and that A. became so by returning to Pennsylvania in 1785 ; and that a claim to lands could only (if at all) be made through them under 37 Geo. 3, c. 97, s. 24. *Doe* d. *Stansbury* v. *Arkwright*, 5 Car. & P. 575.

Under the treaty of 1794, between Great Britain and America, and 37 Geo. 3, c. 97, American citizens who held lands in Great Britain on the 28th of October, 1795, and their heirs and assigns are at all times to be considered, so far as regards these lands, not as aliens, but as native subjects of Great Britain. *Sutton* v. *Sutton*, 1 Russ. & M. 663. S. P., 8 Wheaton Amer. Rep. 494.

33 & 34 Vict. c. 14.]—Where the title to an alien to hold land accrued before the passing of the Naturalisation Act, 1870 :—Held, that that act did not remove his disability to hold the land. *Sharp* v. *De St. Sauveur*, 41 L. J., Ch. 576 ; L. R. 7 Ch. 343 ; 26 L. T. 142 ; 20 W. R. 269.

The statute 33 Vict. c. 14, is not retrospective. *De Geer* v. *Stone*, 52 L. J., Ch. 57 ; 22 Ch. D. 243 ; 47 L. T. 434 ; 31 W. R. 241.

British Subject Naturalised in Foreign Country.]—A testator who was by birth a British subject, and was the father of the plaintiff, went to reside in Switzerland, and in the year 1842 acquired the "Landrecht" or "Indigenat" in the canton of Zurich, without being required to renounce his English nationality, which in the then state of English law he could not have effectually done ; and he thereby became of Swiss nationality. With the sanction of the cantonal authorities he could have relinquished this "Landrecht" or "Indigenat," but he never effectually did so, although he after-

wards left Switzerland and went to reside in France, where he died with a French domicil in the year 1878:—Held, that the 6th section of the Naturalisation Act, 1870, applied to the testator; that at the time of his death he was a Swiss, and not a British subject; and that, having regard to the French law, under which the Swiss tribunals were the proper forum, the courts of Zurich had jurisdiction to decide upon the right of succession to his personal estate:—Held, also, that notwithstanding an attempted disposition by the testator of the whole of his personal estate in favour of a stranger, the plaintiff was, in accordance with a judgment of the courts of Zurich, entitled as the testator's only child to nine-tenths of such estate as his compulsory portion. *Trufort, In re, Trafford* v. *Blanc*, 57 L. J., Ch. 135; 36 Ch. D. 600; 57 L. T. 674; 36 W. R. 163.

b. Husband and Wife and Divorce.

1. Marriage.

How Constituted.]—When an English woman marries a domiciled foreigner, the marriage is constituted according to the lex loci contractûs; but she takes his domicil and is subject to his law. *Harvey* v. *Farnie*, 52 L. J., P. 33; 8 App. Cas. 43; 48 L. T. 273; 31 W. R. 433; 47 J. P. 308—H. L. (E.)

Where the formalities of the lex loci contractûs are observed, it is immaterial that one of the parties to the marriage had some other motive besides marriage. *Bell* v. *Graham*, 13 Moore, P. C. 242; 1 L. T. 221; 8 W. R. 98.

A marriage contract was entered into in Paris between two English subjects, according to the formalities required by the French law, in anticipation of a marriage to be solemnised "suivant la loi." A valid English marriage took place at the embassy, but no marriage ceremony took place according to the French forms and solemnities:—Held, that the marriage "suivant la loi" was fulfilled by the English marriage, and that the settlement being to regulate an English marriage, was valid here, notwithstanding that, according to the French law, the marriage and the settlement might be inoperative. *Este* v. *Smyth*, 18 Beav. 112; 23 L. J., Ch. 705; 18 Jur. 300; 2 W. R. 148.

English subjects, on their marriage, may stipulate that their marriage rights shall be regulated by the law of a foreign country, and this court will enforce such a contract. *Ib.*

Marriage in Uncivilised Country between Domiciled Englishman and Woman of Barbarous Tribe—Native Customs.]—A union formed between a man and a woman in a foreign country, although it may there bear the name of a marriage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the law of England, unless it is formed on the same basis as marriages throughout Christendom, and be in its essence the voluntary union for life of one man and one woman to the exclusion of all others. *Bethell, In re, Bethell* v. *Hildyard*, 57 L. J., Ch. 487; 38 Ch. D. 220; 58 L. T. 674; 36 W. R. 503.

Capacity to Contract Marriage.]—Although the lex loci contractûs quoad solemnitates determines the validity of the contract of marriage, the question whether the parties may enter into such contract must depend upon the lex domicilii. *Brook* v. *Brook*, 9 H. L. Cas. 193; 7 Jur. (N.S.) 422; 4 L. T. 93; 9 W. R. 461. Affirming 3 Sm. & G. 481; 27 L. J., Ch. 401.

The 5 & 6 Will. 4, c. 54, would not affect the law of marriage in any conquered colony in which a different law of marriage has prevailed. It is limited in its operation to the inhabitants of Great Britain and Ireland. *Ib.*

The rule that the marriage, if good in the country where it was contracted, is good everywhere, is subject to the qualification, that the marriage must not be one prohibited by the country to which the parties contracting belong. *Ib.*

The personal capacity of parties to enter into the contract of marriage depends upon their domicil; and where both parties had a foreign domicil, and, by the law of their domicil, their marriage was invalid by reason of consanguinity, a marriage which was contracted in England, and which would have been valid according to English law, was held invalid. *Sottomayer (otherwise De Barros)* v. *De Barros*, 47 L. J., P. 23; 3 P. D. 1; 37 L. T. 415; 26 W. R. 455—C. A. *See next case.*

Two natives of Portugal, one of whom was domiciled in England, the other in Portugal, contracted a marriage in England in 1866. They were first cousins, and were incapable, according to the law of Portugal, of intermarrying, on account of consanguinity, without a papal dispensation. The petitioner (the wife) filed a petition praying that her marriage with the respondent might be declared null and void:—Held, that the lex loci contractûs should prevail in the matter; and the marriage being valid according to the law of England, the court dismissed the petition. *Sottomayer (otherwise De Barros)* v. *De Barros (The Queen's Proctor intervening)*, 49 L. J., P. 1; 5 P. D. 94; 41 L. T. 281; 27 W. R. 917. *And see preceding case.*

The rule, that the lex loci contractûs of a marriage establishes its validity, requires this qualification—viz., where the law of a country forbids marriage under any particular circumstances, the prohibition follows the subjects of that country wherever they may go. *Fenton* v. *Livingstone*, 3 Macq. H. L. 497; 5 Jur. (N.S.) 1183; 7 W. R. 671.

The comity of nations does not demand that a nation should recognise as valid every marriage which is valid lege loci contractûs, and not prohibited by the common consent of Christianity. Each nation has a right to define and prohibit incest. *Ib.*

If a marriage, though good according to the law of the domicil, were nevertheless contrary to the religious or moral notions of other states, it would be impossible to contend that it ought to be adopted by them. *Ib.*

If the comity of nations were always to prevail, a foreign marriage between uncle and niece, under papal dispensation, must be held valid, and the issue might claim to take a Scotch estate and Scotch honours, although, had the marriage been contracted in Scotland, the parties might have been capitally punished. *Ib.*

A divorced wife, who and whose husband are not native-born subjects of the country in which the divorce was pronounced, may contract a valid marriage here, although by the law of the foreign country the wife, being the guilty party, could

not contract a valid marriage so long as the innocent party remained unmarried. *Scott* v. *Att.-Gen.*, 55 L. J., P. 57 ; 11 P. D. 128 ; 56 L. T. 924 ; 50 J. P. 824.

If Marriage between British subjects in France is not Valid there, it will not be Valid here.]—Where the parties, British subjects, are married in France, if the marriage is not valid in that country, it will not be so in this. *Lacon* v. *Higgins*, D. & R., N. P. C. 38 ; 3 Stark. 178 ; 25 R. R. 779. S. P., *Butler* v. *Freeman*, Ambl. 303 ; *Kent* v. *Burgess*, 11 Sim. 361 ; 10 L. J., Ch. 100 ; 5 Jur. 166. *Alison, In re*, 31 L. T. 638 ; 23 W. R. 226.

Where the alleged husband cohabited with a party entitled to a pension, durante viduitate, residing in Scotland, and reputed as man and wife ; but with the view to the receipt of the pension, she yearly made the solemn declaration of continuing widowhood :—Held, on exception to the Master's report, that he was warranted in finding that no valid marriage had taken place. *Robertson* v. *Crawford*, 3 Beav. 102.

British Subjects in a British Settlement.]—British subjects resident in a British settlement abroad are governed by the laws of this country, and consequently, with respect to marriage, by the law which existed here before the marriage act, viz., the canon law. *Lautour* v. *Teesdale*, 2 Marsh. 243 ; 8 Taunt. 880 ; 17 R. R. 518.

Marriage at British Embassy.]—The 4 Geo. 3, c. 91, gives validity to the marriage of a British subject in the chapel of the British ambassador abroad, whether the other party to the marriage is a British subject or not. *Wright's Trust, In re*, 2 Kay & J. 595 ; 25 L. J., Ch. 621 ; 2 Jur. (N.S.) 465 ; 4 W. R. 541. And see *Este* v. *Smyth*, 18 Beav. 112 ; 23 L. J., Ch. 705 ; 18 Jur. 300 ; 2 W. R. 148.

Celebration by Army Chaplain.]—The marriage of an officer, celebrated by a chaplain of the British army within the lines of the army when serving abroad, is valid under 9 Geo. 4, c. 91, though such army is not serving in a country in a state of actual hostility, and though no authority for the marriage was previously obtained from the officer's superior in command. *Waldegrave Peerage*, 4 Cl. & F. 649.

Effect of Marriage.]—A woman who has become by the law of France personally liable for her husband's debts, and has paid them after his death, and who is by the same law entitled to sue a defendant in her own right to recover the money so paid, has a primâ facie right to bring such action in this country without first taking out administration here. She is entitled to the like privilege as a donee by the law of France of her deceased husband's rights of action. *Vanquelin* v. *Bouard*, 15 C. B. (N.S.) 341 ; 33 L. J., C. P. 78 ; 10 Jur. (N.S.) 566 ; 9 L. T. 582 ; 12 W. R. 128.

Where a husband and wife carry on trade as partners in Spain, they cannot sue as such in our courts, nor maintain a joint action against persons resident in this country, to recover the amount of a balance due to the partnership account, without proof being given that by the law of Spain a feme covert is permitted to trade ; and it is doubtful whether an action could be maintained by both, even on such proof being given. *Cosio* v. *De Bernales*, 1 Car. & P. 266 ; R. & M. 102 ; 28 R. R. 775.

Other Matters.]—A marriage established by the sentence of a foreign court, having proper jurisdiction, is conclusive by the law of nations. *Roach* v. *Garvan*, 1 Ves. Sen. 159.

2. Marriage Settlement.

In General.]—Where a contract is made between persons domiciled in a foreign land, and in a form known to the law of that country, the court in administering the rights of parties under it will give it the same construction and effect as the foreign law would have given it. If, therefore, a domiciled Scotchman would be held entitled in Scotland, by virtue of a marriage contract executed there, and in the Scotch form, to receive whatever property accrued during coverture to his wife, this court will enforce his right, as against any such property coming within its jurisdiction, and will not raise an equity for a settlement in favour of the wife in opposition to the provisions of the contract. *Anstruther* v. *Adair*, 2 Myl. & K. 513.

Immovable Property—Englishwoman with Foreign Husband.]—By a settlement made in 1881, upon the marriage of an English lady with a Spaniard, certain real estate in England, the property of the lady, was, with the approbation of the intended husband, "given in consideration of the renunciation that day executed by her of any rights which she would otherwise have acquired by marriage in her husband's property according to the law of Spain," conveyed to a trustee to such uses as she should, notwithstanding coverture, by deed appoint. And it was thereby declared that the settlement was to be construed according to the law of England. By an indenture dated the 23rd of February, 1882, the wife, with the consent of her husband, appointed the real estate to a trustee in fee, upon trust to sell and to stand possessed of the proceeds of sale in trust for such persons as "she should at any time thereafter by any writing appoint" ; and, in default of appointment, in trust for her separate use. The wife died in June, 1882, without children, having, by her will, made immediately after her marriage, given four fifths of her real and personal estate, in case she should leave no children, to her husband absolutely. According to the law of Spain, as she had died without children, two-thirds of her property belonged to her parents :—Held, that the deed of February, 1882, must be construed according to English law. *Hernando, In re, Hernando* v. *Sawtell*, 53 L. J., Ch. 865 ; 27 Ch. D. 284 ; 51 L. T. 117 ; 33 W. R. 252.

—— **Englishman with Foreign Wife.**]—The Scotch real estate of a wife, whose domicil at the date of the marriage was Scotch, while that of her husband was English, is entitled to be exonerated from his debt, which had been charged upon it by way of security, although he has obtained a divorce by reason of her adultery ; and she being domiciled in England may sustain a suit for the purpose in England, even though he is at the time domiciled abroad. *Drummond* v. *Drummond*, 37 L. J., Ch. 811 ; 17 W. R. 6.

Power in a marriage settlement to grant to a wife any annual sum of money or yearly rent-charge to be tax free, and without any deduction,

and to be issuing out of and chargeable upon lands in Ireland, so that such rent-charge do not exceed, in the whole, the yearly sum of 3,000*l.* of lawful money of Great Britain :—Held, that a rent-charge appointed under this power, is payable in Ireland in the currency of England ; but that the appointee is not entitled to have the sum transmitted to England free of the charge of conveyance and exchange, properly so called. *Lansdowne* v. *Lansdowne*, 2 Bli. 60 ; 21 R. R. 43.

Movable Property—Infant domiciled abroad.]—The appellant, the widow of a domiciled Scotchman, brought an action in the Court of Session, for the reduction of an ante-nuptial contract, by which in consideration of a provision made by her husband she purported to discharge her legal rights of terce and jus relictæ. The contract was executed in Ireland by the appellant, who was then an infant domiciled in Ireland, but it was contemplated that she and her husband should reside, and they actually resided, during their married life in Scotland. The grounds upon which the appellant sought to obtain reduction of the contract were, that being an infant she was incapable of contracting by the law of Ireland, and minority and lesion according to the law of Scotland :—Held, that the capacity of the appellant to bind herself by the marriage contract must be determined by the law of her domicil (i.e. the Irish or English law), and that under such law she could not as an infant incur an obligation which was not shown to be for her benefit, and that she was therefore at liberty to avoid the contract and claim her legal rights as a Scotch widow. *Cooper* v. *Cooper*, 13 App. Cas. 88 ; 59 L. T. 1—H. L. (Sc.) See also, *Cooke's Trusts, In re*, 56 L. J., Ch. 637 ; 56 L. T. 737 ; 35 L. T. 608.

A married woman, domiciled in France, entered into a contract in England respecting her reversionary interest in trust money invested in the English funds, which was substantially valid according to French law, although invalid according to the English law ; but the contract was not entered into in the manner prescribed by French law, which requires that there should be as many instruments as there are distinct parties to the contract :—Held, that the French law gave capacity to make the contract, but that the English law regulated the form of it, and that therefore the contract was valid ; and it was enforced by decree. *Guépratte* v. *Young*, 4 De G. & Sm. 217.

—— **How affected by form.**]—By a settlement in contemplation of marriage, made at the Mauritius, where the laws of France were in force, drawn up in the French language, and executed according to the French form, it was agreed, that there should be no community of goods between the husband and wife ; and it was stated to be the intention of the parties to marry according to the laws and customs of England, the benefit of which they reserved to themselves the right to claim. The husband then acknowledged the receipt of 4,000*l.*, belonging to the wife, which he covenanted to invest for her benefit, and for her separate use during the marriage, either in land or in the French funds, or other securities which the wife should approve. The 4,000*l.* was never paid to the husband, nor did he invest such a sum during the marriage. His domicile was in England. Held, that upon his death intestate, the wife was entitled to receive 4,000*l.* out of his estate, and also a distributive share of his personal estate remaining after payment of that sum. *Lang* v. *Lang*, 8 Sim. 451 ; 6 L. J., Ch. 324 ; 1 Jur. 472.

A marriage settlement, made in France between English subjects, stipulated that the custom of Paris should regulate their community and the other clauses of the contract. As to 2,000*l.* (part of the wife's fortune), the husband was to be chargeable to his wife, and it was to remain her bien personnel. By the general law of France a wife can make a will. A marriage, valid as to the English, but, as was alleged, invalid as to the French law, followed. Held, that the rights were to be regulated by those which French subjects would have under such a contract and marriage valid in France ; and that, whether the contract was valid or not in France, still that here the wife had a power to dispose of the property by will. Held, secondly, on the construction of the instrument, that the marital right over the property was excluded ; and thirdly, that a will executed according to English, though not according to French formalities, effectually disposed of this property. *Este* v. *Smyth*, 18 Beav. 112 ; 23 L. J., Ch. 705 ; 2 Eq. R. 1208 ; 18 Jur. 300 ; 2 W. R. 148.

A French gentleman domiciled in France, and an English lady resident in that country, in contemplation of a marriage, which was afterwards solemnised in France, executed a settlement in the English form, declaring the trusts of the property comprised therein in favour of the husband and wife and children of the marriage. The settlement was void in France, for want of formalities required by the French law. The property comprised in the settlement consisted of moneys which had been appointed in favour of the wife, upon the understanding that it should be settled, and retained in England in the name of the English trustees. The husband and wife were still domiciled in France. The husband filed a bill, praying a declaration that the settlement was void :—Held, that the contract must be construed according to the English law, and not according to the lex domicilii, and that the marriage having taken place upon the faith of the validity of the settlement, effect must be given to it by the court. *Van Grutten* v. *Digby*, 31 Beav. 561 ; 32 L. J., Ch. 179 ; 9 Jur. (N.S.) 111 ; 7 L. T. 455 ; 11 W. R. 230.

A. being domiciled in Turkey was married in London to B., an Englishwoman. Previously to the marriage a settlement was made, in English form, of property belonging to A. on B., her daughter by her former husband, and her issue by A. After the marriage they went to reside in Turkey, and children were born to them. After some time the wife returned to this country with her children, and during her absence, and without giving her notice, the husband obtained a divorce which was good according to Turkish law. She afterwards died :—Held, that the settlement was an English one, and to be construed according to English law, and that the court would not, under the circumstances, take into consideration the Turkish divorce and its effect on the settlement according to Turkish law. *Colliss* v. *Hector*, 44 L. J., Ch. 267 ; L. R. 19 Eq. 334 ; 32 L. T. 223 ; 23 W. R. 485.

By a marriage contract dated in 1857, and made in Scotland, on the marriage of a domiciled

Englishman with a domiciled Scotchwoman, real estate in England and a sum of consols were brought into settlement on the part of the husband, and property in Scotland was brought into settlement on the part of the wife. There was an absolute trust for sale and conversion of the husband's property, and investment of the proceeds, which were to be held in trust for the husband and wife successively for life, and after the decease of the survivor, in trust "for such child or children of the said intended marriage, and if more than one, in such shares and in such manner and form, and to vest at such time or times, and to be subject to such powers and restrictions," as the husband and wife by deed, or the survivor, by deed or will, should appoint. The other trusts of the husband's property were in English form, and the trustees were to have "the usual powers for advancement, maintenance and accumulation, according to the law of England." The trusts declared of the wife's property were exclusively in Scotch form, the phraseology of the general clauses was mainly Scotch, and the deed was registered in the Court of Session in Scotland. The trustees named were six in number, four of whom were Scotch. Held, that notwithstanding the general rule, that the construction of a contract regarding personal estate is to be determined by the lex loci contractûs, yet here, in accordance with the manifest intention of the parties, as evidenced by the frame of the instrument, the marriage contract must, so far as the husband's property was concerned, be construed according to English law. *Chamberlain* v. *Napier*, 49 L. J., Ch. 628; 15 Ch. D. 614; 29 W. R. 194.

In 1849 an Englishman domiciled in England married a Scotch lady in Scotland. Previously to the marriage the parties executed a "contract of marriage" in the Scotch form. The intended husband thereby bound himself, his heirs, executors, and successors, to pay to the intended wife, in case she should survive him, an annuity of 200*l*., and further to pay 3,000*l*. to the children of the marriage after his death. After the marriage the parties resided in England. In 1870 the husband died there, having by his will, dated in 1863, but which did not in any way refer to the marriage contract, given his residuary estate to trustees upon trust to pay the income thereof to his wife for life, with remainder as to the capital to his children equally at twenty-one. The wife died in England in 1886, having made a will appointing executors. During her widowhood she never received the annuity under the contract, but enjoyed the income of her husband's residuary estate. There were two children of the marriage, both of whom survived their father, but predeceased their mother, having attained twenty-one. The husband's estate being insufficient to satisfy both the arrears of the widow's annuity and the 3,000*l*. payable to the children, the question was raised, by originating summons, whether the contract was to be construed according to Scotch law (under which the provision of an annuity to the wife on marriage imports a jus crediti in her favour, entitling her to rank pari passu with her husband's other creditors, the children having only a spes successionis), or according to the English law:—Held, that the intention of the parties on entering into the contract must be considered; that the fact that it was entered into in the Scotch form led to the inference that it was to be construed not according to the law of England, but according to the law of Scotland; and that the case was governed by *Guepratte* v. *Young* (4 De G. & Sm. 217), and that, therefore, as the husband's assets were not more than enough to satisfy the paramount claim of the wife's representatives to the arrears of her annuity, the claim of the children in the division of the assets failed. *Barnard, In re, Barnard* v. *White*, 56 L. T. 9.

Registration.]—A man and his wife, who were married in Batavia, entered into a contract before the marriage, by which a sum of 75,000 guilders was settled on the wife for her separate use. By the law of Batavia no marriage contract excluding a community of goods has any effect as regards third parties until registered in the courts of that country. The contract was never registered. They subsequently came to England, where the husband became bankrupt, and his wife claimed to prove against his estate for the sum settled:—Held, that the provision of the law of Batavia respecting registration did not affect the validity of the contract, but only the remedy of those claiming under it; that all questions of priority of creditors must be determined by the law of the country where the bankruptcy takes place; and, therefore, that the wife was not precluded by the non-registration of the deed from proving for the sum settled pari passu with the other creditors. *Melbourn, Ex parte*, 40 L. J., Bk. 25; L. R. 6 Ch. 64; 23 L. T. 578; 19 W. R. 83.

How affected by Divorce.]—A settlement on a marriage in England between a domiciled Turkish subject and an English lady, on the faith of his promise to reside in England, is governed by English law. *Colliss* v. *Hector*, 44 L. J., Ch. 267; L. R. 19 Eq. 334; 32 L. T. 223; 23 W. R. 485.

A divorce in Turkey, the effect of which by Turkish law was to annul the settlement, but which was pronounced without notice to the wife or other persons interested under the settlement, disregarded. *Ib.*

Other Matters—Marriage of Scotchman with Englishwoman.] — Upon the marriage of a Scotchman with an Englishwoman upon whom property has already been settled, it is desirable that an ante-nuptial contract should be entered into by them confirming the wife in her rights according to the English Law, so as to preclude the husband, in the event of the wife's death, from setting up any claim, jure mariti, to her property under the Scotch Law. *Craignish, In re, Craignish* v. *Hewitt*, [1892] 3 Ch. 180; 67 L. T. 689.

3. Equity to a Settlement.

A feme covert, domiciled with her husband in Scotland, was entitled to the produce of a real estate in England directed to be sold. Upon proof that, by the law of her domicile, her personal estate vested absolutely in the husband, and that she had no equity to a settlement, the estate, being unsold, was directed to be conveyed to the husband in fee. *Hitchcock* v. *Clendinen*, 12 Beav. 534; 19 L. J., Ch. 238.

Where a husband and wife are domiciled in Scotland, in which country a wife has no equity to a settlement, the court here will order payment of the wife's legacy to an assignee

of the husband. *M'Cormick* v. *Garnett*, 5 De G. M. & G. 278; 2 Eq. R. 536; 23 L. J., Ch. 777; 18 Jur. 412; 2 W. R. 408.

Where a wife was entitled to share under the distributions, and resident in Prussia, by the laws of which, one moiety of the effects of the husband must come to her on his death; the court did not require him to make any settlement. *Sawer* v. *Shute*, 1 Anstr. 63.

By a decree of this court, a feme sole, a subject of Great Britain, was decreed entitled to a certain sum to be realised by a sale of certain lands. Afterwards, and before the sum was realised, she intermarried abroad with a subject of the Austrian empire, and continued to reside with her husband in that empire. Afterwards, the sum being realised and in court, an application made on behalf of the husband and wife, that the money should be paid out to the attorney for the husband and wife on a warrant executed abroad by them, and on an affidavit stating that by the laws of the Austrian empire the sum would be at the absolute disposal of the wife, was granted, the court, under the circumstances, not requiring that the husband should thereout make any settlement on the wife, or that any commission for her separate examination should issue. *Hutchinson* v. *Catheart*, 8 Ir. Eq. R. 394.

Money belonging to the wife paid to the husband, the parties being subjects of Denmark, and the law of that country not requiring a settlement. *Chapple* v. *Cadell*, Jac. 544; 23 R. R. 138.

In 1855 a domiciled Manxman came to England, and married an Englishwoman, and resided in England for twenty years. At the date of the marriage the wife was entitled to a vested reversionary interest in a legacy which fell into possession in 1885. In 1875 the husband and wife returned to the Isle of Man, where the husband carried on business till 1878, when he became insolvent, and executed a deed of assignment of all his property, including his wife's interest in the legacy for the benefit of his creditors. In 1880 the parties returned to England, where they resided till 1882, when the husband went to Mexico to seek employment. The doctrine of a wife's equity to a settlement is unknown to Manx law:—Held, that the husband's domicil was Manx, and that the wife's equity to a settlement could not be asserted. *Marsland, In re*, 55 L. J., Ch. 581; 54 L. T. 635; 34 W. R. 540.

Ward of Court.]—Although, according to the law of Scotland, a wife has no equity to a settlement, still, if she is a ward of the Court of Chancery, the court is bound, before parting with her funds to her husband, to take care that proper provision is made for her. *Tweedale, In re*, 1 Johns. 109.

4. Divorce.

Domicil to found Jurisdiction.]—The word domicil has many meanings, according as it is used with reference to succession and other purposes. A person may have retained a foreign domicil for many purposes, and yet may be domiciled in England, so as to give jurisdiction to the court for divorce; but if he has never resided in England except temporarily, and is not there at the time of the commencement of the suit, he is not subject to its jurisdiction. *Yelverton* v. *Yelverton*, 1 Sw. & Tr. 574; 29 L. J., Mat. 34; 6 Jur. (N.S.) 24; 1 L. T. 194; 8 W. R. 134.

A bonâ fide residence of the husband in this country, not casual, or as a traveller, is sufficient to found the jurisdiction of this court against the wife, who has committed adultery abroad, during such residence. *Brodie* v. *Brodie*, 2 Sw. & Tr. 259; 30 L. J., P. 185; 4 L. T. 307; 9 W. R. 815. S. P., *Wilson* v. *Wilson*, 41 L. J., P. 33; L. R. 2 P. 435; 26 L. T. 108, 189; 20 W. R. 373.

Mere residence in England at the time of the institution of a matrimonial suit, is not sufficient to found the jurisdiction of the court. The residence of the petitioner must be bonâ fide, and not casual or as a traveller. *Manning* v. *Manning*, 40 L. J., P. 18; L. R. 2 P. 223; 24 L. T. 196; 19 W. R. 479.

The domicil of the husband will sustain the jurisdiction of the court over the wife, though married abroad, always after marriage resident abroad, and accused of adultery committed abroad. *Gillis* v. *Gillis*, Ir. R. 8 Eq. 597.

Domicil without residence is sufficient to sustain the jurisdiction of the court; and the jurisdiction of the court is not defeated by non-residence, except in cases where the non-residence affects the domicil. *Ib.*

Domicil of Husband.]—In 1854 an Englishman, being in pecuniary difficulties, left England, and went to reside in Scotland in order to avoid his creditors. He left his wife in England, she refusing to accompany him. In 1858 he became lessee, for a term of six years, of a house and shooting ground. He occasionally visited England, and corresponded with solicitors, in reference to getting rid of his liabilities. In 1860 he commenced proceedings in the Scotch courts for a divorce from his wife, on the ground of adultery:—Held, that the husband had not acquired a Scotch domicil, and therefore the Court of Session had no jurisdiction. *Pitt* v. *Pitt*, 4 Macq. H. L. 627; 10 Jur. (N.S.) 735; 10 L. T. 626; 12 W. R. 1089.

The domicil of the husband in cases of this kind is not to be regarded in law as the domicil of the wife, either by construction or by attraction, so as to compel the wife to become subject to the jurisdiction of the tribunals of any country in which the husband may choose to acquire a domicil. *Ib.*

The court has jurisdiction to grant a divorce against a foreigner. A marriage was solemnised at Gibraltar between a Frenchman and an Englishwoman. The husband resided for several years in England, but being a consul for France he retained his domicil of origin. The wife presented a petition for a divorce, alleging adultery committed in England and desertion. The husband appeared under protest and prayed to be dismissed:—Held that the court had jurisdiction to grant a divorce. *Niboyet* v. *Niboyet*, 48 L. J., P. 1; 4 P. D. 1; 39 L. T. 486; 27 W. R. 203—C. A.

—— **Wife in England.**]—In proceedings for divorce it appeared that the petitioner had been born in France of French parents. When he was ten years old his parents settled in England, and the father subsequently obtained letters of naturalisation as a British subject. The

petitioner when eighteen years of age went to Canada, where he took up the business of farming, bought a farm, served in the Canadian volunteers, and discharged the duties of a citizen of Canada. In 1878 he married the respondent, who was a Canadian, and in 1883 he brought her with their children to this country, where he resided for some years with his father. He had occasion to return several times to Canada, as he alleged, to look after his farm, and from 1884 was only seven months in this country. The respondent remained in England until the date of the alleged adultery, when she visited France: —Held, that the petitioner had not lost his English domicil—that the matrimonial home was in England, and that the court had therefore jurisdiction over the proceedings. *D'Etchegoyen* v. *D'Etchegoyen*, 57 L. J., P. 104; 13 P. D. 132; 37 W. R. 64.

Of Origin or Choice.]—A husband whose domicil of origin was English entered the Ceylon civil service and acquired a domicil of choice there. He afterwards returned to England and took rooms with the intention that his children should be educated here and that his wife should remain in those rooms or other home provided by the husband until the children's education should be finished, and that they should remain here even if he were obliged to return to Ceylon; the husband intended ultimately to rejoin his wife and children in England, either on leave or after his retirement from the Ceylon civil service :— Held, that the domicil of the husband and wife was English. *Hurley* v. *Hurley*, 67 L. T. 384.

In a petition by the wife for divorce, on the ground of the husband's adultery and desertion, it appeared that both husband and wife were born in France, of parents born in England but resident in France. The marriage took place in England, but the husband and wife subsequently resided in France. The respondent, on coming of age, made a declaration of his intention to retain his English nationality, and it also appeared that both he and his father contemplated returning to England when they had made sufficient money to maintain them. The respondent, after deserting his wife, led an unsettled life in New Zealand and the Australian colonies :—Held, that both parties had an English domicil at the commencement of the proceedings, and that the court, therefore, had power to entertain the petition and to dissolve the marriage. *Goulder* v. *Goulder*, 61 L. J., P. 117; [1892] P. 240.

Rights of Wife in Divorce Court.]—A wife's domicil is that of her husband, and her remedy for matrimonial wrongs must, as a general rule, be sought in the courts of that domicil; and, therefore, the wife of a man not domiciled in England cannot maintain a suit for restitution of conjugal rights if her husband has left the jurisdiction before the commencement of the proceedings. *Firebrace* v. *Firebrace*, 47 L. J., P. 41; 4 P. D. 63; 39 L. T. 94; 26 W. R. 617.

When a husband has been guilty of such misconduct as would furnish the wife with a defence to a suit by him for restitution of conjugal rights, she cannot on that ground acquire a separate ground of domicil for herself. *Yelverton* v. *Yelverton*, 1 Sw. & Tr. 574; 29 L. J., Mat. 34; 6 Jur. (N.S.) 24; 1 L. T. 194; 8 W. R. 134.

A. intermarried with B., a major in her majesty's royal artillery at Edinburgh, in April, 1857, and in August, 1857, the marriage was celebrated in Ireland, according to the rites of the Romish church. In April, 1858, B. deserted A. at Bordeaux, and had, since that time, been stationed with his regiment at Edinburgh. B.'s domicil of origin was in Ireland, and he had never acquired a domicil in England. A. petitioned for restitution of conjugal rights, and described herself as resident in England :—Held, that as there was no proof of B. having acquired an English domicil, and A.'s domicil was that of her husband, the court had no jurisdiction to entertain the suit. *Ib.* And see *Niboyet* v. *Niboyet*, 48 L. J., P. 1; 4 P. D. 1; 39 L. T. 486; 27 W. R. 203—C. A. supra.

And see further, tit. HUSBAND AND WIFE.

Foreign Divorces.]—A foreign tribunal has no authority, so far as consequences in England are concerned, to pronounce a decree of divorce à vinculo in the case of an English marriage between English subjects, unless such subjects are, at the time of such decree pronounced, bonâ fide domiciled in the country where that tribunal has jurisdiction, and the suit is prosecuted without collusion. *Shaw* v. *Gould*, 37 L. J., Ch. 433; L. R. 3 H. L. 55; 18 L. T. 833. S. P., *Dolphin* v. *Robins*, 7 H. L. Cas. 390; 3 Macq. H. L. 563; 29 L. J., P. 11; 5 Jur. (N.S.) 1271; 7 W. R. 674.

English courts of justice cannot recognise any power in the courts of Scotland to dissolve an English marriage, where the parties are not really domiciled in Scotland, but have only been there for such time as would render them amenable to the jurisdiction of the Scotch courts, and for the sole purpose of founding such jurisdiction. *Ib.*

The English courts will recognise as valid the decision of a competent foreign christian tribunal dissolving the marriage between a domiciled native in the country where such tribunal has jurisdiction, and an Englishwoman, when the decree of divorce is not impeached by any species of collusion, or fraud. And this, although the marriage may have been solemnised in England, and may have been dissolved for a cause which would not have been sufficient to obtain a divorce in England. *Harvey* v. *Farnie*, 52 L. J., P. 33; 8 App. Cas. 43; 48 L. T. 273; 31 W. R. 433; 47 J. P. 308—H. L. (E.)

A domiciled Scotchman married, in England, an Englishwoman. Immediately after the ceremony the married couple went to Scotland and resided there as their matrimonial home. Two years after, the wife obtained, in Scotland, a divorce à vinculo matrimonii, on the ground of her husband's adultery only. The husband came to England and married there another Englishwoman, the first wife being still alive. In a suit for a declaration of the nullity of the first marriage at the instance of the second wife :— Held, that the divorce in Scotland was a sentence of a court of competent jurisdiction, not only effectual within that jurisdiction but entitled to recognition in the courts of this country also. *Rex* v. *Lolley* (Russ. & Ry. 237; 15 R. R. 737) explained: *Warrender* v. *Warrender* (2 Cl. & F. 488): *Geils* v. *Geils* (1 Macq. H. L. 255) undistinguishable: *Maghee* v. *M'Allister*, (3 Ir. Ch. 604) also undistinguishable and affirmed: *M'Carthy* v. *Decaix* (2 Russ. & M. 614) dissented from. *Ib.*

Quære, whether a bonâ fide change of domicil which was English at the date of the contract

would affect the question of dissolution; and whether *Pitt* v. *Pitt* (4 Macq. H. L. 627) would govern cases like *Niboyet* v. *Niboyet* (4 P. D. 1), if they arose in Scotland. *Ib.*

Where the courts of a country assume jurisdiction to decree a divorce between persons living in the country, the jurisdiction must be derived either from some recognised principle of the general law of nations, or from some rule of municipal law peculiar to its forum. Where the jurisdiction exercised is in accordance with the principles of international law, the decree ought to be respected by the tribunals of every civilised country; but where it is derived solely from some rule of the municipal law of the particular country, it cannot claim extraterritorial authority if it trenches upon the interest of any other country to whose tribunals the spouses are amenable. *Le Mesurier* v. *Le Mesurier*, 64 L. J., P. C. 97; [1895] A. C. 517; 11 R. 527; 72 L. T. 873.

While mere residence may be sufficient to justify the courts of that country in ordering aliment or decreeing judicial separation, the only true test of jurisdiction to decree a divorce, according to international law, is the domicil for the time being of the married pair. There is no such thing as a matrimonial domicil. *Ib.*

The petitioner, being a domiciled Englishwoman, in 1872 went through a form of marriage with an American citizen. She cohabited with him until February, 1879, in the United States, and in April, 1879, the supreme court of Columbia pronounced a decree dissolving the marriage on the ground of the husband's incapacity. She then returned to this country, and in 1886 presented a petition to this court, praying for a declaration of nullity of marriage:—Held, that as the marriage was voidable and not void, the petitioner had acquired an American domicil, that the American court had jurisdiction to dissolve the marriage, and that there being no longer a marriage in existence, this court had no jurisdiction. *Turner* v. *Thompson*, 57 L. J., P. 40; 13 P. D. 37; 58 L. T. 387; 36 W. R. 702; 52 J. P. 151.

A domiciled Englishman married in England a native of the United States. After a time the husband was served in England with a citation to appear in proceedings for divorce commenced in America by the wife, but he refused to submit to the jurisdiction of the American court, and did not appear:—Held, that the decree in America dissolving the English marriage was not binding in this country, and could not affect the husband's rights here. *Green* v. *Green*, 62 L. J., P. 112; [1893] P. 89; 1 R. 507; 68 L. T. 261; 41 W. R. 591.

S., an Austrian subject by birth and parentage, and a Roman Catholic by religion, contracted a valid marriage in Berlin with a lady of the same domicil as himself, but described in the marriage certificate as of the evangelical religion. This marriage, which, by the law of Austria, was absolutely indissoluble, was subsequently dissolved in Berlin by mutual consent, on a petition presented by the wife. S. subsequently married in England an English Protestant lady, his first wife being still alive. The second wife petitioned the English court for a decree of nullity, on the ground that the Berlin divorce did not effectually dissolve the first marriage of S., which she alleged was therefore still subsisting and binding:—Held, that the Berlin divorce was good; and, consequently, that the second marriage was good also. *Ingham* v. *Sachs*, 56 L. T. 920.

Prior to 20 & 21 Vict. c. 85.]—At a time when marriage in England was indissoluble, except by act of parliament, a sentence of divorce à vinculo of a foreign court, purporting to dissolve a marriage solemnised in England between domiciled subjects, was of no force. *Shaw, Ex parte, Wilson, In re*, 35 L. J., Ch. 243; L. R. 1 Eq. 247; 12 Jur. (N.S.) 132: 13 L. T. 576; 14 W. R. 101: *M'Carthy* v. *Decaix*, 2 Russ. & M. 614; 2 Cl. & F. 568, n.

—— **Fraud—On Court granting Divorce.**]—M., a domiciled Englishman, obtained a divorce in the Scotch courts on the ground of his wife's adultery with B., by fraudulent representations as to his domicil and otherwise, to which B. was a party. The wife then went through a form of marriage with B. during the lifetime of M. B. afterwards brought a suit to have such subsequent marriage declared null and void:—Held, that the Scotch divorce had not dissolved the marriage, that B. was not estopped from taking advantage of the fraud to which he was a party, and the court declared the subsequent marriage null and void. *Bonaparte* v. *Bonaparte*, 62 L. J., P. 1; [1892] P. 402; 1 R. 490; 67 L. T. 531.

B., an Englishman, married in England H., an Englishwoman, but they separated, and B. lived apart, in adultery with another woman. S. wished to marry H., and he induced B. to go to and reside in Scotland for forty days in order to give the Scotch court jurisdiction to entertain a suit to be brought against him by H. for a divorce; and there was an agreement between S. and B. that S. should pay B. a sum of money, but only in case B. gave no information which should be prejudicial to the divorce. The suit was instituted, and a decree of divorce obtained:—Held, that the Scotch divorce was null and void quoad its operation in England, because the divorce was obtained by collusion. *Shaw* v. *Gould*, 37 L. J., Ch. 433; L. R. 3 H. L. 55; 18 L. T. 833.

An agreement by which the former and guilty husband should receive a sum of money for bringing himself within the reach of the Scotch court, so as to enable his wife to institute a suit for divorce, to be determined on its merits, would not be objectionable on the ground of collusion. But an agreement that he should forfeit a sum of money if he, or any one through him, gave information which should be prejudicial to the divorce, would be such a collusion as would have the effect of invalidating the decree of divorce. *Ib.*

—— **Other Matters—Presumption of Jurisdiction of Foreign Court—Validity of Second Marriage.**]—A. and B., both having an Irish domicil, were lawfully married in Ireland, and resided in Ireland for a year after their marriage. They subsequently went to an English colony, where the husband was engaged in various pursuits, abandoned all idea of returning home, and visited England only for short periods and for temporary purposes. In the fifth year of cohabitation B. committed adultery with S., whose domicil was English, and in a suit instituted by A. in the colonial court, in which all parties were represented, a decree was pronounced dissolving the marriage. B. and S. shortly afterwards returned to England, where they went through the form of a marriage according to law:—Held, first, that it must be taken that A. was domiciled in the colony and

that the divorce was valid; secondly, that the marriage between B. and S. was valid, for although the law prevailing in the colony prohibited the re-marriage of a guilty party as long as the innocent party remained unmarried, yet as the colonial divorce operated to annul the existing marriage and to restore the parties to the position of unmarried persons, they were free to remove from the jurisdiction and to contract a fresh marriage according to the laws of this country. *Scott* v. *Att.-Gen.*, 55 L. J., P. 57; 11 P. D. 128; 56 L. T. 924; 50 J. P. 824.

5. Other Matters.

Rights in each other's Property.]—An Englishwoman married a domiciled Frenchman. Articles were, previous to the marriage, executed in the English form, by which the wife became entitled to 200*l.* a year. Her husband afterwards separated from her, and subsequently the French court condemned her for adultery:—Held, that the contract of marriage was English, and that the rights of the parties were to be regulated by the English law, and further property of the wife having fallen into possession, and the moral conduct of both parties being reprehensible, the income of the fund must be equally divided between them. *Watts* v. *Shrimpton*, 21 Beav. 97.

—— **Gift to Separate Use.**]—A father gave his residuary estate to trustees upon trust to pay the income to his daughter for life for her separate use, and after her death to pay the fund to the children of the daughter as she should by deed or will appoint, and in default of appointment amongst them equally. The daughter appointed by deed the whole of the fund amongst her children, giving the plaintiff, who was one of them, a specified sum for her separate use absolutely. The plaintiff, after the death of her grandfather, and before the date of the appointment by her mother, married a Frenchman domiciled in France. He died before the date of the appointment, and there was one child only of the marriage. There was no settlement on the marriage, and the French law of community applied, under which the child became entitled, in the absence of any contrary declaration by the donor, to half the property acquired by her mother during the marriage:—Held, that the plaintiff must be considered to have acquired the appointed fund from the date of the appointment only, and that the fund not having been acquired during the marriage, did not become subject to the law of community. *De Serre* v. *Clarke*, 43 L. J., Ch. 821; L. R. 18 Eq. 587; 31 L. T. 161; 23 W. R. 3.

Held, also, that the fact of the gift being expressed to be for the separate use was a sufficient declaration to exclude the law of community. *Ib.*

Enforcing Foreign Contract for Settlement.]—A contract made in France, on the marriage of two people of that nation, who afterwards take refuge and live in England, shall be carried into a specific execution here, although the terms of it refer to the custom of Paris. *Foubert* v. *Turst*, 1 Bro. P. C. 129; Pre. Ch. 207.

Compromise of Suit.]—Compromise of suit by married woman, domiciled in France, sanctioned without reference to the master, on proof that they concurred in notarial acts, which by the law of France were binding on them, and that the subject-matter was mere personalty. *Chameau* v. *Riley*, 8 Beav. 269; 14 L. J., Ch. 349.

Foreign Law—Presumption.]—In a conflict of evidence as to the law of France on a point relating to the rights of a married woman in personalty in reversion, no presumption can be derived from the law of England. *Guepratte* v. *Young*, 4 De G. & Sm. 217.

c. Legitimacy.

By what Law Determined.]—The legitimacy of a child is determined by the law of the country where its parents are domiciled at the time of the conception and birth of the child, and not by the law of the country where the child is born. *Wright's Trust, In re*, 2 Kay & J. 595; 25 L. J., Ch. 621; 2 Jur. (N.S.) 465; 4 W. R. 541.

A child who is born illegitimate cannot afterwards be made legitimate by the parents domiciling themselves and intermarrying in a country where, if they had been domiciled there at the time of the birth, such child would have been legitimate. *Ib.*

Therefore, where a domiciled Englishman became the father of a child by a Frenchwoman, and afterwards, having gained a domicil in France (where the subsequent marriage of the parents, with acknowledgment of their children born previously to the marriage, renders those children legitimate), married the mother and acknowledged the child:—Held, that the child was not legitimate. *Ib.*

—— **Illegitimate born Children—Subsequent Marriage—Foreign Nationality.**]—T., a German by birth, came to England in 1734, and remained there, carrying on business, till 1779. Soon after coming to England he lived with P. as his wife, and by her had three children, born in 1744, 1745, and 1747. In 1749 he married W., and by her had one child, G. W. died in 1752, and in 1755 he married P., and by her had four more children. In 1774 he presented a petition to the council of Geneva, which he described as "his native country," seeking to establish the legitimacy in Geneva of his three children by P. born before marriage, by reason of his subsequent marriage with her, and the council made an order accordingly. T. died in 1779 in England, having by his will, made in English form, described himself as of Tottenham, in Middlesex, and being possessed of leasehold property in London. A daughter of G. had died intestate a domiciled Englishwoman, and it became necessary to ascertain who were her next-of-kin, and the question was, whether the children of T. by P. born before marriage were legitimate or not:—Held, that T. had in 1744 acquired an English domicil, and the legitimacy of his children by P. must be determined according to the law of the place where their parents were domiciled at their birth, i.e. England, and that those born before marriage were, therefore, not legitimate. *Grove, In re, Vaucher* v. *Treasury Solicitor*, 58 L. J., Ch. 57; 40 Ch. D. 216; 59 L. T. 587; 37 W. R. 1—C. A.

A child born a bastard in a country which does not recognise legitimation per subsequens matrimonium, cannot be legitimated by the subsequent marriage of its parents, although the

country in which the putative father is domiciled recognises that form of legitimation. *Shedden* v. *Patrick*, 1 Macq. H. L. 535. S. P., *Goodman* v. *Goodman*, 3 Giff. 643; 8 Jur. (N.S.) 554; 6 L. T. 641.

—— **Scotch Law.**]—The child of a Scotchman, though born in England, becomes legitimate for all civil purposes in Scotland by the subsequent marriage of the parents in England, if the domicil of the father continued throughout to be Scotch. Neither the place of the marriage, nor the place of the birth of the child, will under such circumstances affect the status of the child. *Dalhousie* (*Countess*) v. *M'Douall*, 7 Cl. & F. 817. Same point decided the same way, where there was also the additional circumstance of the mother being an Englishwoman. *Munro* v. *Munro*, 7 Cl. & F. 842.

In order to entitle the children of a putative marriage, which has been declared void, to the status of legitimacy, under the Scotch law, the parents must be justifiably ignorant of the subsistence of the impediment which led to the nullity, and the impediment must be a matter of fact and not of law only. *Shaw* v. *Gould*, 37 L. J., Ch. 433; L. R. 3 H. L. 55; 18 L. T. 833.

In relation to Descent of Land.]—The question of legitimacy having relation to real estate is a question which each country will answer for itself. *Fenton* v. *Livingstone*, 3 Macq. H. L. 497, 556; 5 Jur. (N.S.) 1183; 7 W. R. 671.

In deciding the title to real estate, the lex loci rei sitæ must always prevail, so that a person legitimate by the law of his birthplace, and of the place where his parents were married, may not be regarded as legitimate to take a real estate by inheritance elsewhere. *Ib.*

In respect to immovable property, the rule is, that the law of the country in which it is situated governs the tenure, the title and the descent. *Ib.*

The general rule is to determine the validity of a mariage by the law of the country where the parties were domiciled, and in most cases the legitimacy of a party is to be determined by the law of his birthplace, and of his parents' domicil. *Ib.*

A child born in Scotland of unmarried parents, domiciled in that country, and legitimated for all purposes in Scotland, by the subsequent marriage of the parents, is not capable of inheriting lands in England. *Birtwhistle* v. *Vardill*, 7 Cl. & F. 895; West, 500; 9 Bli. (N.S.) 32. *S. C.*, nom. *Doe* d. *Birtwhistle* v. *Vardill*, 2 Scott (N.R.) 828; 6 Bing. (N.C.) 85—H. L. (E.) S. P., *Dow's Estate*, *In re*, 4 Drew. 194; 27 L. J., Ch. 98; 3 Jur. (N.S.) 1192; 5 W. R. 836.

Succession Duty Act.]—J. A., a native of Cumberland, acquired a Roman or Italian domicil before his death, which occurred in 1877. He cohabited with an Italian woman, by whom he had four sons, all born in Rome prior to 1862. The parents were never married. By his will, made in the English form, he gave all his real estate, whether in Italy or England, to his four sons nominatim. Upon petition by the children for the distribution of a fund in court representing the proceeds of sale of English real estate, which J. A. had inherited:—Held, that they were strangers in blood to the testator for the purposes of the Succession Duty Act, 1853. *Atkinson* v. *Anderson*, *Anderson*, *In re*, or *Atkinson*, *In re*, *Anderson* v. *Atkinson*, 51 L. J., Ch. 452; 21 Ch. D. 100; 46 L. T. 850; 30 W. R. 562.

Will—Gift to Children of Married Person—Child Legitimated by subsequent Marriage.]—A child legitimated by the subsequent marriage of his parents, is entitled to share in a specific devise of realty to the children of H., although H. had children born subsequently to the marriage. *Grey*, *In re*, *Grey* v. *Stamford* (*Earl*), 61 L. J., Ch. 622; [1892] 3 Ch. 88; 41 W. R. 60.

By the law of Scotland, where a marriage between two persons is invalid by reason of the existence of a prior marriage entered into by one of those persons, and either of such persons is, at the time of the solemnisation of such second marriage, justifiably ignorant that any impediment to such second marriage exists, the issue of the invalid marriage have, nevertheless, the personal status of legitimate children. *Wilson's Trust*, *In re*, *Shaw*, *In re*, 35 L. J., Ch. 243; L. R. 1 Eq. 247; 12 Jur. (N.S.) 132; 13 L. T. 576; 14 W. R. 161.

But, according to the law of England, such issue will not come within the terms of a gift to children lawfully begotten contained in an English will. *Ib.*

Legitimation by subsequent Marriage—Residuary Bequest.]—A testator bequeathed his residuary personal estate to trustees in trust for his great-nephews, the sons of his deceased nephew, T. G. A., in equal shares. T. G. A. was a native of Guernsey. The plaintiff was a son of T. G. A., born before the marriage of his parents, who were domiciled in Guernsey, both at the time of the plaintiff's birth and of their subsequent marriage. By the law of Guernsey, children born out of wedlock become legitimated by the subsequent marriage of their parents. Other children were born after the marriage; and the plaintiff claimed to share with them in the property bequeathed by the will:—Held, that since a bequest of personalty in an English will to the children of a foreigner meant to his legitimate children, and by international law, as recognised in this country, those children were legitimate whose legitimacy was fixed by the law of the father's domicil, the plaintiff was entitled to share in the gift as a legitimate child of the father. *Andros*, *In re*, *Andros* v. *Andros*, 52 L. J., Ch. 793; 24 Ch. D. 637; 49 L. T. 163; 32 W. R. 30.

—— **Distributive Share in Personalty.**]—The proper law for determining the "kindred" under the Statute of Distributions is the international law adopted by the comity of states. A child born in a country which recognises legitimation by the subsequent marriage of the parents, if the parents are there domiciled at its birth, is entitled to share in the personal estate of an intestate dying domiciled in England as one of the next of kin, under the Statute of Distributions. *Goodman's Trusts*, *In re*, 50 L. J., Ch. 425; 17 Ch. D. 266; 44 L. T. 527; 29 W. R. 586—C. A.

d. Guardianship of Infants.

British Subject.]—When the Court of Chancery had appointed a guardian, and settled a scheme for the education of an infant peer, who was entitled to large estates in England and Scotland, it restrained the tutor dative from continuing proceedings in the Court of Session relative to

the education and residence of the infant, and as to his English estates which had been instituted in Scotland, so as to supersede the scheme approved of by the Court of Chancery. *Bute (Marquis)* v. *Stuart*, 2 Giff. 582; 7 Jur. (N.S.) 355; 3 L. T. 809; 9 W. R. 356. Affirmed sub nom., *Stuart* v. *Moore*, 9 H. L. C. 440; 4 Macq. H. L. 1; 7 Jur. (N.S.) 1129; 4 L. T. 382; 9 W. R. 722.

An infant, being a British subject and also an American citizen, and having lost both father and mother, was brought over to England from the United States, where her property was situated, by a paternal aunt with whom she resided; an application was then made by a maternal aunt, who had been appointed her guardian by the court in America, to have the custody of the infant delivered to her, with the view of taking the infant back to America. The Lord Chancellor refused to interfere, being of opinion that he had no right to make such an order, even if on other grounds he had thought proper, which he did not, to accede to the application. *Dawson* v. *Jay*, 3 De G. M. & G. 764; 2 W. R. 366. Varying, 3 Sm. & G. 199; 1 Jur. (N.S.) 36; 2 W. R. 311.

Foreign Subject—Order of Foreign Court.]—When an infant, a citizen of a foreign country, is sent to England, the Court of Chancery will carry out in all respects the orders of the courts of the foreign country in regard to the infant, so far as consistent with the laws of England. *Di Savini* v. *Lousada*, 22 L. T. 61; 18 W. R. 425.

V. DOMICIL.

a. General Principles.

Definition.]—Observations upon the various definitions of domicil. *Whicker* v. *Hume*, 7 H. L. Cas. 124; 28 L. J., Ch. 396; 4 Jur. (N.S.) 933.

The domicil of a person is that place or country in which his habitation is fixed without any present intention of removing therefrom. *Craignish, In re, Craignish* v. *Hewitt*, [1892] 3 Ch. 180; 67 L. T. 589—C. A.

Distinction upon contemporary domicils, in the case of a nobleman or gentleman, generally the domicil is the mansion-house in the country; that of a merchant is at his residence in town. *Somerville* v. *Somerville (Lord)*, 5 Ves. 750; 5 R. R. 155.

The mere place of birth or death does not constitute the domicil. The domicil of origin which arises from birth and connections remains until clearly abandoned and another taken. In the case of Lord Somerville, of two acknowledged domicils, the family seat in Scotland, and a leasehold house in London, upon the circumstances, the former of which was the original domicil, prevailed. *Ib.*

A person may be said to have more than one residence. If he have houses in different places, at each of which he keeps an establishment, each may be called his residence, though he may not go there for years. But the meaning of the word residence is different from domicil, for an infant has the domicil of his parents until he attains his full age, and does some act to acquire a new one, and thus his domicil may be in a country in which he has never personally been; whereas residence implies personal presence at some time or other. *Walcot* v. *Botfield*, Kay, 534; 18 Jur. 570; 2 W. R. 393.

Only one Domicil Possible.]—A man cannot have two domicils, at least with reference to the succession of his personal estate. *Forbes* v. *Forbes*, Kay, 341; 2 Eq. R. 178; 23 L. J., Ch. 724; 18 Jur. 642; 2 W. R. 253. S. P., *Crookenden* v. *Fuller*, 1 Sw. & Tr. 441; 29 L. J., P. 1; 5 Jur. (N.S.) 1222; 1 L. T. 70; 8 W. R. 49.

With respect to domicil as affecting Marriage, Divorce and Legitimacy, *see* tit. Persons, supra.

Change of Domicil.]—A change of domicil must be a residence sine animo revertendi. A temporary residence for the purposes of health, travel, or business, does not change the domicil. Also (1) every presumption is to be made in favour of the original domicil; (2) no change can occur without an actual residence in a new place; and (3) no new domicil can be obtained without a clear intention of abandoning the old. *Lauderdale Peerage, The*, 10 App. Cas. 692—H. L. (Sc.)

Domicil not lost by forced Residence abroad.]—A domicil will not be lost by a constrained residence in a foreign country. *D'Orleans (Duchess), In Goods of*, 1 Sw. & Tr. 253; 28 L. J., P. 129; 5 Jur. (N.S.) 104; 7 W. R. 269.

Does not affect Allegiance.]—Every individual at his birth becomes the subject of some particular country by the tie of natural allegiance, which fixes his political status, and becomes subject to the law of the domicil, which determines his civil status. *Udny* v. *Udny*, L. R. 1 H. L., Sc. 441.

To suppose that for a change of domicil there must be a change of natural allegiance is to confound the political and the civil status, and to destroy the distinction between patria and domicilium. *Ib.*

A man may change his domicil as often as he pleases, but not his allegiance. Exuere patriam is beyond his power. *Ib.*

The question of domicil is distinct from that of naturalisation and allegiance, and in order to effect a change of domicil it is not necessary that a man should do all in his power to divest himself of his original nationality (exuere patriam), it being sufficient that there should be a change of residence of a permanent character voluntarily assumed. *Haldane* v. *Eckford*, L. R. 8 Eq. 631; 21 L. T. 87; 17 W. R. 1059.

Not arising from Society or Locality—Anglo-Egyptian.]—There is no such thing as domicil arising from society and not from connection with a locality; consequently, as Cairo is not a British possession governed by English law, a testator's permanent abode therein under British protection does not attract to him an English or Anglo-Egyptian domicil. *Tootal's Trusts, In re* (23 Ch. D. 532), approved. *Abd-Ul-Messih* v. *Farra*, 57 L. J., P. C. 88; 13 App. Cas. 431; 59 L. T. 106—P. C.

The testator, a member of the Chaldean Catholic community, having a Turkish domicil of origin, fixed his permanent residence in Cairo, where he acquired the status of a protected British subject:—Held, that he died domiciled in the dominions of the Porte, and that the consular court at Constantinople, being bound by ss. 5 and 6 of the order in council of 1873 to follow the same principles which would have been observed by an English court of probate,

was right in holding that the law of Turkey governing the succession to a member of the Chaldean Catholic community domiciled in Turkey should be followed in considering the power of testacy of the deceased and in distributing his effects. *Ib.*

—— **Anglo-Chinese.**]—British subjects resident in Chinese territory cannot acquire in China a domicil similar to that existing in India, and commonly known as Anglo-Indian. *Tootal's Trusts, In re*, 52 L. J., Ch. 664 ; 23 Ch. D. 532 ; 48 L. T. 816 ; 31 W. R. 653.

How Established.]—Primâ facie, the place of residence is the place of domicil, but that may be rebutted or supported by circumstances. *Bempde* v. *Johnstone*, 3 Ves. J. 198.

Domicil is established not by assertion, but by conduct. *McMullen* v. *Wadsworth*, 59 L. J., P. C. 7 ; 14 App. Cas. 631 ; 61 L. T. 487—P. C.

b. Of Origin.

Principles regulating Law.]—The law is, beyond all doubt, clear with regard to the domicil of birth, that the personal status indicated by that term clings and adheres to the subject of it until an actual change is made by which the personal status of another domicil is acquired. *Bell* v. *Kennedy*, L. R. 1 H. L., Sc. 307.

The domicil of origin adheres until a new domicil is acquired. *Ib.*

It is a settled principle that no man shall be without a domicil ; and to secure this end the law attributes to every individual as soon as he is born the domicil of his father if the child is legitimate, and the domicil of his mother if the child is illegitimate. This is called the domicil of origin, and is involuntary. It is the creation of law—not of the party. It may be extinguished by act of law, as for example, by sentence of death, or exile for life, which puts an end to the status civilis of the criminal ; but it cannot be destroyed by the will and act of the party. *Udny* v. *Udny*, L. R. 1 H. L., Sc. 441.

In matters to be determined by the domicil of the parties, it is a principle of law that the domicil of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicil, and acquiring another as his sole domicil. *Dalhousie* v. *M'Douall*, 7 Cl. & F. 817.

The domicil of origin must be presumed to continue until another sole domicil has been acquired by actual residence, with the intention of abandoning the domicil of origin. *Ib.*

In order to lose a domicil of origin, and to acquire a new domicil, a man must intend quatenus in illo exuere patriam. It is not enough for him to take a house in the new country, even with the probability and the belief that he may remain there all the days of his life. *Moorhouse* v. *Lord*, 10 H. L. Cas. 272 ; 1 N. R. 555 ; 32 L. J., Ch. 295 ; 9 Jur. (N.S.) 677 ; 8 L. T. 212 ; 11 W. R. 637—H. L. (E.)

A mere change of residence, however long continued, does not affect a change of domicil in a testamentary sense, unless there is also an intention to change the domicil, or throw off his native country ; as, for example, if an Englishman goes to France, he must not only reside in France, but intend to become a Frenchman instead of an Englishman, before his domicil will be held changed. *Ib.* S. P., *Att.-Gen.* v. *Blucher de Wahlstatt*, 3 H. & C. 374 ; 34 L. J., Ex. 29 ; 10 Jur. (N.S.) 1159 ; 11 L. T. 454 ; 13 W. R. 163.

Presumption as to—Officer—Anglo-Indian.]—The mere fact that a person bears an English name, and is an officer in the British army, does not raise any presumption that his domicil is English as distinguished from Scotch or Irish. The cases relating to Anglo-Indian domicil commented on and explained. *Cunningham, Ex parte, Mitchell, In re*, 53 L. J., Ch. 1067 ; 13 Q. B. D. 418 ; 51 L. T. 447 ; 33 W. R. 22 ; 1 Morrell, 137—C. A.

Presumption as to Intention to Change.]—The strongest intention of abandoning a domicil, and actual abandonment of residence, will not deprive a man of that domicil unless he has acquired another. *Forbes* v. *Forbes*, Kay, 341 ; 2 Eq. R. 178 ; 23 L. J., Ch. 724 ; 18 Jur. 642 ; 2 W. R. 253.

The presumption of law is against the intention to abandon the domicil of origin. *Hodgson* v. *De Beauchesne*, 12 Moore, P. C. 285 ; 7 W. R. 397. S. P., *Att.-Gen.* v. *Rowe*, 1 H. & C. 31 ; 31 L. J., Ex. 314 ; 8 Jur. (N.S.) 823 ; 6 L. T. 438 ; 10 W. R. 718.

Length of residence in a foreign country, per se, according to time and circumstances, raises a presumption of intention to abandon the domicil of origin, and to acquire a new domicil, but such presumption may be rebutted by facts shewing that there was no such intention. *Ib.*

A change of domicil is not to be inferred from the fact of a lengthened residence in a foreign country. To constitute a change of domicil it must be animo et facto. *Ib.*

An intention to abandon the domicil of origin and to acquire another must be indicated by some words or acts of a marked character, from which a definite resolve may safely be collected ; but the mode in which a man may indicate such an intention must vary indefinitely with the age, the character, the circumstances, and the general conduct of the individual. *Sharpe* v. *Crispin*, 38 L. J., P. 17 ; L. R. 1 P. 611 ; 20 L. T. 41 ; 17 W. R. 368.

For the purposes of succession where there is an undoubted domicil of origin continued through many years, such domicil will be held to have been retained unless there is evidence of an intention to abandon it, accompanied by acts sufficient to found the acquisition of a new domicil. *Crookenden* v. *Fuller*, 1 Sw. & Tr. 441 ; 29 L. J., P. 1 ; 5 Jur. (N.S.) 1222 ; 1 L. T. 70 ; 8 W. R. 49.

Reverting to Domicil of Origin.]—When a domicil of choice is abandoned, the domicil of origin revives—a special intention to revert to it being unnecessary. *Udny* v. *Udny*, L. R. 1 H. L., Sc. 441.

If after having acquired a domicil of choice a man abandons it and travels in search of another domicil of choice, the domicil of origin comes instantly into action and continues until a second domicil of choice has been acquired. *Ib.*

A natural-born Englishman may domicile himself in Holland ; but if he breaks up his establishment there and quits Holland, declaring that he will never return, it is absurd to suppose that his Dutch domicil clings to him until he has set up his tabernacle elsewhere. *Ib.*

A man having acquired a domicil of choice, may put an end to it of choice, without it being

incumbent on him to acquire another domicil of choice, because his domicil of origin thereupon becomes his domicil. *King* v. *Foxwell*, 45 L. J., Ch. 693 ; 3 Ch. D. 518 ; 24 W. R. 629.

In order to lose the domicil of choice, and revive the domicil of origin, it is not sufficient for the person to form the intention of leaving the domicil of choice, but he must actually leave it with the intention of leaving it permanently. *Marrett, In re, Chalmers* v. *Wingfield*, 36 Ch. D. 400 ; 57 L. T. 896 ; 36 W. R. 344—C. A.

The domicil of origin does not revive until an acquired domicil is finally abandoned. *Craigie* v. *Lewin*, 3 Curt. 435 ; 7 Jur. 519.

Abandonment of Origin—What is.]—A domiciled Scotchman not in the service or employ of the Indian government went to India and resided there for the purposes of his private business, always, however, retaining the wish and intention of returning finally to Scotland :—Held, that he never lost or intended to lose his original Scotch domicil. *Jopp* v. *Wood*, 4 De G. J. & S. 616 ; 5 N. R. 422 ; 34 L. J., Ch. 212 ; 11 Jur. (N.S.) 212 ; 12 L. T. 41 ; 13 W. R. 481.

Domicil can only be changed animo et facto ; and residence alone, although decisive as to the factum, is an equivocal act as to the animus. *Ib.*

Domicil imports an abiding and a permanent home, and not a mere temporary one. *Ib.*

The acquisition of a new domicil involves the abandonment of the previous domicil, and to effect the change the animus of abandonment must be shewn. *Ib.*

A person, born in France, succeeded his uncle in business at Manchester, and purchased land and built a handsome house there, and also a vault in which he buried his uncle, wife and child, and, going to Vichy for his health, died at the place of his birth. The evidence of intention was conflicting, and went chiefly to the impression of the witness ; but he preferred the French climate, and talked of taking his wife's body to France :—Held, that the domicil of origin never was lost, and that he died a domiciled Frenchman. *Capdevielle* v. *Capdevielle*, 21 L. T. 660 ; 18 W. R. 107.

For many purposes a domicil of origin requires more to change it than a domicil of acquisition ; and in order to prove that the domicil of an adult of sound mind has been changed, an intention on his part must be shewn. *Douglas* v. *Douglas*, 41 L. J., Ch. 74 ; L. R. 12 Eq. 617 ; 25 L. T. 530 ; 20 W. R. 55.

It might be convenient to insist, as evidence of the requisite intention, on the proof of a desire to change the civil status of the party—as that would leave the question to be governed by the domicil of origin—but such, although the stricter rule, is not that of the law of England. *Ib.*

All that the law requires is proof of an intention to settle in a new country as a permanent home. If that is proved certain legal consequences ensue, whether intended or not, and even although, perhaps, the exact contrary of those consequences may have been intended. *Ib.*

The evidence necessary to support the intention must be either express, or such as to shew that if the question had been formally submitted to the party whose domicil is in dispute he would have declared his wish in favour of a change. That is to say, such an intention must be proved to have actually existed in the mind of the party, or it must appear that it was reasonably certain it would have existed, if the question had arisen in a form requiring a deliberate and solemn determination. *Ib.*

A child of Scotch parents for some time resident in England, who was born there, and was for many years himself a resident with his wife and children there, and who died and was buried in England, was, under all the circumstances of the case, held not to have lost his Scotch domicil of origin. *Ib.*

A testator, born in America, A.D. 1764, went to Scotland, when a minor, for the purposes of education, and, after he had attained his majority, in 1788 sailed for India, describing himself in the ship's books as an American ; he remained in India thirty years, when he returned to Europe, leaving the bulk of his property in Bengal ; and afterwards, having been in America, visited England, Scotland and the continent, when he returned to America, entered into agricultural pursuits there, and continued to draw his property to that country until his death, at New York, in 1826 :—Held, that he was an American citizen. *Bruce, In re*, 2 C. & J. 436 ; 2 Tyr. 475 ; 1 L. J., Ex. 153.

Intention and Act both necessary to Create Change of Domicil.]—*See* post, col. 239.

c. Change of Domicil.

General Principles.]—Domicil of choice is the creation of the party. When a domicil of choice is acquired, the domicil of origin is in abeyance ; but is not absolutely extinguished or obliterated. *Udny* v. *Udny*, L. R. 1 H. L., Sc. 441.

In order to lose a domicil of origin, and to acquire a new domicil, a man must intend quatenus in illo exuere patriam. It is not enough for him to take a house in the new country, even with the probability and belief that he may remain there all the days of his life. *Moorhouse* v. *Lord*, 10 H. L. Cas. 272 ; 1 N. R. 555 ; 32 L. J., Ch. 295 ; 9 Jur. (N.S.) 677 ; 8 L. T. 212 ; 11 W. R. 637—H. L. (E.)

That place is properly the domicil of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or uncertain) shall occur to induce him to adopt some other permanent home. *Lord* v. *Colvin*, 4 Drew. 366 ; 28 L. J., Ch. 361 ; 5 Jur. (N.S.) 351 ; 7 W. R. 250.

Slighter evidence is required to warrant the conclusion that a man intends to abandon an acquired domicil, and to resume his domicil of origin, than is necessary to justify the conclusion that he means to abandon his domicil of origin, and to acquire a new one. *Ib.*

It requires stronger and more conclusive evidence to justify the court in deciding that a man has acquired a new domicil in a foreign country than in one where he is not a foreigner. *Ib.*

A man changes his domicil of origin by choosing a new domicil, i.e. by voluntarily fixing his sole or chief residence in a country not being the country of origin, with an intention of continuing to reside there for a period not limited as to time. *King* v. *Foxwell*, 45 L. J., Ch. 693 ; 3 Ch. D. 518 ; 24 W. R. 629.

Naturalisation is neither essential to, nor conclusive of, domicil ; it is important as evidence of an intention to reside permanently. *Ib.*

Peer can acquire one.]—A peer of the British parliament is not, by reason of his obligation to attend the House of Peers whenever his presence there is required, incapacitated from acquiring a domicil of choice in a foreign country. *Hamilton* v. *Dallas*, 45 L. J., Ch. 15; 1 Ch. D. 257; 33 L. T. 495; 24 W. R. 264.

How Established.]—Domicil is established not by assertion, but by conduct. *McMullen* v. *Wadsworth*, 59 L. J., P. C. 7; 14 App. Cas. 631; 61 L. T. 487—P. C.

Evidence of subsequent, as well as of prior, act is admissible for the purpose of ascertaining a person's domicil at a given period. *Grove, In re, Vaucher* v. *Treasury Solicitor*, 58 L. J., Ch. 57; 40 Ch. D. 216; 59 L. T. 587; 37 W. R. 1—C. A.

In order to acquire a domicil, there must be actual residence in the place chosen, which must be the principal and permanent residence of the party. *Dalhousie* v. *McDoual*, 7 Cl. & F. 817.

The mere declaration of intention to change a domicil without an actual change of residence is inoperative to create a new domicil. *Brown* v. *Smith*, 15 Beav. 444; 21 L. J., Ch. 356.

To constitute a new domicil, there must be not only the factum of residence in a place, but the animus manendi. *Ib.*

The animus to change an acquired domicil is not sufficient without the factum of return. *Drevon* v. *Drevon*, 4 N. R. 316; 34 L. J., Ch. 129; 10 Jur. (N.S.) 717; 10 L. T. 730; 12 W. R. 946.

The courts are slower to hold a change of the domicil of origin, and must be satisfied that the party intended quatenus in illo exuere patriam. *Ib.*

In questions of domicil, less weight is given by the courts to a testator's declarations than to his acts, and no one act is necessarily per se paramount in importance; but the relative importance of all his acts, however trivial, must be considered as evidence of the animus manendi or revertendi. *Ib.*

An intention expressed, but not executed, cannot countervail existing facts. *Platt* v. *Att.-Gen. for New South Wales*, 47 L. J., P. C. 26; 3 App. Cas. 336; 38 L. T. 74; 26 W. R. 516—P. C.

R. left Dunkerque, where she had an acquired domicil, with intention of residing in England; she got on board the packet at Calais, but before it left the harbour she was through illness obliged to land, and never sufficiently recovered to leave France:—Held, that there was no sufficient act to give effect to the intention to resume the English domicil. *Raffenel, In goods of*, 3 Sw. & Tr. 49; 1 N. R. 569; 32 L. J., P. 203; 9 Jur. (N.S.) 386; 8 L. T. 211; 11 W. R. 549.

A new domicil cannot be acquired except by intention and act; but, being in itinere to the intended domicil, is a sufficient act for this purpose. *Forbes* v. *Forbes*, Kay, 341; 2 Eq. R. 178; 23 L. J., Ch. 724; 18 Jur. 642; 2 W. R. 253. S. P., *Munroe* v. *Douglas*, 5 Madd. 379.

A party whose domicil was in question was called as a witness, and examined to prove what was passing in his own mind at a given period with reference to his domicil. *Maxwell* v. *M'Clure*, 3 Macq. H. L. 852; 6 Jur. (N.S.) 407; 2 L. T. 65; 8 W. R. 370—H. L. (Sc.)

—— **Change of Political Status.**]—Naturalisation is important as evidence of an intention to reside permanently. *King* v. *Foxwell*, 45 L. J., Ch. 693; 3 Ch. D. 518; 24 W. R. 629.

Naturalisation is neither essential to, nor conclusive of, domicil. *Ib.* S. P., *Brunel* v. *Brunel*, L. R. 12 Eq. 298; 25 L. T. 378; 19 W. R. 970; *Doucet* v. *Geoghegan*, 9 Ch. D. 441; 26 W. R. 825—C. A.

A de facto domicil governing the succession to personal property of which he dies intestate may be acquired in France by a foreigner who has not obtained the government authorisation imposed by the Code Napoléon, art. 13, as the condition for enjoyment by a foreigner resident in that country of full civil rights. *Hamilton* v. *Dallas*, 45 L. J., Ch. 15; 1 Ch. D. 257; 33 L. T. 495; 24 W. R. 264.

Evidence of Domicil.]—A British subject went to settle in France in 1762, and afterwards purchased an estate and became naturalised there. In 1791 he left France and came to England, in consequence of the French revolution, and shortly afterwards his property was confiscated by the revolutionary government. In January, 1802, he made a will in London, by which he left his property partly to a charity in Ireland, and partly to individuals resident in England, and appointed one of those individuals his executor. In April, 1802, emigrants were permitted to return to France, and soon afterwards he returned to that country. In 1804 he made a will in Paris, in which he stated that he was born at Waterford, and had come to France to obtain restitution of his estate; and, after referring to his former will (which he had mislaid in London), he recapitulated very nearly its contents, and concluded by expressly confirming it. He died in Paris in 1806; and his two testamentary papers were proved both in France and in England:—Held, that the testator was domiciled in France at his death, and that the fund in court was not subject to legacy duty. *Charitable Donations Commissioners* v. *Devereux*, 13 Sim. 14; 11 L. J., Ch. 362; 6 Jur. 616.

Residence Abroad.]—Residence originally temporary, and intended for a limited period, may afterwards become general and unlimited, and in such a case, as soon as the change of purpose, or animus manendi, can be inferred, the fact of domicil is established. *Haldane* v. *Eckford*, L. R. 8 Eq. 631; 21 L. T. 87; 17 W. R. 1059.

Although permanent residence abroad without intent to return may not operate as a change of domicil, if believed to be necessary for health's sake, the circumstance that such residence was occasioned by mere preference of climate, or by the opinion that the air or the habits of the country may be better suited to the health than those of the country which has been quitted, will not be sufficient to prevent such permanent residence from so operating. *Hoskins* v. *Matthews*, 8 De G. M. & G. 13; 25 L. J., Ch. 689; 2 Jur. (N.S.) 196; 4 W. R. 216.

An English gentleman, long before his death, took up his abode in a house he had purchased in a foreign city, set up his establishment there, centred his fortune, so far as it admitted of locality, there, lived there with such of his children as were not at school or out in the world, and destined that place as their future residence; from thence he went and habitually returned. He died in the country where he had

purchased the house, having made a will in the language of that country, but not effectual for disposing of his property there, and a will in the English form, giving all his other property, which was personal:—Held, that the domicil was foreign. *Ib.*

A British subject, domiciled and having real and personal estate in England, went abroad, and purchased, in 1821, the title, castle and estate of R., in the Papal States. He hired Italian domestic servants, male and female, whom he kept at R. until his death. He expended large sums in repairing and improving the castle and grounds of R., which repairs and improvements were going on at the time of his death. He did not make R. his constant residence, but from 1828 to 1831 sometimes occupied it, sometimes lived in furnished lodgings in the town adjacent, and at other times visited Rome, Florence and other parts of Italy, residing in furnished lodgings. In 1831, he came to England, and resided in different parts of it till September, 1832. In March, 1832, he made his will in London. In the same month he left England and went to Florence, where he remained two months, and thence to R.; he then lived sometimes in the castle of R., sometimes in furnished lodgings in the adjacent town, till October, 1833, when he went to Rome, and there lived in furnished lodgings till his death, in February, 1834:—Held, that upon these facts there was no evidence of the testator's having actually acquired a domicil at R., or elsewhere abroad; although they indicated an intention to make R. his domicil; that his English domicil therefore remained. *Att.-Gen.* v. *Dunn*, 6 M. & W. 511.

A testator born at Montory in France, of French parents, in 1807 went to Cadiz, where he was clerk to a merchant. He afterwards went to Gibraltar. In 1830 he came to England, and carried on business as a commission agent at Manchester until his death in 1859. During all that time he resided in lodgings, for which he paid a weekly rent, and a further weekly sum for his board. In 1835 he visited Montory, and again in 1846, when he passed a solemn act before a notary for the preservation of his co-hereditary rights of succession to a property there. He also then purchased a house and land at Montory, and desired that some apartments in the house should be kept ready for his return. He frequently expressed an intention to return to his native country. He devised and bequeathed all his real and personal property to his nephew in England. He had no real property in England, but a large amount of personal property, consisting of cash and railway shares:—Held, that the testator was domiciled in France. *Capdevielle, In re*, 2 H. & C. 985; 5 N. R. 15; 33 L. J., Ex. 306; 10 Jur. (N.S.) 1155; 12 W. R. 1110.

In 1858, M. left Canada, which was his domicil of origin, sold his house and burial-ground there, and came to Paris to educate his children. He lived in Paris ten years, but went over several times to Montreal, and amongst other things made his will there, describing himself as of Montreal. In 1868, he came to England and took a lease of a house in London. His daughter married and settled in London, and he purchased for his son a share in a business in London. M. died in 1871:—Held, that he had acquired and shewn an intention to retain an English domicil. *Stevenson* v. *Masson*, 43 L. J., Ch. 134; L. R. 17 Eq. 78; 29 L. T. 666; 22 W. R. 150.

—— **For Permanent Pursuit.**]—If a man is settled in a foreign country, engaged in some permanent pursuit requiring his residence there, a mere intention to return to his native country on a doubtful contingency will not prevent such residence from changing his domicil of origin. *Aikman* v. *Aikman*, 3 Macq. H. L. 854; 7 Jur. (N.S.) 1017; 4 L. T. 374.

A domiciled Scotchman went to India, where he was engaged in mercantile pursuits for nine years:—Held, that this residence and occupation in India did not, in the absence of any expression of intention, change his domicil. *Jopp* v. *Wood*, 4 De G. J. & S. 616; 5 N. R. 422; 34 L. J., Ch. 212; 11 Jur. (N.S.) 212; 12 L. T. 41; 13 W. R. 481.

In 1818, S., a Portuguese, came to England as agent of a wine company, in which capacity he was employed until 1833. He continued to reside in England, and in 1857 was appointed attaché to the Portuguese embassy, which office he held until his death in 1860. There was no evidence of his having visited Portugal, or communicated with any person there, after he came to England. In a will in his handwriting he stated that as he was a Portuguese subject, and an attaché, his property was not liable to legacy duty:—Held, first, that he had acquired an English domicil. *Att.-Gen.* v. *Kent*, 1 H. & C. 12; 31 L. J., Ex. 391; 6 L. T. 864; 10 W. R. 722.

Held, secondly, that his appointment as attaché did not revive his domicil of origin. *Ib.*

A French subject, by establishing himself in business in this country, marrying, and continuing to reside here for more than thirty years, making only occasional business visits to France, loses his domicil of origin, and acquires an English domicil, notwithstanding his refusal to take out letters of naturalisation in this country, on the ground that he might return to France, and would not give up his status as a French citizen. *Brunel* v. *Brunel*, L. R. 12 Eq. 298; 25 L. T. 378; 19 W. R. 970.

—— **Retaining Property in Domicil of Origin.**]—A person born in Scotland, resided many years in India, returned to Scotland, and lived in his paternal house for six years; then resided in France for six years, and died at Boulogne, on his return from a journey to Scotland, where he had been for some weeks. He was said to have preferred France, and to have been annoyed at his neighbours in Scotland. He had apartments at Paris, and furnished them handsomely. He sent for his horses, but not for his furniture or plate, from Scotland. He never let his paternal estate, and attended to the management of it:—Held, that he had not abandoned his Scotch domicil. *Lord* v. *Colvin*, 4 Drew. 366; 28 L. J., Ch. 361; 5 Jur. (N.S.) 351; 7 W. R. 250.

A., domiciled in England, took up his abode in Scotland under circumstances which, had they stood alone, would have sufficed to constitute a Scotch domicil, but inasmuch as he all the time retained his English residence and performed certain functions in England:—Held, that he had not abandoned his English domicil. *Maxwell* v. *M'Clure*, 3 Macq. H. L. 852; 6 Jur. (N.S.) 407; 2 L. T. 65; 8 W. R. 370.

W. was born and educated in England, and for a time held a commission in the army. In 1835 he sold out, married an Englishwoman, and went to reside abroad. He travelled about to different places, but from 1846 until his death, in 1860, he resided either at Boulogne, or at St. Germain-en-

Laye, in France. He periodically visited his brother in England, and sent his eldest son to be educated in this country. In 1846 he made his will in the English form, but in 1848 he executed a copy of it according to the law of France, and at the same time wrote a memorandum, in which he stated that he did so by reason of some doubts which had lately arisen as to the validity of wills made in the English form by persons residing and dying abroad, and that he had no intention to reside permanently away from England. All his property was in England, except some furniture in his house at St. Germain :—Held, that he had not lost his domicil of origin, and that his will made in the English form was entitled to probate. *West, In Goods of*, 6 Jur. (N.S.) 831.

—— **Permanent Residence of Wife and Family.**]—In determining the question of a man's domicil it is material to consider where his wife and family have their permanent residence. *Platt* v. *Att.-Gen. for New South Wales*, 47 L. J., P. C. 26 ; 3 App. Cas. 336 ; 38 L. T. 74 ; 26 W. R. 516—P. C. S. P., *Doucet* v. *Geoghegan*, 9 Ch. D. 441 ; 26 W. R. 825—C. A.: *Bullen-Smith, In re, Berners* v. *Bullen-Smith*, 58 L. T. 578.

A native of Scotland acquired a domicil in New South Wales, where he was possessed of a station called Westbrook, at which he, for some time, resided. The portion of New South Wales in which Westbrook was situate was afterwards separated from the rest, and made into an independent colony under the name of Queensland. Shortly before the separation he had ceased to reside permanently at Westbrook, and handed over the management of the station to his partner ; but he was still part owner of the station, and frequently visited it, and had expressed an intention to reside there at a future time, and to be buried there. He was a member of the Legislative Assembly of Queensland, and took an active part in the political business of the colony but had no permanent residence there. His wife and family lived at a house which he had built in New South Wales. He died suddenly while on a visit to the station at Westbrook, and was buried there :—Held, that he was domiciled in New South Wales, and not in Queensland. *Ib.*

The rule that a man will be considered as domiciled in the place where his wife permanently resides, and in which he has fixed his establishment, is not affected by the circumstance that the choice of residence has been made in deference to the wishes of the wife, and that the house has been bought and furnished at her instance and with her money. *Aitchison* v. *Dickson*, 39 L. J., Ch. 705 ; L. R. 10 Eq. 589 ; 23 L. T. 97 ; 18 W. R. 989.

A Scotchman having his domicil in Scotland, and being a landed proprietor and a banker there, married an Englishwoman, with whom he resided for some years in Scotland. He then, on account of his health, left Scotland, and for ten years resided at different places in England. Afterwards he returned to Scotland, and remained there for a few months, for the purposes of his business, but was again forced to leave by ill health and return to England, where for nearly two years he was in confinement in an asylum, and for the next five years he was travelling about on the continent, and in England ; meanwhile almost all his Scotch property was sold to pay his debts. At the end of that time, the wife's trustees bought a house at Brighton, and he and his wife lived there till his death ten years afterwards :—Held, that he had acquired an English domicil. *Ib.*

An Englishman emigrated to America in 1851, where he carried on a shoemaker's trade. In 1856 he was admitted as a citizen of the United States of America. He buried his first wife in America, and remarried there in 1866 :—Held, that he had acquired an American domicil of choice. *King* v. *Foxwell*, 45 L. J., Ch. 693 ; 3 Ch. D. 518 ; 24 W. R. 629.

A Frenchman came to England when about eighteen, and lived here twenty years, and bought and improved a house in which he lived ; and also bought a vault in which he buried his uncle, and also his wife, who died four years before him. After his wife's death he shewed a disposition to return to France, but continued to reside in England. He died during a temporary visit to his native place, and made his will there, in which he referred to his English residence as "home" :—Held, that his domicil was French. *Capdeville* v. *Capdeville*, 18 W. R. 107 ; 21 L. T. 663.

In 1858 M. left Canada, which was his domicil of origin, sold his house and burial-ground there, and came to Paris to educate his children. He lived in Paris ten years, but went over several times to Montreal, and amongst other things made his will there, describing himself as of Montreal. In 1868 he came to England and took a lease of a house in London. His daughter married and settled in London, and he purchased for his son a share in a business in London. M. died in 1871 :—Held, that he had acquired and shewn an intention to retain an English domicil. *Stevenson* v. *Masson*, 43 L. J., Ch. 134 ; L. R. 17 Eq. 78 ; 29 L. T. 666 ; 22 W. R. 150. And see *Brunel* v. *Brunel*, L. R. 12 Eq. 298 ; 25 L. T. 378 ; 19 W. R. 970.

—— **Conversations and Declarations as Evidence.**]—Conversations and declarations unless accompanying acts are the lowest species of evidence of a change of domicil ; they must not, however, be discarded, but must be duly weighed together with the rest of the evidence. *Crookenden* v. *Fuller*, 1 Sw. & Tr. 441 ; 29 L. J., P. 1 ; 5 Jur. (N.S.) 1222 ; 1 L. T. 70 ; 8 W. R. 49.

In questions of domicil, less weight is given by the courts to a testator's declarations than to his acts, and no one act is necessarily per se paramount in importance ; but the relative importance of all his acts, however trivial, must be considered as evidence of the animus manendi or revertendi. *Drevon* v. *Drevon*, 4 N. R. 316 ; 34 L. J., Ch. 129 ; 10 Jur. (N.S.) 717 ; 10 L. T. 730 ; 12 W. R. 946.

—— **Statement in Will.**]—The fact of a testator describing himself in his will as of a foreign country does not of itself shew any intention to change his domicil. *Jopp* v. *Wood*, 4 De G. J. & S. 616 ; 5 N. R. 422 ; 34 L. J., Ch. 212 ; 11 Jur. (N.S.) 212 ; 12 L. T. 41 ; 13 W. R. 481. S. P., *Att.-Gen.* v. *Kent*, 1 H. & C. 12 ; 31 L. J., Ex. 391 ; 6 L. T. 864 ; 10 W. R. 722.

Where a person left England and took up his residence at Hamburgh, and the facts shewed that he intended to live there permanently, and he did live and died there :—Held, that his domicil was there, notwithstanding that in a will made during a visit to England he said that although he intended to return to Hamburgh, he did not mean by such declaration of intention to

renounce his domicil of origin as an Englishman. *Steer, In re*, 3 H. & N. 594; 28 L. J., Ex. 22.

——**Form of Will.**]—Making will in a particular form, employing terms of art, is evidence of intention to acquire a domicil. *Doucet* v. *Geoghegan*, 9 Ch. D. 441; 26 W. R. 825—C. A. S. P., *Bullen-Smith, In re, Berners* v. *Bullen-Smith*, 58 L. T. 578.

And also to retain one. *West, In Goods of*, 6 Jur. (N.S.) 831. Vide *Att.-Gen.* v. *Pottinger*, 6 H. & N. 733; 30 L. J., Ex. 284; 7 Jur. (N.S.) 470; 4 L. T. 368; 9 W. R. 578.

The execution in England of a will, according to the English form and law, by a man who had acquired an English domicil of choice, but was resident abroad, held not sufficient to prevent the acquisition of another domicil of choice. *Anderson* v. *Laneuville*, 9 Moore, P. C. 325; 2 Spinks, 41.

Terms of Foreign Law in Will.]—A Scotchman came to live in England and acquired an English domicil. He afterwards went for ten years to France, and returned to England where he soon after died. He left an unsigned will of personal estate made in 1827, which was drawn by a Scotch lawyer, and contained several technical words of Scotch law. The will was admitted to probate by the English court. Semble, that the testator died domiciled in England, his residence in France not being sufficient evidence of his intention to abandon his English domicil. Semble, also, that the use of some technical Scotch words in the will, did not furnish sufficient indication of the intention of the testator to induce the court to construe it according to Scotch law. *Bradford* v. *Young*, 29 Ch. D. 617; 53 L. T. 407; 33 W. R. 860—C. A. Affirming in part 54 L. J., Ch. 96.

A domiciled Scotchman made a will, and afterwards married in Scotland. He subsequently acquired an English domicil, which he retained until his death:—Held, that as the will was valid so long as he remained in Scotland, it was not revoked by his subsequent change of domicil, and was entitled to probate in England. *Reid, In the Goods of*, 35 L. J., P. 43; L. R. 1 P. 74; 12 Jur. (N.S.) 300; 13 L. T. 680; 14 W. R. 316.

When Acts of Party are contrary to Expressed Intention.]—The expressions of an intention not to renounce a domicil of origin cannot prevail against the intention and facts collected from the acts of the party if those are otherwise sufficient to constitute a domicil abroad. *Steer, In re*, 3 H. & N. 594; 28 L. J., Ex. 22.

A Frenchman had lived twenty-seven years in England, during the greater part of which time he was a partner in an English house of business, paying occasional visits to France. He married successively, in English churches, two wives, who were Englishwomen and Protestants, though himself a Roman Catholic, and his children were brought up in England as Protestants. He made his will in the English form, and died and left his property in a manner inconsistent with French law. Upon an action to establish a French domicil, numerous witnesses deposed that he had made various parol declarations that he intended to return to France when he made his fortune. It was also proved that he always refused to be naturalised in England, and would not take a lease of more than three years of his house:—Held, that the acts of the testator manifested an intention to acquire an English domicil; and that his declarations of intention to return to France when he had made his fortune were not sufficient to rebut the conclusion to be derived from the facts of his life, especially of his English marriages. *Doucet* v. *Geoghegan*, 9 Ch. D. 441; 26 W. R. 825—C. A.

A testator, whose domicilium originis was Ireland, where he inherited considerable estates, abandoned such, and by a long residence in England acquired an English domicil. In 1836 he sold his house and furniture, and broke up his establishment in England, and went to reside in France, where he bought and furnished a house, in which he resided permanently (cohabiting with a French woman) to the period of his death, in 1849, with the exception only of occasional visits of short duration to England for purposes of business relating to his estates in Ireland and his property in the English funds:—Held, that the domicil was French, and was not affected by his having expressed an intention to return to England, in an event which never happened, or of his having, on one occasion, when in England, executed a will according to the English form and law, or from the circumstance that the bulk of his property, at his death, was in the English funds. *Anderson* v. *Laneuville*, 9 Moore, P. C. C. 325; 2 Spinks, 41.

An Irishman went to India, and was there resident in business for at least ten years. He then came to England, and lived here for nine years, having taken a house on lease, and furnished it. Being in bad health, he sold his lease and furniture, and went to Madeira, leaving his books and trunks in care of a person living in London. He lived at Madeira two years, and there made his will; and then he went to Lisbon, and died. He had property in India, some Irish stock, some India stock and some English stock; and he banked in London. He was proved to have expressed himself as intending ultimately to reside in Ireland:—Held, that he abandoned his Indian domicil, and acquired an English domicil; and that he never changed the latter, either for India, or Madeira, or Ireland. *Att.-Gen.* v. *Fitzgerald*, 3 Drew. 610; 25 L. J., Ch. 743; 4 W. R. 797.

Acts and Declarations.]—An unmarried Englishwoman, in 1849, went to reside abroad at the house of her married sister in Germany. She resided there, contributing towards the expenses of housekeeping, until 1863, in which year she died. Her property consisted of money invested in English securities, but she also possessed a valuable library, which she caused to be transported to Germany. She occasionally came over to England with her married sister to visit her friends, and while in England in 1854 she made her will, describing herself as on a visit to her sister, bequeathing her property to trustees to pay the annual income to her sister for life for her separate use, without power of anticipation, with power of appointment to her sister by deed or will. The testatrix told her sister that if she survived her, she should continue to live in Germany, and that nothing would induce her to return to England, except on an occasional visit. She also named the church-yard where she wished to be buried, and where she was afterwards buried:—Held, that her acts and declarations did not shew a sufficient intention to change her domicil; and, assuming she intended to give up her English domicil, that until she acquired a new domicil her English domicil continued.

Att.-Gen. v. *Blucher de Wahlstatt*, 3 H. & C. 374; 5 N. R. 135; 34 L. J., Ex. 29; 11 Jur. (N.S.) 1159; 11 L. T. 454; 13 W. R. 163.

Abandonment of Domicil of Choice.] — An acquired domicil is not lost by mere abandonment, but continues until a subsequent domicil is acquired, which can only be animo et facto, unless the party dies in itinere towards an intended domicil. *Munroe* v. *Douglas*, 5 Madd. 379.

In order to lose the domicil of choice and revive the domicil of origin it is not sufficient for the person to form the intention of leaving the domicil of choice, but he must actually leave it with the intention of leaving it permanently. *Marrett, In re, Chalmers* v. *Wingfield*, 36 Ch. D. 400; 57 L. T. 896; 36 W. R. 344—C. A.

A. was born in Scotland; when a young man he went to the East Indies, where he remained above ten years in the company's service; he then returned to Scotland, and lived in Edinburgh, where he put his name on the books of the municipality, married, took a house, entered into business as a partner in a banking-house, and became a member of various societies there established. At the end of a few years he left Edinburgh in anger; the banking business had come to an end, and he took off his name from the books of the municipality and of the various societies, and declared his intention never to return to Auld Reekie; he lived in London, first in lodgings, and then in houses hired for different periods, lectured on Oriental literature, and endeavoured thereby to increase the sale of some books which he had written on the Hindostanee language. At the end of some years he went to Paris, to avoid some annoyances in London, but never made any such declarations with respect to London that he had made with respect to Edinburgh; and he left his works in London, and likewise some ornamental furniture which he desired a friend to keep for him till his return. He died in Paris, having just before made a will in the English form:—Held, that he had lost his Scotch, and obtained an English domicil. *Whicker* v. *Hume*, 7 H. L. Cas. 124; 28 L. J., Ch. 396; 4 Jur. (N.S.) 933; 6 W. R. 813.

In 1855, a domiciled Manxman came to England and married an Englishwoman, and resided in England for twenty years. At the date of the marriage the wife was entitled to a vested reversionary interest in a legacy which fell into possession in 1885. In 1875 the husband and wife returned to the Isle of Man, where the husband carried on business till 1878, when he became insolvent, and executed a deed of assignment of all his property, including his wife's interest in the legacy, for the benefit of his creditors. In 1880 the parties returned to England, where they resided till 1882, when the husband went to Mexico to seek employment. The doctrine of a wife's equity to a settlement is unknown to Manx law:—Held, that the Manx domicil of the husband, which had been lost by the twenty years' residence in England, reverted on his return to the Isle of Man, that nothing happened afterwards to re-establish the English domicil, and that the domicil was therefore Manx. *Marsland, In re*, 55 L. J., Ch. 581; 54 L. T. 635; 34 W. R. 540.

—— **Burden of Proof.**]—The onus of proving a change of domicil is on the party who alleges it. *Bell* v. *Kennedy*, L. R. 1 H. L., Sc. 307.

The burden of proof is on the party who impugns the domicil of origin. *Crookenden* v. *Fuller*, 1 Sw. & Tr. 441; 29 L. J., P. 1; 5 Jur. (N.S.) 1222; 1 L. T. 70; 8 W. R. 49. S. P., *Att.-Gen.* v. *Rowe*, 1 H. & C. 31; 31 L. J., Ex. 314; 8 Jur. (N.S.) 823; 6 L. T. 438; 10 W. R. 718. *Att.-Gen.* v. *Blucher de Wahlstatt*, 3 H. & C. 374; 5 N. R. 135; 34 L. J., Ex. 29; 10 Jur. (N.S.) 1159; 11 L. T. 454; 13 W. R. 163.

Where a domicil has been acquired, the onus of proof, to be deduced from all the facts and circumstances of the case, lies on the person who desires to shew that that domicil has been changed. *Maxwell* v. *M'Clure*, 3 Macq. H. L. 852; 6 Jur. (N.S.) 407; 2 L. T. 65; 8 W. R. 370.

A testator made his will in England in 1843, and afterwards went to reside in France where he died in 1850. On the question that an inquiry ought to take place, as it had been suggested that his domicil was French:—Held, that there was no ground for an inquiry, there being nothing to shew that the testator's domicil was not English. *Harrison* v. *Southampton Corporation*, 18 Jur. 669; 2 W. R. 659.

—— **Presumption of Reverter to Domicil of Origin.**]—Where a question between a reverter to the domicil of origin and a domicil in another country is in equilibrio, the domicil of origin will prevail. *Craigie* v. *Lewin*, 3 Curt. 435; 7 Jur. 519.

d. Married Women.

Domicil of Wife.]—By marriage, the domicil of the husband becomes that of the wife. *Dalhousie* v. *M'Douall*, 7 Cl. & F. 817.

When an English woman marries a domiciled foreigner, the marriage is constituted according to the lex loci contractûs; but she takes his domicil, and is subject to his law. *Harvey* v. *Farnie*, 52 L. J., P. 33; 8 App. Cas. 43; 48 L. T. 273; 31 W. R. 433; 47 J. P. 308—H. L. (E.)

A wife cannot acquire a domicil separate and distinct from her husband. *Dolphin* v. *Robins*, 7 H. L. Cas. 390; 3 Macq. H. L. 563; 29 L. J., P. 11; 5 Jur. (N.S.) 1271; 7 W. R. 674.

A feme coverte, living apart from her husband, has no power to change her domicil. *Daly, In re*, 25 Beav. 456; 27 L. J., Ch. 751; 4 Jur. (N.S.) 525; 6 W. R. 533.

—— **In Relation to Divorce.**]—*See* col. 223, ante.

—— **After Sentence of Divorce.**]—The ordinary presumption that a wife is legally domiciled where the husband is, fails, when there has been a sentence of divorce. *Williams* v. *Dormer*, 2 Rob. Ec. Rep. 505; 16 Jur. 366.

A. and B. were married in England, and resided here for many years; differences then arose between them, and by agreement they lived separate from each other. B. had the power to dispose of property by deed or will. In February, 1854, A. went to Scotland, and committed adultery there; he resided there till the middle of June in that year. While he was so residing there, B. instituted a suit against him for a divorce, on the ground of adultery. Pending the suit she made a will in favour of C. A decree of divorce was pronounced. She married C., and went with him to France, where she lived till her death. In June, 1856, she made a testamentary paper, revoking all former wills:—Held, that the divorce was inoperative; that she had no domicil but that of her husband, and that, consequently,

the French will was void. *Dolphin* v. *Robins*, supra.

Englishwoman Marrying Foreigner Abroad —Acquisition of new Domicil—Abandonment of Domicil of Origin.]—In 1839 N., a domiciled Englishwoman, being then an infant, married in France a Frenchman. Previously to the marriage she entered into a notarial contract dealing with her property according to French law. There were children of the marriage. In 1845 she separated from her husband and went with her children to reside in Jersey. In 1849 an act of separation of property between the husband and wife was made by the Royal Courts of Jersey. In 1853 N., believing her husband to be dead, went through the ceremony of marriage with B., and accompanied him and her children to New South Wales, where she lived until her death in 1879. Her husband did not in fact die until 1877. In 1878 she made a will, by which she left all her property to B. :—Held, that by going to New South Wales N. had acquired a new domicil there, inasmuch as there were present both the elements necessary for such acquisition —namely, the factum and the animus manendi; but that, even if not so, it must be taken that she had abandoned her French domicil and that her English domicil of origin had revived :—Held, also, following *Sottomayor* v. *De Barros* (3 P. D. 5), that the validity of the notarial contract must be decided according to the law of her domicil of origin, and consequently, she being an infant, that such contract was invalid :—Held, therefore, that there was nothing to prevent her making a will, or to disentitle B. to take under it as against the children of the French marriage. *Cooke's Trusts, In re*, 56 L. J., Ch. 637; 56 L. T. 737; 35 W. R. 608.

c. INFANTS.

Rule.]—It is a settled principle that no man shall be without a domicil; and to secure this end the law attributes to every individual as soon as he is born the domicil of his father if the child is legitimate, and the domicil of the mother if the child is illegitimate. *Udny* v. *Udny*, L. R. 1 H. L., Sc. 441.

Legitimate children acquire by birth the domicil of their father. *Forbes* v. *Forbes*, Kay, 341; 2 Eq. R. 178; 23 L. J., Ch. 724; 18 Jur. 642; 2 W. R. 253.

Change of Domicil during Infancy.]—A new domicil cannot be acquired during pupilage, or until the person is sui juris. *Somerville* v. *Somerville* (*Lord*), 5 Ves. 750; 5 R. R. 155.

An infant cannot change his domicil by his own act. *Forbes* v. *Forbes*, supra.

There can be no change of domicil during infancy, and the lapse of seven years after the attainment of majority would be too short a time to operate a change of domicil, in the absence of any evidence of an intention to change it. *Jopp* v. *Wood*, 4 De G. J. & S. 616; 34 L. J., Ch. 212; 11 Jur. (N.S.) 212; 12 L. T. 41; 13 W. R. 481.

—— **By Change of Father's Domicil.**]—A. was born in England, and at the age of nine accompanied his father to Jersey, where he resided partly with his father, and at times with an uncle, for eleven years. He, being still under age, entered the navy, and was borne on the books of some one of her majesty's ships of war until he died. The father continued to live in the same island :—Held, that at the time A. went to sea his domicil was that of his father, namely, at Jersey, and that, as he never afterwards acquired a new one, that was his domicil when he died. *Patten, In Goods of*, 6 Jur. (N.S.) 151. S. P., *Firebrace* v. *Firebrace*, 47 L. J., P. 41; 4 P. D. 63; 39 L. T. 94; 26 W. R. 617: *D'Etchegoyen* v. *D'Etchegoyen*, 57 L. J., P. 104; 13 P. D. 132; 37 W. R. 84.

A.'s father was formerly the sovereign of the Punjaub, but in 1849, by a treaty made by him with the English government when he was ten years of age, he renounced his sovereignty, and subsequently resided in England until 1886, when he left this country, taking with him his wife and son, with the avowed intention of returning to India, and on being prevented from so doing had since resided on the continent. A. at this time had not attained his majority, and while still a minor returned to England with his father's consent and lived with his mother at his father's expense up to and after his majority, when he entered the English army as an officer, his regiment being stationed in Canada :—Held, that A.'s father, although he had resided in England, had never abandoned his domicil of origin in the Punjaub, and that even if he had the English domicil was renounced during the minority of A., who thereupon followed the domicil of his father wherever that might be: that there was not sufficient evidence to shew that A., after he attained his majority, intended to take a domicil of choice in this country. *Cross, Ex parte, Dulcep Singh, In re*, 7 Morrell, 228—C. A.

Per Lopes, L.J. :—A domicil of choice arises when an independent person resides in a country with the intention of permanently residing there. *Ib.*

—— **Effect on Domicil of Origin.**]—Where the domicil of birth is changed during infancy by a change of domicil of the father :—Semble, that the altered domicil cannot be regarded as the infant's domicil of origin. *Craignish, In re, Craignish* v. *Hewitt*, [1892] 3 Ch. 180; 67 L. T. 689—C. A.

—— **By Change of widowed Mother's Domicil.**]—A native of England, domiciled in Guernsey, died intestate, leaving a widow and infant children by her, and also by a former wife. The widow, after his death, was appointed guardian of the children by the Royal Court of Guernsey, and in conjunction with another person, who was appointed guardian of the children by a former marriage, sold the property of the intestate, and invested the produce in the English funds, after which she came to England with her children, and was domiciled there. On the death of some of the children under age, a question arose whether their shares of the property were distributable according to the law of England or of Guernsey :—Held, that the law of England governed the succession, the domicil of the children being (according to the opinion of foreign jurists, our own law being silent on the subject) to follow the domicil of the surviving mother, where no fraudulent intention can be imputed. *Potinger* v. *Wightman*, 3 Mer. 67; 17 R. R. 20.

—— **Second Marriage—Change of Mother's Domicil—Domicil of Step-father.**]—The change

in the domicil of an infant, which may follow from a change of domicil on the part of its widowed mother, is not to be regarded as the necessary consequence of a change of the mother's domicil (e.g. upon her second marriage), but as the result of the exercise by her of a power vested in her for the welfare of the infant, which in its interest she may abstain from exercising, even when she changes her own domicil. *Potinger* v. *Wightman* (3 Mer. 67; 17 R. R. 20) explained. *Beaumont, In re*, 62 L. J., Ch. 923; [1893] 3 Ch. 490; 8 R. 9; 42 W. R. 142.

Domicil of Lunatic Child after attaining Majority.]—The domicil of a child during its minority follows that of the father; and if from lunacy or mental imbecility it is incapable, after it has attained the age of majority, to choose a domicil for itself, in such case its domicil will still continue to be determined by that of the father. *Sharpe* v. *Crispin*, 38 L. J., P. 17; L. R. 1 P. 611; 20 L. T. 41; 17 W. R. 368.

Illegitimate Child—Domicil of Origin or of Choice.]—The illegitimate son of a Portuguese woman was sent to Scotland when a child, and remained under the control of his father's relations there, being sent to school in Scotland, and for a short time in Germany. At the age of eighteen he obtained an appointment in the English Customs Department, and went to Yarmouth, and afterwards to London, where he remained in the same employment till he was twenty-eight, when he returned to Scotland in ill-health, and soon afterwards became lunatic, in which state he remained until his death. While living in London he paid some visits to Scotland, where he retained apartments, in which he left his books, &c. According to Scotch law an infant can choose his own domicil at the age of fourteen:—Held, on the evidence, that his domicil was not Scotch. Semble, that his domicil was English. *Urquhart* v. *Butterfield*, 57 L. J., Ch. 521; 37 Ch. D. 357; 58 L. T. 750—C. A.

Effect of Domicil on Legitimacy.]—*See* tit. LEGITIMACY, col. 235, supra.

f. CORPORATIONS.

Double Domicil.]—A public company may have two domicils; and places of business may, for the purpose of founding jurisdiction, be treated as places of domicil, and service there is sufficient. *Carron Co.* v. *Maclaren*, 5 H. L. Cas. 416; 24 L. J., Ch. 620; 3 W. R. 597.

The Caledonian Railway Company was incorporated in 1845 by 8 & 9 Vict. c. clxii. for the purpose of making a railway from Carlisle to Glasgow and Edinburgh. The whole of the line, with the exception of six miles in England, is situate in Scotland. By s. 1 of the special act the Companies Clauses (Scotland) Act, 1845, is, among others, incorporated with the special act, s. 2 of which also incorporates the English Companies Act, 1845, so far as may be necessary for carrying into effect the object and purposes of the special act in relation to the portion of the line situate in England. The meetings of the board of directors of the company were held at Glasgow, from which place the business of the company was managed and controlled. The company also had a station at Carlisle, in England, where the traffic in that district was managed and controlled by a district traffic superintendent, who was subject to the orders issued by the board of directors at Glasgow:—Held, that the company was a Scotch company, domiciled in Scotland, and not a company partly Scotch and partly English. *Palmer* v. *Caledonian Ry.*, 61 L. J., Q. B. 552; [1892] 1 Q. B. 823; 66 L. T. 771; 40 W. R. 562—C. A.

g. TAKING SERVICE UNDER THE CROWN.

In General.]—Residence in a foreign country as a public officer gives rise to no inference of a domicil in that country; but if already there domiciled and resident, the acceptance of an office in the public service of another country does nothing to destroy the domicil. *Sharpe* v. *Crispin*, 38 L. J., P. 17; L. R. 1 P. 611; 20 L. T. 41; 17 W. R. 368.

—— **Subsequent Residence Abroad.**]—A person whose name was English, but whose domicil of origin was not shewn, held a commission in the English army. He sold out in 1810, and subsequently resided, down to his death, in France; there he formed a French connection, there he educated his son as French, and there he died, and his whole property was in French rentes:—Held, that his domicil at his death was French, and that legacy duty was not payable on his assets. *United States President* v. *Drummond*, 33 Beav. 449; 4 N. R. 7; 33 L. J., Ch. 501; 10 Jur. (N.S.) 533; 10 L. T. 321; 12 W. R. 701.

P. was born in Scotland in 1792, of Scotch parents. In 1810 he obtained a commission in the army, and immediately proceeded with his regiment on foreign service, and served abroad till 1860, when he retired from the army. From 1860 till his death he resided in lodgings, hotels, and boarding-houses in various places in England, dying in 1882, intestate and a bachelor, in a private hotel in London, leaving no real estate in England, and no property whatsoever in Scotland. From the year 1810 till his death he never revisited Scotland, and for the last twenty-two years of his life never left the territorial limits of England:—Held, that the domicil of the intestate at his death was Scotch. *Patience, In re, Patience* v. *Main*, 54 L. J., Ch. 897; 29 Ch. D. 976; 52 L. T. 687; 33 W. R. 501.

Ambassador.]—A foreigner having gained a British domicil does not lose it by becoming chargé d'affaires in this country for his own sovereign. *Att.-Gen.* v. *Kent*, 1 H. & C. 12; 31 L. J., Ex. 391; 6 L. T. 864; 10 W. R. 722.

Nor does his appointment revive his domicil of origin. *Ib.*

In 1819, a Sardinian came to England, and became attached to the Sardinian embassy. In 1821, he was dismissed, but he continued to reside ten years in England. He was then, for three years, chargé d'affaires in London, and for three years minister in Holland. In 1837, he was appointed envoy extraordinary and minister plenipotentiary to England, and retained this office until his death in 1846:—Held, upon the evidence of his declaration and acts, that he was domiciled in England. *Heath* v. *Samson*, 14 Beav. 441.

Civil Service.]—In 1856, a Queen's counsel, whose domicil of origin was England, was appointed chief justice of Ceylon, during the pleasure of the crown, and he resided with his

family there, in the exercise of the duties of his office, until his death in 1860. He left a library and other effects in England, and he invested large sums of money on mortgage in Ceylon :— Held, that, in the absence of any evidence of an intention to acquire a foreign domicil, he retained his domicil of origin. *Att.-Gen.* v. *Rowe*, 1 H. & C. 31 ; 31 L. J., Ex. 314 ; 8 Jur. (N.S.) 823 ; 6 L. T. 438 ; 10 W. R. 718.

A domiciled Irishman went to India in the military service of the East India Company in 1804. In 1840 he returned to England, and went in 1841 to China as plenipotentiary. In 1844 he returned to England and bought a house. In 1845 he went as governor to the Cape of Good Hope, and in 1848 to Madras as governor. In 1854 he returned to England, and in 1855 went to Malta, with an idea of proceeding at some time to India. In his will, made in England, and in a codicil, made at Malta, he described himself as of Eaton Place, London :—Held, that he resumed his English domicil in 1844, and never subsequently lost it. *Att.-Gen.* v. *Pottinger*, 6 H. & N. 733 ; 30 L. J., Ex. 284 ; 7 Jur. (N.S.) 470 ; 4 L. T. 368 ; 9 W. R. 578.

Naval Service.]—A Scotchman came to England at the age of sixteen, and remained in the English naval service until his death in 1848 :— Held, that he had not lost his domicil of origin. *Brown* v. *Smith*, 15 Beav. 444 ; 21 L. J., Ch. 356.

Military Service.]—A domiciled Irishman, by enlisting in a regiment in her majesty's service, the headquarters of which are in England, does not thereby acquire an English domicil. *Yelverton* v. *Yelverton*, 1 Sw. & Tr. 574 ; 29 L. J., Mat. 34 ; 6 Jur. (N.S.) 24 ; 1 L. T. 194 ; 8 W. R. 134.

The rule that a British subject does not, by entering into and remaining in the military service of the crown, abandon the domicil which he had when he entered into the service, applies to an acquired domicil as well as to a domicil of origin. *Macreight, In re, Paxton* v. *Macreight*, 55 L. J., Ch. 28 ; 30 Ch. D. 165 ; 53 L. T. 146 ; 33 W. R. 838.

A., a domiciled Englishman in the military service of the East India Company, came to England from India, in 1829, upon furlough. By the rules of the service, he was liable at any time to be recalled to India on active service. In 1838 he acquired the brevet rank of major-general in her majesty's service. While on furlough, and in 1832, he went to France, where he resided with his wife and daughter, and died there in 1855. He occupied lodgings during that time in Paris. He also purchased a burial-place for his wife, who died and was buried there ; and purposed to be buried there himself. His residence in Paris was not continuous, as he frequently came to England and Scotland upon visits, but he had no permanent abode in either of those countries, nor did he give up his lodgings in Paris during these visits. All his property, except the furniture of the lodgings in Paris, was in England :—Held, first, that it was not competent to A. to acquire a domicil in a foreign state, as such domicil was incompatible with the obligations and duty of an officer in the military service of the Queen and the East India Company. *Hodgson* v. *De Beauchesne*, 12 Moore, P. C. 285 ; 7 W. R. 397.

Held, secondly, that the presumption of law arising from his profession and status was against any intention by A. to abandon his original domicil and acquire a new domicil in a foreign state, as it would be inconsistent to presume an intention contrary to his duty as an officer in the military service of her majesty and the East India Company. *Ib.*

Held, thirdly, that England being the domicil of origin of A., the onus probandi was upon the party who alleged he had abandoned it and had acquired another domicil, to establish that proposition. *Ib.*

Held, fourthly, that the presumption raised by A.'s residence in France of his intention to acquire a French domicil was rebutted by the facts proved. *Ib.*

—— As affecting Domicil of Origin of Children.]—The rule that the children born abroad of ambassadors in the service of the crown of England abroad, are treated as natural-born British subjects, does not apply to the children born abroad of officers in the military service of the crown in foreign parts. *De Geer* v. *Stone*, 52 L. J., Ch. 57 ; 22 Ch. D. 243 ; 47 L. T. 434 ; 36 W. R. 241.

Engaged in Military Service of East India Company.]—The rule of law, that an engagement in India, in the military service of the East India Company, or as a covenanted servant to that company, changed the domicil into Anglo-Indian, does not extend to a person who becomes the servant in a private establishment abroad, or who goes abroad for the purpose of acquiring a fortune, with the intention of returning, at some undefined period, when his object has been attained. *Jopp* v. *Wood*, 4 De G. J. & S. 616 ; 5 N. R. 422 ; 34 L. J., Ch. 212 ; 11 Jur. (N.S.) 212 ; 12 L. T. 41 ; 13 W. R. 481.

The cases as to officers and covenanted servants of the East India Company are exceptions to the general rule, and their principle will not be extended. *Ib.* And see *Hodgson* v. *De Beauchesne*, supra.

A native of Scotland having, by employment in the military service of the East India Company, acquired a domicil in India :—Held, that by his return to Scotland, animo manendi, his original domicil did not revive, the party still holding his commission, and being liable to be called upon to return to India, and intending to return if called upon to do so. *Craigie* v. *Lewin*, 3 Curt. 435 ; 7 Jur. 519.

h. Anglo-Indian.

In what Cases.]—A British-born subject, an officer on service in her majesty's army in India, died there intestate, leaving all his property situate in that country, with the exception of a small sum of money due to him from the War Office in England. His widow took out letters of administration in India, and after paying the debts, &c., invested the rest of the estate in India in her own name, for her own benefit, and that of the next of kin. She afterwards took out letters of administration in England for the purpose of obtaining the debt due from the War Office :—Held, that as the deceased was on duty in India in her majesty's service, he did not acquire a domicil in that country, and that the whole of his property, though chiefly situate abroad, was liable to legacy duty. *Att.-Gen.* v. *Napier*, 6 Ex. 217 ; 20 L. J., Ex. 173 ; 15 Jur. 253.

P., who was the son of Irish parents, and an officer in the military service of the East India

Company on the Bombay establishment, returned to England in 1840, having attained the regimental rank of colonel. By the regulations of the service, officers who had attained that rank were permitted to reside where they pleased, subject to the company's orders for their return to duty in India. P. continued in the service of the company until his death. In 1841 he was appointed plenipotentiary in China, and accepted this appointment with consent of the East India Company. On his return in 1844, having been made a privy councillor, he purchased the ground-lease of a house in Eaton Place, which he furnished and fitted up for his residence, and resided there. Soon afterwards he was appointed governor of the Cape of Good Hope, where he continued until 1848, when he was appointed governor of Madras. He resided at Madras until 1854, when he returned to his house in Eaton Place, but afterwards went to other places in England, and ultimately to Malta, where he died. In his will and codicils he described himself as of Eaton Place. During the last period of his life he frequently declared his intention of returning to India :—Held, that the fact that he continued in the service of the company, and was liable to be ordered to return to India, did not prevent him from acquiring an English domicil on his return from China ; that his subsequent residence as governor of the Cape of Good Hope and at Madras did not involve the loss of his English domicil ; and that, as he had acquired an English domicil on his return from China in 1844, subsequent expressions of intention to return to India, and even the going to Malta with the view of ultimately returning there, did not affect the domicil he had acquired in England. *Att.-Gen.* v. *Pottinger*, 6 H. & N. 733 ; 30 L. J., Ex. 284 ; 7 Jur. (N.S.) 470 ; 4 L. T. 368 ; 9 W. R. 578.

C., born in Scotland, went to India and acquired an Anglo-Indian domicil. On his return to Europe he settled in Scotland, at his native place, occupying the family estate. After some years he left Scotland, where, however, he still kept up his house, and went to France, chiefly for the benefit of his health, and for special reasons, and rented an unfurnished house there till he died, in France :—Held, the Scotch domicil had been re-acquired, and had not been changed by the residence in France. *Moorhouse* v. *Lord*, 10 H. L. Cas. 272 ; 1 N. R. 555 ; 32 L. J., Ch. 295 ; 9 Jur. (N.S.) 677 ; 8 L. T. 212 ; 11 W. R. 637.

A native of Scotland went to India in the military service of the East India Company, whereby he acquired an English domicil. He remained in that country, with two exceptions, until 1837. The first of those exceptions consisted of a visit to England on a special military mission ; the second, of a temporary sojourn at the Cape of Good Hope. In 1837, being a lieutenant-colonel in the service, he came to England on leave of absence for three years, which was usually extended to five, still retaining his commission in the service, and being attached to a regiment. There was great probability that he would attain the rank of full colonel before the expiration of his leave of absence, in which event he need not have returned to India. He died in 1841, before his extended leave of absence expired. During this time he resided for the greater part in Scotland, but partly in England. He died in London. He, however, evinced a decided intention of permanently residing in Scotland, but coupled with the determination not to resign his commission in the East India Company's service, and to return to India, if that should be necessary to his becoming full colonel :—Held, that the acquired Anglo-Indian domicil was not divested. *Craigie* v. *Lewin*, 3 Curt. 435 ; 7 Jur. 519.

A domiciled Scotchman, having ancestral property, but no house in his native country, by accepting a commission, and serving in the Indian army, abandoned his domicil of origin, and acquired an Anglo-Indian domicil. He afterwards attained the rank of general in the Indian army, and was made colonel of a regiment and then left India with the intention of not returning thither, but came to Great Britain, where he lived part of the year in a house which he had built on his estate in Scotland, and part in a hired house in London, under circumstances which, if he had been a single man, would have given him again a Scotch domicil ; but his wife and establishment of servants resided constantly at the house in London :—Held, that this fact counterbalanced the effect of the other circumstances, and proved that his intention was permanently to reside in England ; and that therefore he must be considered to have abandoned his acquired domicil in India, and acquired by choice, a new one in England. *Forbes* v. *Forbes*, Kay, 341 ; 2 Eq. R. 178 ; 23 L. J., Ch. 724 ; 18 Jur. 642 ; 2 W. R. 253.

A testator had a Scotch domicil of origin. In 1807 he sailed from England for the East Indies ; the vessel was wrecked, and he was taken prisoner, and confined at Verdun till 1814 : in that year he was released. In 1815 he went to India, and set up in business ; in 1835 he made his will at Calcutta, describing himself as of that place, and appointing two persons resident at Calcutta his executors. In 1836 he sailed from India in a vessel bound for an English port, and died in itinere :—Held, that the domicil at the time of his death was Indian, and therefore no legacy duty was payable upon his personal property. *Lyall* v. *Paton*, 25 L. J., Ch. 746 ; 4 W. R. 798.

An English officer in the navy, upon half-pay, went to India, and remained there as a merchant for ten years, when he died, having acquired a very large fortune there. He always received his half-pay, and from time to time applied for and received fresh leave of absence :—Held, that he was domiciled in India, and that legacy duty did not attach upon his property there. *Cockrell* v. *Cockrell*, 25 L. J., Ch. 730 ; 2 Jur. (N.S.) 727 ; 4 W. R. 730.

A Scotchman by birth, after a service of forty years in India, became insane, and was sent to England on leave. He never recovered his faculties, and died in England :—Held, that his domicil was Anglo-Indian. *Hepburn* v. *Skirving*, 9 W. R. 764.

The decisions that persons going to India in the service of the East India Company, thereby acquire an Anglo-Indian domicil, are excrescences upon, and anomalous to, the principles of domicil. *Drevon* v. *Drevon*, 4 N. R. 316 ; 34 L. J., Ch. 129 ; 10 Jur. (N.S.) 717 ; 10 L. T. 730 ; 12 W. R. 946.

A Scotchman went to India, entered into business, and resided there for eighteen years. He then returned to England for the benefit of his health, leaving all his property in India. He spent eleven months in England and six months in Scotland, having no fixed abode ; after which time he went back to India, made his will, describing himself as T. C., coffee planter, Mysore,

and died in India a few months after:—Held, that he had abandoned his domicil of origin, had acquired an Anglo-Indian domicil, which he retained at his death, and consequently that his property was not liable to legacy duty. *Allardice* v. *Onslow*, 33 L. J., Ch. 434; 10 Jur. (N.S.) 352; 9 L. T. 674; 12 W. R. 397.

i. OTHER MATTERS.

Legacy Duty—Chinese Domicil.]—Notwithstanding the constitution of the supreme court of China and Japan, and the jurisdiction conferred on that court over British subjects having a fixed place of residence in China, a British subject cannot acquire by residence in China a new domicil so as to exempt his personal estate on death from the operation of the Legacy Duty Acts. *Tootal's Trusts, In re*, 52 L. J., Ch. 664; 23 Ch. D. 532; 48 L. T. 816; 31 W. R. 653.

Construction of Statute—Crown Lands Alienation Act.]—The Crown Lands Alienation Act of 1868 (31 Vict. No. 46), enacts (s. 46) that an applicant for lands under the act shall make a declaration that he "lives in Queensland":—Held, that the word "live" must be taken to be used in its popular meaning, denoting more than a transient presence in the colony, though not necessarily an intention to create a new domicil there, and not excluding the possession of a residence elsewhere. *Fisher* v. *Tully*, 47 L. J., P. C. 59; 3 App. Cas. 627; 38 L. T. 236.

Held, also, that this declaration was a material base of the contract created by the act, and that any misrepresentation in it avoided the whole contract. *Ib.*

VI. PROPERTY.

a. PRINCIPLES APPLICABLE TO IMMOVABLE AND MOVABLE.

Generally.]—It is established as a general principle, that a legal title, duly acquired, in any one country, is a good title over all the world. *Simpson* v. *Fogo*, 1 H. & M. 195; 1 N. R. 422; 32 L. J., Ch. 249; 9 Jur. (N.S.) 403; 8 L. T. 61; 11 W. R. 418.

When the law of a foreign country places a restraint upon the alienation of property, a contract here respecting that property cannot be enforced against the foreign law. *Waterhouse* v. *Stansfield*, 10 Hare, 254; 21 L. J., Ch. 881; 16 Jur. 1006; 1 W. R. 11.

—— **Distribution of Estate.**]—Where a person domiciled in one country dies possessed of property situate in another, the personal estate is to be applied and administered according to the law of the place of domicil, and the real estate according to the law of the place where the real estate is situate. *Winchelsea (Earl)* v. *Garrety*, 2 Keen, 293; 7 L. J., Ch. 99.

—— **Decision of Foreign Tribunal.**]—Although the parties claiming to be entitled to the estate of a deceased person may not be found to resort to the tribunals of the country in which he was domiciled, and although the courts of this country may be called upon to administer the estate of a deceased person domiciled abroad, and may in such a case be bound to ascertain as best they can who according to the law of the domicil are entitled to the estate, yet where the title has been adjudicated upon by the courts of the domicil, such adjudication is binding upon and must be followed by the courts of this country, *Enohin* v. *Wylie* (10 H. L. Cas. 1), *Ewing* v. *Orr-Ewing* (10 App. Cas. 453), *Doglioni* v. *Crispin* (L. R. 1 H. L. 301); even if the judgment of the foreign court has by the default of the party complaining of the judgment proceeded on a mistake as to the English law, *Castrique* v. *Imrie* (L. R. 4 H. L. 414), *Godard* v. *Gray* (L. R. 6 Q. B. 139), or the whole of the facts were not before the foreign tribunal (*De Cosse Brissac* v. *Rathbone*, 6 H. & N. 301); for the courts of this country do not sit to hear appeals from foreign tribunals, and if the decision of the foreign tribunal is wrong, recourse must be had to the mode of appeal provided in the foreign country (*Bank of Australasia* v. *Nias*, 16 Q. B. 717). *Trufort, In re, Trafford* v. *Blanc*, 57 L. J., Ch. 135; 36 Ch. D. 600; 57 L. T. 674; 36 W. R. 163.

Omnia ritè esse acta.]—The presumption when a foreign court has purported to act properly and within its jurisdiction is omnia ritè esse acta. *Taylor* v. *Ford*, 29 L. T. 392; 22 W. R. 47.

Will—Not revoked by change of Domicil.]—A domiciled Scotchman made a will, and afterwards married in Scotland. He subsequently acquired an English domicil, which he retained until his death:—Held, that as the will was valid as long as he remained in Scotland, it was not revoked by his subsequent change of domicil, and was entitled to probate in England. *Reid, In goods of*, 35 L. J., P. 43; L. R. 1 P. 74; 12 Jur. (N.S.) 300; 13 L. T. 680; 14 W. R. 316. And see *Bradford* v. *Young*, 29 Ch. D. 617; 53 L. T. 407; 33 W. R. 860—C. A.

—— **Foreign Technical Language.**]—Semble, where a will made in an acquired domicil uses technical language of the native domicil, the courts of the acquired domicil resort to the law of the native domicil for the purpose of ascertaining the meaning of such language. *Martin* v. *Lee*, 4 L. T. 657.

—— **Executing a Power of Appointment.**]—A will of a person who dies domiciled abroad disposing of personal estate in this country, if made in pursuance of a power of appointment, and executed in compliance with the requisites of the power, is entitled to probate, though not executed according to the testamentary law of the domicil or testator. *Alexander, In goods of*, 29 L. J., P. 93; 6 Jur. (N.S.) 345; 2 L. T. 56; 8 W. R. 451.

Where a domiciled Englishman executes by will a general power of appointment created by a Scotch will, the case is governed by the law of Scotland, and consequently the appointor does not thereby make the appointed property part of his general estate so as to be assets for creditors. *Bald, In re, Bald* v. *Bald*, 66 L. J., Ch. 524; 76 L. T. 462; 45 W. R. 499.

—— **Of Married Woman.**]—The testamentary law of the domicil at the time of death does not govern the will of a married woman made in execution of a power. *Alexander, In goods of*, 29 L. J., P. 93; 6 Jur. (N.S.) 345; 2 L. T. 56; 8 W. R. 451.

A married woman, domiciled in Scotland, made a will under a power in the English form, but not valid by the law of Scotland:—

Held, that it was entitled to probate. *Hallyburton, In goods of*, 35 L. J., P. 122; L. R. 1 P. 90; 12 Jur. (N.S.) 416; 14 L. T. 136.

—— **Deceased Domiciled Abroad—Foreign Creditors.**]—In the administration in England of the English assets of a foreigner who died domiciled abroad, no priority is given to English creditors over foreign creditors, but all take pari passu. *Klæbe, In re, Kannreuther* v. *Geiselbrecht*, 54 L. J., Ch. 297; 28 Ch. D. 175; 52 L. T. 19; 33 W. R. 391.

Power of Attorney—Exercise in Country other than that in which made—Extent of Authority.]—Where a power of attorney is executed in a foreign country in a language of that country, the intention of the writer is to be ascertained by evidence of competent translators and experts, including, if necessary, lawyers of the country, as to the meaning of the language used; and if, according to such evidence, the intention appears to be that the authority shall be acted upon in other countries, the extent of the authority in any country in which the authority is acted upon must be determined by the law of that country. *Chatenay* v. *Brazilian Submarine Telegraph Co.*, 60 L. J., Q. B. 295; [1891] 1 Q. B. 79; 63 L. T. 739; 39 W. R. 65—C. A.

b. IMMOVABLE PROPERTY.

In General.]—The lex loci rei sitæ governs exclusively the tenure, title and descent of immovable property. *Fenton* v. *Livingstone*, 3 Macq. H. L. 497; 5 Jur. (N.S.) 1183; 7 W. R. 671.

The incidents to immovable property, the right of alienating or limiting it, and the course of succession, depend entirely on the law of the country where the estate is situated. *Nelson (Earl)* v. *Bridport (Lord)*, 8 Beav. 547; 10 Jur. 1043.

Duly to acquire a legal title to immovable property, such legal title must be according to the lex loci rei sitæ. *Simpson* v. *Fogo*, 1 H. & M. 195; 1 N. R. 422; 32 L. J., Ch. 249; 9 Jur. (N.S.) 403; 8 L. T. 61; 11 W. R. 418.

Immovable property is regulated by the law of the country where the land lies. *Brodie* v. *Barry*, 2 Ves. & B. 131; 13 R. R. 37. S. P., *Elliot* v. *Minto (Lord)*, 6 Madd. 16.

All questions as to the burdens and liabilities of immovable property situate in a foreign country depend solely upon the lex loci, in the absence of any trust or personal contract affecting it executed in this country. *Harrison* v. *Harrison*, 42 L. J., Ch. 495; L. R. 8 Ch. 342; 28 L. T. 145; 21 W. R. 164.

The validity of a testamentary disposition of English leasehold is governed by the law of England, and not by the law of the testator's domicil. *Freke* v. *Carbery (Lord)*, L. R. 16 Eq. 461; 21 W. R. 835.

A child, born in Scotland of unmarried parents, domiciled in that country, and legitimated for all purposes in Scotland by the subsequent marriage of the parents, is not capable of inheriting lands in England. *Birtwhistle* v. *Vardill*, 7 Cl. & F. 895; West, 500; 9 Bli. (N.S.) 32. *S. C.*, nom. *Doe* d. *Birtwhistle* v. *Vardill*, 2 Scott (N.R.) 828; 6 Bing. (N.C.) 385—H. L. (E.) S. P., *Don's Estate, In re*, 4 Drew. 194; 27 L. J., Ch. 98; 3 Jur. (N.S.) 1192: 5 W. R. 836.

Will of.]—The incidents to immovable property, the right of alienating or limiting it, and the course of succession to it, depend entirely on the law of the country where the estate is situated. An estate in Sicily was granted to an English subject, which he disposed of by his will upon certain trusts:—Held, that as he could not subject his successor to a course of succession different from that which accorded with the grant and the law of Sicily, so neither could he subject the successor, as such, to any duties or obligations different from the duties and obligations which by the grant and the law of Sicily were annexed to his holding. *Nelson (Earl)* v. *Bridport (Lord)*, 8 Beav. 547; 10 Jur. 1043.

—— **Chattels Real.**]—The validity of a testamentary disposition of an English leasehold is governed by the law of England, and not by the law of the testator's domicil. *Freke* v. *Carbery (Lord)*, L. R. 16 Eq. 461; 21 W. R. 835.

A French subject, domiciled and resident in France, by his will, executed as required by the 1 Vict. c. 26 (but not made and executed as required for the validity thereof by the law of France), bequeathed his personal estate in England and Ireland to trustees, whom he also named executors, and he gave and devised leaseholds for years in Cork, in Ireland, and all other his real estate and chattels real in England and Ireland to the same trustees:—Held, that the will was valid as to the chattels real, but invalid as to the personal property of the testator, other than the chattels real, and so far as it purported to appoint executors, or to revoke any prior testamentary disposition of personal property other than chattels real, and the court granted to the trustees in that character alone administration cum test. ann. limited to the chattels real in Ireland. *De Fogassieras* v. *Duport*, 11 L. R., Ir. 123.

—— **Construction—Specific Devise to Children of named Person—Child Legitimated by subsequent Marriage.**]—The rule laid down in *Doe* d. *Birtwhistle* v. *Vardill* (5 B. & C. 438), that an antenatus son cannot inherit English land as heir, relates only to descent on an intestacy, and does not affect the case of a specific devise to children. The testator devised specifically a share of real estate and also a share of personalty upon trust for his son Harry for life, and then for his children. Harry acquired a domicil at the Cape of Good Hope, and died there, leaving, amongst other children, a son John, born before marriage, but, according to Cape law, legitimated by the subsequent marriage of his parents:—Held, that John was entitled to a share of both the real and personal estate. *Grey, In re, Grey* v. *Stamford (Earl)*, 61 L. J., Ch. 622; [1892] 3 Ch. 88; 41 W. R. 60.

Succession to.]—A child, born in Scotland of unmarried parents, domiciled in that country, and who afterwards intermarry in Scotland, though, by the laws of Scotland, capable of inheriting lands in that country, is not capable of inheriting lands in England. *Birtwhistle* v. *Vardill*, 7 Cl. & F. 895; West, 500; 9 Bli. (N.S.) 32. *S. C.* nom. *Doe* d. *Birtwhistle* v. *Vardill*, 2 Scott (N.R.) 828; 6 Bing. (N.S.) 385—H. L. (E.)

An ante-nuptial son, born in Scotland of Scotch parents, who was legitimised according to the law of Scotland, by the subsequent marriage of his parents, settled in England and purchased

freehold property. The son died intestate and unmarried, leaving his father surviving him :—Held, that the father was incapable, under the 3 & 4 Will. 4, c. 106, s. 6, of inheriting real estate from his son, although that son was legitimate by the law of England as to his personal status. The property, therefore, escheated to the Crown. *Don's Estate, In re*, 4 Drew. 194 ; 27 L. J., Ch. 98 ; 3 Jur. (N.S.) 1192 ; 5 W. R. 836.

—— **Chattels Real.**]—Succession to chattels real depends on the law of the country wherein they are situate, and not on that of the deceased's domicil ; and in case of intestacy the right to administration as to chattels real must follow the right of succession to them ; and it is not the practice of the Court of Probate to limit its grants by the measure of the beneficial interest of the grantee. *Gentili, In goods of*, Ir. R. 9 Eq. 541.

Leaseholds in England, belonging to a domiciled Scotchman, devolve, in case of his intestacy, upon the persons entitled according to the English Statute of Distributions. *Duncan* v. *Lawson* or *Duncan and Lawson, In re*, 58 L. J., Ch. 502 ; 41 Ch. D. 394 ; 60 L. T. 732 ; 37 W. R. 524 ; 53 J. P. 532.

—— **Sale under Partition Act.**]—A fund of upwards of 13,000*l* consols, representing the proceeds of sale of real estate, the absolute property of a foreign lunatic, which had been sold by order of the court under the powers of the Partition Act, 1868, was standing in court to the credit of the lunatic. The curator ad bona of the lunatic, duly appointed according to the law of the country in which the lunatic resided, and who according to that law had the fullest powers and control over the lunatic's real and personal estate, petitioned for the transfer of the fund to him :—Held, that the fund, representing real estate sold under special legislation, was subject to the laws of this country relative to real estate, and must remain in court as a fund which might devolve upon the heir-at-law of the lunatic, and that the curator ad bona was only entitled to receive the dividends. *Grimwood* v. *Bartels*, 46 L. J., Ch. 788 ; 25 W. R. 843.

Actions in English Courts with respect to Foreign Lands—Trespass.] — An action for damage for trespass to land situated in a foreign country, founded on a disputed claim of title to such land, cannot be tried in the courts of this country. *British South Africa Co.* v. *Companhia de Moçambique*, 63 L. J., Q. B. 70 ; [1893] A. C. 602 ; 6 R. 1 ; 69 L. T. 604—H. L. (E.)

Ord. XXXVI. r. 1 (R. S. C., 1883), which abolishes local venues, is a rule of procedure only, and does not affect the jurisdiction of the courts of this country. The Judicature Acts and Rules deal with procedure only, and do not confer any new right of action. *Ib.*

—— **Waste.**]—On a bill for a partition of lands in Ireland, and an account of waste committed there, a demurrer was allowed as to the partition, and overruled as to the account. *Kennedy* v. *Cassillis* (*Earl*), 2 Swanst. 323.

—— **Liability for Waste under Implied Contract — Tort — Actio Personalis moritur cum Personâ.**]—The possessor of Austrian entailed estates died domiciled in, and leaving property in, England. By the law of Austria the possessor is under an obligation to hand over the property to the successor in as good a state as when he received it, and is liable for deterioration, whether voluntary or permissive, unless it occurs without any fault of his, and he is entitled to compensation for improvements made by him. The successor brought a creditor's action in England against the English executrix, in which it was admitted by the parties that there was some deterioration, and also that some improvements had been made. The court below made a decree for administration with liberty to the plaintiff to take proceedings in the courts of the countries in which the estates were situate, to establish the amount of his claim :—Held, on appeal, that the objection that the plaintiff's claim was for a tort analogous to waste, and therefore, according to English law, died with the person, and could not be enforced in an English court, was not sustainable, for that the deteriorations were not to be regarded as torts, but as breaches of an obligation in the nature of an implied contract ; but that the accounts in an administration suit ought not to be directed till it was ascertained that a sum was due to the plaintiff. *Batthyany* v. *Walford*, 56 L. J., Ch. 881 ; 36 Ch. D. 269 ; 57 L. T. 206 ; 35 W. R. 814—C. A.

—— **Upon Contracts relating to.**]—A contract between domiciled Englishmen relating to real estate in a foreign country, is governed by English law, and is therefore cognisable by the courts of this country, although it has been adjudicated upon by the courts of the country in which the real estate is situate. *Cood* v. *Cood*, 33 Beav. 314 ; 3 N. R. 275 ; 33 L. J., Ch. 273 ; 9 Jur. (N.S.) 1335.

A. and B. were entitled to real estate in Chile. A., who was residing there, wrote to B. in this country, offering to purchase his interest in the property. B. replied in terms which would warrant A. in concluding that he had accepted the offer. Nothing further was done on either side during a period of thirteen years to ratify or annul the contract :—Held, that B. was barred by lapse of time from disputing the existence of the contract. *Ib.*

S. & Co., German merchants, carrying on business in London and Shanghai, being in Prussia, entered into verbal negotiations with H. & Co., merchants in Prussia, for opening a credit with H. & Co., against which S. & Co. were to draw bills to a certain amount. As a security S. & Co. proposed to deposit with H. & Co. the title deeds of real estate at Shanghai. These negotiations were subsequently carried on by letters, written by S. & Co. from London and H. & Co. from Prussia. A final contract was completed by a letter written by S. & Co. from London, transmitting the title deeds to H. & Co., and undertaking to register the mortgage at Shanghai, as required by the law there. S. & Co. liquidated their affairs by arrangement in the London bankruptcy court. They were indebted in a large amount to H. & Co., under the above-mentioned contract. H. & Co. applied for an order that the trustee in liquidation should convey the real estate to them. The mortgage had not been registered in Shanghai, and without such registration was incomplete according to the law of Shanghai :—Held, that by whatever law the contract was governed it was personally binding on S. & Co., and the real estate was ordered to be sold, and the proceeds paid to H. & Co. *Holthausen, Ex parte, Scheibler, In re*, 44 L. J., Bk. 26 ; L. R. 9 Ch. 722 ; 31 L. T. 13.

Held, semble, that looking to the nature of the

security, and the letter by which the deposit was completed, and which was written and posted in London, the contract must be construed according to the law of England. *Ib.*

By Scotch law an instrument under seal is not necessary for the conveyance of a sporting right, and therefore the stipulations of an unsealed lease made between Englishmen in England of a sporting right over land in Scotland may be enforced by action in the English courts, as the provision of the law of England, that an instrument under seal is necessary for the conveyance of a right to an incorporeal hereditament, is not part of the lex fori. Even if such lease were invalid for want of a seal, the lessee, after having had enjoyment of the right, could not set up the invalidity as a defence to an action for breach of a stipulation in the lease to leave a good breeding stock of game on the ground at the termination of the lease. *Adams* v. *Clutterbuck*, 52 L. J., Q. B. 607; 10 Q. B. D. 403; 48 L. T. 614; 31 W. R. 723.

—— **Court of Equity.**]—An action was brought against the executors and trustees of a will to recover a share of the proceeds of sale of a house in Dresden, which had been sold by C. S. H., the testator in the action. The plaintiffs alleged that, upon the death of Colonel H., a domiciled Irishman, who died in February, 1853, one moiety of the house, subject to a certain life interest therein, devolved by Saxon law, as to three-fourth parts thereof, on G. G., his daughter. That lady died in 1863, leaving her husband, J. G. surviving her, and he thereupon, by Saxon law, became entitled to all her property, movable and immovable, including her interest in the house. The plaintiffs were the administrator and the next of kin of J. G., who died intestate. The defendants denied the alleged title of the plaintiffs, and contended that C. S. H. held the house as sole and legal owner for his own use and benefit. All the parties interested were resident within the jurisdiction:—Held, that this being a contested claim to real property situate in Dresden, the question must be determined by the law of Saxony as to immovables; and where the only ground for instituting proceedings in this country was the fact that the defendants were residents here, the court had no authority to adjudicate on the case, and the action must therefore be dismissed. *Hawthorne, In re, Graham* v. *Massey*, 52 L. J., Ch. 750; 23 Ch. D. 743; 48 L. T. 701; 32 W. R. 147.

—— **Equities.**]—Whether the court will enforce against defendants, having in their hands proceeds of the sale of land situated out of the jurisdiction, the equities to which such proceeds would have been subjected if the land had been situated within the jurisdiction depends upon the question whether the contract, which is sought to be enforced, was, or was not, by the lex loci rei sitæ, capable of being fulfilled. *Waterhouse* v. *Stansfield*, 9 Hare, 234; 21 L. J., Ch. 881; 16 Jur. 1006; 1 W. R. 11.

If a contract relating to land situated out of the jurisdiction be one which the lex loci rei sitæ renders incapable of fulfilment, the court will not enforce the contract against the proceeds of a sale of such land coming to the possession of parties within the jurisdiction, though they take such proceeds bound by the same equity as affected the party to the contract under whom they claim. *Ib.*

The rights of the parties interested in the proceeds of the sale of lands situated out of the jurisdiction do not cease to be governed by the lex loci rei sitæ by the circumstance of such proceeds being brought in specie within the jurisdiction. *Ib.*

A law permitting alienation of land only upon the terms of the proceeds being applied in a particular manner is a restraint upon alienation, and restraints upon the alienation of land are always governed by the lex loci rei sitæ. *Ib.*

—— **Administration.**]—A testator, domiciled in England, dies seised of lands in a foreign country, which, by the law of that country, and also by the will, are charged with his debts; the assets, being insufficient for the payment of his simple contract debts, the produce of those lands must be applied among the simple contract creditors, according to the priorities recognised by the law of the country where the lands are situate. *Hanson* v. *Walker*, 7 L. J. (O.S.) Ch. 135.

All questions as to the burdens and liabilities of real estate situate in a foreign country depend solely upon the lex loci, in the absence of any trust or personal contract affecting it executed in this country. *Harrison* v. *Harrison*, 42 L. J., Ch. 495; L. R. 8 Ch. 342; 28 L. T. 145; 21 W. R. 164.

Therefore, when a testator devised real or heritable estate in Scotland, and gave a legacy to his heir according to the law of Scotland, who elected to take against the will, and his personal estate, though sufficient to pay his debts, was not sufficient to pay in full the legacies given by the will and the costs of a suit instituted for the administration of the estate:—Held, that there must be an inquiry whether, by the law of Scotland, the descended real estate or heritable estate was liable to the payment of any and which of the debts of the testator, and, if so, whether it was so liable, primarily, or in exoneration of the personal estate in favour of the legatees. *Ib.*

—— **Fraudulent Conveyance.**] — Court of equity in England will relieve against fraudulent conveyances gained of lands in Ireland, when defendant is in England. *Arglasse* v. *Muschamp*, 1 Vern. 75; 2 Ch. Rep. 266.

This court having jurisdiction in personam upon equity arising out of transactions concerning lands abroad, particularly if in the British dominions, a purchase of an estate in the West Indies, by a creditor under his own execution, was, upon the circumstances, held only a security for the debt, the expenses of the proceeding, and the incumbrances paid by him with interest; and subject thereto, a reconveyance was decreed. *Cranstown* (*Lord*) v. *Johnston*, 3 Ves. J. 170; 3 R. R. 80.

—— **Partition.**]—On a bill for a partition of lands in Ireland, and an account of waste committed there, a demurrer was allowed as to the partition, and overruled as to the account. *Kennedy* v. *Cassillis* (*Earl*), 2 Swanst. 323.

—— **Mortgage.**]—A company with an office in London, and having house property at Florence, raised, under powers in its articles, a sum of money by the issue of obligations payable to bearer, whereby it purported to "bind itself, its successors and assigns, and all its estate, property

and effects," reserving the right to redeem a part of the obligations (to be determined by drawings) in each of eight successive years. Subsequently, by a mortgage in the Italian form, registered at Florence, the company mortgaged the property to a bank with a London office, which had notice of the obligations. The bank having taken proceedings in the tribunal at Florence to enforce its mortgage, an action was brought on behalf of the holders of the obligations against the company and the bank, claiming to be mortgagees of the Florence property in priority to the bank. On motion to restrain the sale of the property :— Held, that the obligations were not mortgages, but simply bonds. *Norton* v. *Florence Land and Public Works Co.*, 7 Ch. D. 332 ; 38 L. T. 377.

Held, also, that even if they created a charge on the company's property, they could not be enforced as against the bank claiming under a registered mortgage at Florence ; and that, the matter being already before the tribunal of the country where the property was situated, the court of chancery would not interfere. *Ib.*

An American company, having large concessions in Lower California, Mexico, issued debentures charging the lands. The plaintiffs, who were English, held some of the debentures, but in order to have a valid claim on the lands it was necessary, according to Mexican law, to register there a deed of hypothecation. The American company transferred their undertaking and assets to an English company expressly subject to the debenture charges, and the English company registered the instrument of transfer in Mexico. The plaintiffs never registered a deed of hypothecation. The English company claimed the right to dispose of the lands without regard to the interests of the plaintiffs. The plaintiffs brought an action against the English company for a declaration that they were entitled to a first charge on the lands and for an account, and moved for a receiver. The court, without formerly deciding whether it had jurisdiction to appoint a receiver over mortgaged property situate in a foreign country, declined to do so under the circumstances mentioned below, but held that the English company having acquired the lands subject to the plaintiffs' charge and to the obligation of satisfying it, they and their directors personally would be responsible to the court if they applied any part of the proceeds of the lands without making provision for the plaintiffs' claims, and might be restrained from so doing. *Mercantile Investment Co.* v. *River Plate Trust Co.*, 61 L. J., Ch. 473 ; [1892] 2 Ch. 303 ; 66 L. T. 711.

According to English law, an equitable mortgage was effected of Scotch property. The special case found, that " by the law of Scotland no lien or equitable mortgage on the estate in question was created by the deposit " :—Held, nevertheless, that the parties contracting, as well as the assignees under a subsequent fiat against the mortgagors, being resident here, the property came to the hands of the assignees charged with the equity, and therefore they were bound to pay the mortgage debt out of the proceeds of the particular property. *Pollard, Ex parte, Courtney, In re*, Mont. & C. 239 ; 4 Deac. 27.

The courts of this country will apply the general law thereof, being abstractedly just and not founded on any peculiar technical rule, to questions relating to lands in a colony where a different system of jurisprudence prevails, unless it is suggested or shown that the laws of the colony are different on the point in question :— Held, therefore, that the mortgagee of an estate in Demerara was not to be bound to produce his securities for inspection before payment. *Bentinck* v. *Willink*, 2 Hare, 1. Cp., *Smith* v. *Gould*, 4 Moore, P. C. 21 ; 6 Jur. 543.

A. lent money to B. on mortgage of land in Demerara, to be repaid by bills on Scotland :— Held, that the contract was governed by the law of Scotland, and that moneys having been paid from B. to A., which according to that law were referable to other debts, the mortgage was still subsisting for the whole amount. *Campbell* v. *Dent*, 2 Moore, P. C. 292.

A loan was secured by the issue of bonds bearing coupons for twenty half-yearly payments of interest, on the 1st of June and 1st of December, such bonds to be redeemable by half-yearly drawings of at least five per cent. on the total amount of the loan. A deed was executed, by which the borrowers granted certain foreign railways to trustees, and covenanted with them to remit half-yearly sums sufficient to pay the amount of interest and moneys required for redemption. On each 1st of December and 1st of June the moneys so to be remitted were to be applied in payment of the principal sums secured by such of the bonds as should have been drawn on the preceding 1st of November and 1st of May, as the case might be, and of the interest on such of the bonds as should be outstanding and bearing interest which would become payable on such 1st of December or 1st of June ; but it was declared that no interest should be payable on any drawn bond after the day fixed for its redemption. In case of default in the remittances, the trustees were to enter into possession of the railways, and apply the net profits in payment of all arrears of interest due on such of the bonds as should be outstanding and bearing interest ; in redemption of such an amount of bonds as ought to have been redeemed on any previous 1st of June or 1st of December, but might not have been redeemed through failure of the borrowers to remit funds ; and lastly in payment of the future interest on the bonds and the redemption of the same in any future half year ; and after full payment and satisfaction of all the principal moneys and interest secured by the bonds, the trustees were to hold the surplus in trust for the borrowers. Default was made in the remittances, the trustees took possession, and in November, 1876, had a fund in hand out of which they proposed to pay interest on the undrawn bonds only. Bonds to the amount of 10 per cent. on the whole loan had been drawn in November, 1875, and May, 1876, but had not been paid through want of funds :— Held, that drawn bonds which remained unredeemed through failure of the borrowers to provide funds, could only be redeemed by payment of the principal with interest up to the time of payment. *Gordillo* v. *Weguelin*, 46 L. J., Ch. 691 ; 5 Ch. D. 287 ; 36 L. T. 206 ; 25 W. R. 620 —C. A.

Held, that the funds were to be applied in the first place in payment of interest pari passu on undrawn bonds, and on drawn bonds which remained unpaid through the failure of the borrowers to provide funds ; dissentiente Brett J. A., who was of opinion that the payment of interest on undrawn bonds had priority over the payments in redemption of drawn bonds. *Ib.*

—— **Lien.**]—Where there is no privity between the plaintiff and the defendant, a plaintiff in this country cannot, as against a defendant also

residing in this country, enforce a lien on immovable property of the defendant situate out of the jurisdiction of the court. *Norris* v. *Chambres*, 3 De G. F. & J. 583; 7 Jur. (N.S.) 689; 4 L. T. 345; 9 W. R. 794. Affirming 29 Beav. 246; 30 L. J., Ch. 285.

The court will not pronounce a decree, even in personam, where it cannot be enforced without the intervention of a foreign court. *Ib.*

A suit by a plaintiff in England against defendants, also residing in England, to enforce a lien on real estate in Prussia, can only be sustained by special circumstances arising out of the dealings between the parties, but where no privity existed between the plaintiff and the defendants, and where the principal parties were Prussians, and not amenable to the jurisdiction of the court, the bill was dismissed. *Ib.*

If a plaintiff makes out a case which entitles him to a declaration of lien upon the real estate of a defendant out of the jurisdiction, the court will make it, and, in some cases, grant a receiver, but it will leave the plaintiff to make it available or not as he can by means of the foreign tribunals. *Ib.*

—— **Specific Performance.**] — A contract between domiciled Englishmen relating to immovable property in a foreign country is governed by English law, and is therefore cognisable by the courts of this country, although it has been adjudicated upon by the courts of the country in which the real estate is situate. *Cood* v. *Cood*, 33 Beav. 314; 3 N. R. 275; 33 L. J., Ch. 273; 9 Jur. (N.S.) 1335.

—— **Trusts.**]—Bill lies here to be relieved touching a trust of lands in Ireland, defendant being in England. *Kildare* (*Earl*) v. *Eustace*, 1 Vern. 405.

Where land in Sardinia was devised by a domiciled Englishman by an English will upon trust for sale, which was a valid trust according to Italian law, and upon trust to hold the proceeds, which were directed to be invested in English securities, upon certain trusts which were invalid according to Italian law, the validity of the trusts of the proceeds of sale must be determined by the English law. But before the sale of the lands by the trustees, the foreign law must determine the persons by whom the rents and profits are to be received. *Piercy, In re, Whitwham* v. *Piercy*, 64 L. J., Ch. 249; [1895] 1 Ch. 83; 13 R. 106; 71 L. T. 745; 43 W. R. 134.

—— **Where a Foreign Tribunal has already adjudicated on the Claim.**]—Jurisdiction upon a contract concerning an estate in colony; but the question, upon the construction of the contract for a security by way of mortgage, having been before a court of competent jurisdiction in the colony, and a foreclosure and judicial sale directed, the allegations of fraud merely general and denied, an injunction was refused. *White* v. *Hall*, 12 Ves. 321; 8 R. R. 324. S. P., *Kennedy* v. *Cassillis* (*Earl*), 2 Swanst. 323; *Trufort, In re, Trafford* v. *Blanc*, 57 L. J., Ch. 135; 36 Ch. D. 600; 57 L. T. 674; 31 W. R. 163. And see *Cood* v. *Cood*, supra.

—— **Evidence.**]—The courts of this country, in dealing with real property in Jamaica, will be guided by the law of evidence in Jamaica. *Tulloch* v. *Hartley*, 1 Y. & C. C. C. 114.

c. Movable Property.

In General.]—Foreign personal assets are governed by the lex domicilii of the deceased owner for the purpose of succession and enjoyment. For the purpose of legal representation, of collection and of administration as distinguished from distribution among the successors, they are governed by the lex loci. *Blackwood* v. *Reg.*, 52 L. J., P. C. 10; 8 App. Cas. 82; 48 L. T. 441; 31 W. R. 645—P. C.

Personal property, having no situs of its own, follows the domicil of its owner. *Thomson* v. *Advocate-General*, 1 Cl. & F. 1—H. L. (Sc.)

The law of the domicil of a testator governs questions of testacy and intestacy, of the construction of the will, and of the rights of those who claim to be his next of kin. *Enohin* v. *Wylie*, 10 H. L. Cas. 1; 31 L. J., Ch. 402; 8 Jur. (N.S.) 897; 6 L. T., 263; 10 W. R. 467—H. L. (E.)

The law of the domicil of a deceased person governs the succession to his personal estate wherever situate, but the estate itself must be administered in the country in which possession is taken of it under lawful authority. *Preston* v. *Melville* (*Viscount*), 8 Cl. & F. 1—H. L. (Sc.)

In dealing with the succession to deceased foreigners, the court is bound by the law of domicil at the time of death. *Lynch* v. *Paraguay Government*, 40 L. J., P. 81; L. R. 2 P. 268; 25 L. T. 164; 19 W. R. 982.

A domiciled foreigner made a will disposing of personal property in England. After his death the government of his country passed a decree confiscating all his property. The court declined to recognise this decree, and held that the government had no locus standi to oppose the grant of probate. *Ib.*

The due acquisition of a legal title to movables may give rise to the question whether the lex loci contractûs, or the law of the country wherein the contracting parties may be domiciled, or even the lex loci rei sitæ, shall prevail. *Simpson* v. *Fogo*, 1 H. & M. 195; 1 N. R. 422; 32 L. J., Ch. 249; 9 Jur. (N.S.) 403; 8 L. T. 61; 11 W. R. 418.

But where all these circumstances are combined in the acquisition of a legal title to a movable, such title is, beyond doubt, good over all the world. *Ib.*

Where assets are distributable, the order and disposition of such assets will be in accordance with the lex fori where such assets are distributable, but not where such assets are the produce of a chattel upon which a valid security has been given. *Ib.*

A ship, the property of British subjects, was duly mortgaged in Great Britain, to other British subjects, and being in the mortgagor's possession, proceeded to New Orleans. Whilst there it was attached by creditors of the mortgagor's resident in New Orleans, and, after due intervention and hearing of the British mortgagees, before and by the courts of Louisiana, sold under process of the court, to satisfy the attaching creditors, to a British subject, who had notice of the mortgagees' intervention:—Held, that the sale was subject to the right of the mortgagees. *Ib.*

—— **Judicial Decision in Court of Domicil.**]—The judgment of the court of the domicil of the deceased at time of death is binding on the court of a foreign country in all questions as to the succession and title to personal property, whether under testacy or intestacy, where the same

questions between the same parties are in issue in the foreign court which have been decided by the court of the domicil. *Doglioni* v. *Crispin*, 35 L. J., P. 129 ; L. R., 1 H. L. 301 ; 15 L. T. 44—H. L. (E.).

Title to.]—If personal chattels are sold in a manner binding according to the law of the country in which they are disposed of, that disposition is binding in this country. *Cammell* v. *Sewell*, 5 H. & N. 728 ; 29 L. J., Ex. 350 ; 6 Jur. (N.S.) 918 ; 2 L. T. 799 ; 8 W. R. 639—Ex. Ch.

A cargo of deals was shipped on board a Prussian vessel by Russian merchants at Onego, for an English firm carrying on business at Hull. The vessel struck on the rocks on the coast of Norway, but the cargo was landed safely. A survey was held, when the surveyors recommended, as best for all parties, that the ship and cargo should be sold, and the cargo was sold accordingly. By the law of Norway, though the captain might not, under such circumstances, be able to justify the sale as between himself and the owners of the cargo, an innocent purchaser would have a good title to the property bought at such sale :—Held, that the sale in Norway bound the property, and that the goods having afterwards come to this country, the owner claiming under such sale had a good title to them as against the underwriters to whom the cargo had been abandoned. *Ib.*

The transfer of personal property must be regulated by the law of the owner's domicil, and the disregard of that law by the courts of a foreign country is an infraction of the comity of nations which justifies the court of chancery in decreeing a restitution upon the property coming within its jurisdiction. *Liverpool Marine Credit Co.* v. *Hunter*, 37 L. J., Ch. 386 ; L. R. 3 Ch. 479 ; 18 L. T. 749 ; 16 W. R. 1090.

But if a creditor pursues the chattel of his debtor to a foreign country in which he knows that the rights of a third party will be disregarded, the court of chancery cannot interfere to restrain the proceedings taken by the creditor in the foreign country. *Ib.*

A British ship, mortgaged in England by a British subject to British subjects, was arrested at New Orleans by creditors of the mortgagor, also British subjects resident in England, and as the courts of New Orleans do not recognise such mortgages of ships, the mortgagees, in order to protect the ship from sale, gave bonds for the amounts claimed by the creditors. The mortgagees afterwards filed a bill in equity to restrain the creditors from suing on these bonds :—Held, that though the decisions of the courts of New Orleans might be open to the reproach of injustice, yet as the creditors owed no duty to the mortgagees, and had a right to proceed against the property of their debtor wherever they found it, the bill could not be maintained. *Ib.*

—— **Husband and Wife.**]—Legacy to married woman subject of a foreign state paid to the husband to whom it would, by the law of that country, belong. *Campbell* v. *French*, 3 Ves. J. 323 ; 4 R. R. 5.

—— **Infant—Payment out of Court—Attainment of Age according to Law of Domicil.**]—Funds in court in this country, placed to the separate credit of an infant domiciled abroad, were paid out to her on attaining her full age, according to the law of her then and native domicil, although she had not come of age according to English law. *Donohoe* v. *Donohoe*, 19 L. R., Ir. 349. S. P., *Hellman, In re*, L. R. 2 Eq. 363 ; 14 W. R. 682.

By the law of Holland, the surviving parent is entitled to the income of his children's property until they attain eighteen. By a judicial compromise of a suit in Holland, two infant children, who were domiciled in this country, were adjudged to be entitled to one-fourth of their deceased mother's personal estate :—Held, that their father was not entitled to the income of their property until they attained eighteen. *Gambier* v. *Gambier*, 7 Sim. 263 ; 4 L. J., Ch. 81.

Succession to.]—The succession to the personal estate of an intestate is regulated by the law of that place, which was his domicil at the time of his death. For that purpose, there can be but one domicil ; and the lex loci rei sitæ does not prevail. *Somerville* v. *Somerville* (*Lord*), 5 Ves. 750 ; 5 R. R. 155 ; S. P., *Burns* v. *Cole*, Ambl. 415 ; *Price* v. *Dewhurst*, 4 Myl. & Cr. 76 ; 8 L. J., Ch. 57 ; 2 Jur. 1006 ; *Preston* v. *Melville* (*Viscount*), 8 Cl. & F. 1—H. L. (Sc.) ; *Thomson* v. *Advocate-General*, 12 Cl. & F. 1—H. L. (Sc.) ; *Doglioni* v. *Crispin*, 35 L. J., P. 129 ; L. R. 1 H. L. 301 ; 15 L. T. 44—H. L. (E.) ; *Forbes* v. *Forbes*, Kay, 341 ; 2 Eq. R. 178 ; 23 L. J., Ch. 724 ; 18 Jur. 642 ; 2 W. R. 253 ; *Crookenden* v. *Fuller*, 1 Sw. & Tr. 441 ; 29 L. J., P. 1 ; 5 Jur. (N.S.) 1222 ; 1 L. T. 70 ; 8 W. R. 49 ; *Balfour* v. *Scott*, 6 Bro. P. C. 550—H. L. (Sc.) ; *Bempde* v. *Johnstone*, 3 Ves. 198.

The law of the domicil of the testator governs questions of testacy and intestacy, of the construction of the will, and of the rights of those who claim to be his next of kin. *Enohin* v. *Wylie*, 10 H. L. Cas. 1 ; 31 L. J., Ch. 402 ; 8 Jur. (N.S.) 897 ; 6 L. T. 263 ; 10 W. R. 467—H. L. (E.)

—— **Domicil with Qualified Civil Rights.**]—If an Englishman has acquired a de facto domicil in France, property as to which he may die intestate will be distributed according to the French law, although he has not been admitted by the authorisation of the government to enjoy civil rights in accordance with Art. 13 of the Code. *Hamilton* v. *Dallas*, 45 L. J., Ch. 15 ; 1 Ch. D. 257 ; 33 L. T. 495 ; 24 W. R. 264.

—— **Legitimacy.**]—The Statute of Distributions being a statute not for Englishmen only but for all persons, English or not, dying intestate and domiciled in England, and applying universally to persons of all countries, races, and religions whatsoever, the proper law for determining the "kindred" under that statute is the international law adopted by the comity of states. Therefore a child born before wedlock, of parents who were at her birth domiciled in Holland, but legitimated according to the law of Holland by the subsequent marriage of her parents :—Held, entitled to a share in the personal estate of an intestate dying domiciled in England as one of her next of kin, under the Statute of Distributions. *Boyes* v. *Bedale* (1 H. & M. 798) disapproved. *Goodman's Trusts, In re*, 50 L. J., Ch. 425 ; 17 Ch. D. 266 ; 44 L. T. 527 ; 29 W. R. 586—C. A.

Will relating to.]—The law of the domicil of a testator governs questions of testacy and intestacy, of the construction of the will, and of the

rights of those who claim to be his next of kin. *Enohin* v. *Wylie*, 10 H. L. Cas. 1; 31 L. J., Ch. 402; 8 Jur. (N.S.) 897; 6 L. T. 263; 10 W. R. 467—H. L. (E.)

Where, therefore, a will was made by an Englishman, who died domiciled abroad, and the foreign court had granted probate of the will, it became the duty of the English court of probate (some of his personal property being situated in this country) to grant ancillary probate to the foreign executors. It had no right to constitute itself a court of construction. *Ib.*

The law of the country, in which a deceased party was domiciled at his death, both decides the right of succession as to his personal estate, and also regulates the decision as to what constitutes his last will. *Price* v. *Dewhurst*, 4 Myl. & C. 76; 8 L. J., Ch. 57; 2 Jur. 1006.

The testatrix, whose domicil of origin was English, married a German subject, and resided in Germany until his death, which happened after the 12th May, 1870. After the death of her husband, she executed in Germany a will, which was valid according to the requirements of the English law, but not according to the requirements of the law of Germany: Held, that the will was not entitled to probate in England. *Bloxam* v. *Favre*, 53 L. J., P. 26; 9 P. D. 130; 50 L. T. 766; 32 W. R. 673—C. A.

If a British subject domiciled in a foreign country by his will appoints A. his executor, but makes a disposition of his personal property, which, though valid by the laws of England, is invalid by the laws of that foreign country, the court of chancery is at liberty, notwithstanding probate may have been granted to A. in this country, to hold that the will has no operation beyond appointing A. the executor. *Thornton* v. *Curling*, 8 Sim. 310.

—— **Validity of Provisions.**]—A legacy to a superstitious use given by a testator domiciled in England is void, even although the legatees are resident in a country where such a legacy would be valid. *Elliott, In re, Elliott* v. *Johnson*, 39 W. R. 297.

—— **Construction.**]—A foreign court in a suit for the distribution of personal estate of a party domiciled out of the country, is bound to adopt, in the interpretation of testamentary instruments, the rules of construction which would prevail in the country where the party was domiciled, but is not bound to adopt the foreign rules of evidence, every court being governed by its own rules of procedure. *Yates* v. *Thompson*, 3 Cl. & F. 544—H. L. (Sc.)

—— **Terms of Foreign Law.**]—Where a testator in a foreign will expresses himself in technical language of the place where made and where he is domiciled, to obtain the intention, the technical terms must be interpreted by the meaning put on them in the systems of law from which they are borrowed. *Studd* v. *Cook*, 8 App. Cas. 577—H. L. (Sc.)

"Male children," in a Dutch will, held to mean "male descendants"; and "male descendants" held to mean according to the English law (and semble, according to the Dutch law also), descendants claiming through males only. *Bernal* v. *Bernal*, 3 Myl. & Cr. 559; C. P. C. 55; 7 L. J., Ch. 115; 2 Jur. 273.

Recourse to foreign law for the construction of a foreign instrument may sometimes be dispensed with. *Ib.*

The meaning and effect of an appointment of an exécuteur testamentaire, in a holograph will made in France by one domiciled there, is a question of French law. *Laneuville* v. *Anderson*, 3 Sw. & Tr. 304; 30 L. J., P. 25; 6 Jur. (N.S.) 1260; 2 L. T. 24; 9 W. R. 74.

The terms used by a foreigner domiciled in England, and there making a will, are to be construed according to their meaning in that country, but the principles of the English law must be applied with respect to their operation. *Anstruther* v. *Chalmer*, 2 Sim. 1; 4 L. J. (O.S.) Ch. 123; 29 R. R. 48.

A native of Scotland domiciled in England, having personal property only, executed, during a visit to Scotland, and deposited there, a will prepared in the Scotch form, and died in England:—Held, that the will was to be construed according to the English law. *Ib.*

—— **Gift to Children—Children legitimated by subsequent Marriage.**]—Under a bequest to the children of S., who had three children born to him in England, while domiciled there, by a woman with whom he had cohabited, and with whom he removed to Holland, and, while domiciled in Holland, had another child born to him by the same woman, whom he afterwards married in Holland:—Held, that the law of the country of the domicil, at the time of the birth and of the marriage, must prevail, and that the child born in Holland was entitled to share equally with another child born there after the marriage, but the three children born in England being illegitimate, according to the law of England were excluded. *Goodman* v. *Goodman*, 3 Giff. 643; 8 Jur. (N.S.) 554; 6 L. T. 641.

Under a gift of personal estate by will to the children of A., a child of A., illegitimate by the law of the testator's domicil, though legitimate by the law of the domicil of A., cannot take unless a contrary intention appears. *Boyes* v. *Bedale*, 1 H. & M. 798; 33 L. J., Ch. 283; 10 Jur. (N.S.) 196; 10 L. T. 131; 12 W. R. 232. And see *Goodman's Trusts, In re*, 50 L. J., Ch. 425; 17 Ch. D. 266; 44 L. T. 527; 29 W. R. 586—C. A.

—— **Gifts in Foreign Currency.**]—Legacies are to be paid in the currency of the country where testator resided, where there were assets and executors in that and this country also. But legatee residing here not entitled to be paid in the foreign currency. *Bourke* v. *Ricketts*, 10 Ves. 330.

Legacy in a foreign country and coin, as sicca rupees by a will in India, if paid by remittance to this country, the payment must be according to the current value of the rupee in India, without regard to the exchange or the expense of remittance; so as to other countries. *Cockerell* v. *Barber*, 16 Ves. 461.

A testator, by his will made in Ireland, prior to the 6 Geo. 4, c. 79, bequeaths an annuity, and dies domiciled in England after that act was passed. The annuity is to be paid according to the rate of Irish currency. *Holmes* v. *Holmes*, 1 Russ. & M. 660; 8 L. J. (O.S.) Ch. 157.

Testator living in Jamaica gave legacies to be paid in sterling money in the first place, and the two legacies immediately following (one of which was to the plaintiff), generally without saying in sterling money; and, at the end of the will, several more to be paid in sterling money:—

Held, that the plaintiff must make his legacy in Jamaica money, for testator's expressing himself differently shewed a different intention. *Saunders* v. *Drake*, 2 Atk. 465.

Bond given in Dublin, or note in Jamaica, must be paid in current money ; the same with regard to a will. *Ib.*

The fact that the legatees are living in England makes no distinction, for the residence of persons devising must decide it. *Ib.*

Though testator's effects are partly in Jamaica, and partly in England, yet, if the devise is of a compound residue without separating the funds, no argument can be drawn from it in favour of the plaintiff. *Ib.*

A testator domiciled in Jamaica gave legacies in Jamaica currency to J. C., H. C., and M. C., persons also domiciled in that island, and desired them to be paid out of money due to him on certain bonds, which the will specified. At his death, which happened in Scotland in 1790, no such bonds were to be found, but J. C. was then indebted to his estate upon other bonds. After administration was taken out to the testator's estate in England, a bill was filed for the purpose of enforcing payment of the legacies :—Held, that the legacies were demonstrative only, and were not to be considered as having been adeemed ; that as they were payable out of assets in this country, their value was to be computed according to the standard par of exchange between Jamaica and British currency, and not according to the actual rate at the time of payment. *Campbell* v. *Graham*, 1 Russ. & M. 453 ; 9 L. J. (O.S.) Ch. 234. Affirmed, 8 Cl. & F. 429 : 32 R. R. 244—H. L. (E.)

—— **Execution.**]—A will must be executed according to the law of the country where the testator was domiciled at the time of his death. *Whicker* v. *Hume*, 7 H. L. Cas. 124 ; 28 L. J., Ch. 396 ; 4 Jur. (N.S.) 933 ; 6 W. R. 813—H. L. (E.)

The grant of probate not appealed against, conclusively establishes that it was so executed. *Ib.*

Lands held in the East Indies by a tenure of the nature of fee simple do not pass by an unattested will, but decreed to the person who would be heir-at-law in England. *Gardiner* v. *Fell*, 1 Jac. & Walk. 22 ; 2 Wils. 32 ; 20 R. R. 208.

A domiciled Englishman, while resident at Milan in October, 1838, executed a codicil disposing of personal property situated in the United States of America. The codicil was holograph signed, though not attested, but was well executed according to the Austrian law :—Held, by the judicial committee, 1st, that the validity of the codicil would be governed by the law of the domicil ; and 2ndly, that the provisions of 1 Vict. c. 26, applied to testamentary papers made in foreign countries by a domiciled Englishman. *Croker* v. *Hertford* (*Marquis*), 4 Moore, P. C. 339 ; 8 Jur. 863.

A foreigner domiciled in England, and naturalised under 6 & 7 Vict. c. 66, s. 6, and whose certificate of naturalisation conferred upon him "all the rights and capacities of a natural-born British subject except (inter alia) any rights and capacities of a natural-born British subject out of and beyond the dominions of the British Crown and the limits thereof," executed a testamentary document in his native country, while on a visit there. The document was valid according to the law of the place where it was made, but was not duly executed in accordance with the provisions of the English law :—Held, that the document was not well executed within the 24 & 25 Vict. c. 114, s. 1, and could not be admitted to probate in England. *Gatti, In Goods of*, 39 L. T. 639 ; 27 W. R. 323.

A French subject, domiciled and resident in France, by his will, executed as required by 1 Vict. c. 26 (but not made and executed as required for the validity thereof by the law of France), bequeathed his personal estate in England and Ireland to trustees, whom he also named executors, and he gave and devised leaseholds in Cork, in Ireland, and all other his real estate and chattels real in Ireland to the same trustees :—Held, that the will was valid as to the chattels real, but invalid as to the personal estate of the testator, other than the chattels real, and so far as it purported to appoint executors, or to revoke any prior testamentary disposition of personal property other than chattels real, and the court granted to the trustees, in that character alone, administration cum test. ann. limited to the chattels real in Ireland. *De Fogassieras* v. *Duport*, 11 L. R., Ir. 123.

—— **In Execution of a Power.**]—A father gave the income of the residue of his estate in trust for his daughter for life, and after her death the capital to be divided among her children in such shares as she should by deed or by will appoint, and in default of appointment equally between them. The daughter had four children, one of whom in 1851 married a French priest, and by him had one child, a daughter. The priest died in 1857, and in 1870 the daughter appointed to her widowed daughter a part of the fund over which she had a power of appointment by the testator's will, for her separate use if she survived her mother, the appointor, which happened :—Held, that there was no "community of goods" within the meaning of art. 1401 of the Code Napoléon, on the ground, first, that the right to the fund accrued under the appointment and consequently after the husband's death ; and secondly, that it was appointed to the lady for her separate use. *De Serre* v. *Clarke*, 43 L. J., Ch. 821 ; L. R. 18 Eq. 587 ; 31 L. T. 161 ; 23 W. R. 3.

—— **Execution.**]—A will, disposing of personal estate, situate in this country, made in pursuance of a power of appointment, and executed in compliance with the requisites of the power, is entitled to probate, though not executed according to the testamentary law of the domicil of the party making it. *Tatnall* v. *Hankey*, 2 Moore, P. C. 342.

An instrument which is valid as a will, according to the law of the country of domicil, is a valid exercise of a power to appoint personalty by will. *D'Huart* v. *Harkness*, 34 Beav. 374 ; 5 N. R. 440 ; 34 L. J., Ch. 311 ; 11 Jur. (N.S.) 633 ; 13 W. R. 513.

Administration — In General.] — Foreign personal assets are governed by the lex domicilii of the deceased owner for the purpose of succession and enjoyment. For the purpose of legal representation, of collection and of administration as distinguished from distribution among the successors, they are governed by the lex loci. *Blackwood* v. *Reg.*, 52 L. J., P. C. 10 ; 8 App. Cas. 82 ; 48 L. T. 441 ; 31 W. R. 645—P. C.

Whether property is to be administered according to English or Scottish notions of equity, is dependent on the domicil of the parties, and the

property to be affected by decree. *Kennedy* v. *Cassillis* (*Earl*), 2 Swanst. 323.

The law of the domicil of a deceased person governs the succession to his personal estate wherever situated, but the estate itself must be administered in the country in which possession is taken of it under lawful authority. *Preston* v. *Melville* (*Viscount*), 8 Cl. & F. 1—H. L. (Sc.)

Although the succession to personal estate is governed by the law of the country where the deceased had his domicil, the administration of that estate should be by the law of the country where it is situate; accordingly, where, on the refusal of trustees and executors of a Scotch will to act, administration to the personalty in England had been taken out by the next of kin, and new trustees were afterwards appointed, it was held on appeal, reversing the judgment of the court of session, that such trustees had no right to call upon the next of kin to transfer to them the personal estate received under the administration. *Id.* 16.

—— **Administration Action.**]—The administration of the personal estate of a deceased person belongs to the court of the country where the deceased was domiciled at his death. The court of the domicil is the forum concursus to which the legatees under a will, or the parties entitled to the distribution of the estate of an intestate, are required to resort. The duty of administering personal estate in this country is to be discharged by the courts of this country, though in the performance of that duty they will be guided by the law of the domicil. *Enohin* v. *Wylie*, 10 H. L. Cas. 1; 31 L. J., Ch. 402; 8 Jur. (N.S.) 897; 6 L. T. 263; 10 W. R. 467—H. L. (E.)

—— **Jurisdiction.**]—An action was brought in England by an infant beneficiary to administer the estate of a testator domiciled in Scotland. The bulk of the estate was in Scotland, and four out of six trustees and executors were domiciled there. The will was proved both in Scotland and England. The trustees all appeared to the writ, without protest, and at their suggestion an inquiry was directed whether the action was for the plaintiff's benefit, which resulted in a decision that it was. At the trial (the English assets having been meanwhile transferred to Scotland) the trustees objected to the jurisdiction of the court. No proceedings had been taken to administer the estate in the Scotch court:—Held, first, that the court had jurisdiction to order an administration. Secondly, that under the circumstances of the case, it had no discretion in the matter, but was bound to make the order, though the action might be stayed before or after decree if it appeared that proceedings were pending in a Scotch court equally beneficial to the plaintiff. Dicta of Lord Westbury in *Enohin* v. *Wylie* (10 H. L. Cas. 1) disapproved. *Ewing* v. *Orr-Ewing*, 53 L. J., Ch. 435; 9 App. Cas. 34; 50 L. T. 401; 32 W. R. 573—H. L. (E.)

—— **Estate of domiciled Scotch Testator—Trust Funds partly in Scotland partly in England.**]—A resident and domiciled Scotchman died leaving a trust disposition and settlement appointing six trustees: three were resident in Scotland, one, being a Scotch member of parliament, resided in Scotland when parliament was not sitting, and the other two were resident in England. The truster had a very large amount of personalty in Scotland as well as heritable estate; and a trifling amount of personal estate only in England. The trustees proved the trust deed in Scotland, and were confirmed as executors. They then had the Scotch probate sealed in accordance with 21 & 22 Vict. c. 66, s. 12, and thus became the personal representatives in England. They removed all but a small portion of the personalty in England into Scotland. A person resident in England, who was entitled to a share of a large legacy, and also to a share of the residue, brought an action in England to administer the estate. The trustees were served and entered an appearance. The plaintiff, an infant, in the English action moved for judgment for administration of the whole estate, and on the 29th November, 1882, the court of appeal granted the order. The trustees lodged an appeal to this house. In June, 1883, the trustees carried certain accounts into chambers in the English action. On the 5th July, 1883, four of the residuary legatees commenced this action in Scotland against the trustees for, inter alia, declarator that the trustees were bound to administer the estate in Scotland, subject to the Scotch law, and under the authority and jurisdiction of the Scottish courts alone. On the 30th November, 1883, this house affirmed the order of the court of appeal. On the 29th February, 1884, the court of session granted an interlocutor finding in terms of the declaratory conclusions of the summons: sequestrating the estate, appointing a judicial factor and interdicting the trustees from removing any title-deeds, &c., from Scotland, or accounting to any one otherwise than the judicial factor appointed by the court. On appeal taken by order of the court of chancery in England:—Held, that the decerniture in terms of the declaratory conclusions of the summons, which in effect affirms the exclusive competency of the Scottish jurisdiction, was not supported by statute or authority; and, therefore, that part of the principal interlocutor and that part of the interdict relating to accounting must be reversed. *Ewing* v. *Orr-Ewing*, 10 App. Cas. 453; 53 L. T. 826—H. L. (Sc.)

The widow of a domiciled Scotchman filed a bill for the administration of her husband's estate, under an English will; and prayed that her infant children should elect and collate, in order to enable her to ascertain her rights and remedies according to the Scotch law; and insisted on a Scotch domicil. The residuary legatee under the English will filed a cross bill, to establish an English domicil, and for the administration of the estate accordingly:—Held, that the questions raised by the widow were well raised, and could be disposed of by the court. *Douglas* v. *Douglas*, 41 L. J., Ch. 74; L. R. 12 Eq. 617; 25 L. T. 530; 20 W. R. 55.

On the marriage of an Englishman, domiciled in England, with a Scotch lady, a settlement in Scotch form was made of her property, under which, after the death of the wife, the property went to the children of the marriage, subject only to an annuity to the husband. On the death of the wife, the only child of the marriage, an infant, resident with his father in England, commenced an action against the trustees to have the trusts administered by the court, alleging that the trustees improperly refused to allow maintenance out of the income. The trust property was all in Scotland, and the trustees all resided there. An order having been obtained

for leave to serve the writ upon the trustees in Scotland:—Held, by the court of appeal, that, assuming that there was jurisdiction under Rules of Court, 1875, Ord. XI. r. 1, to allow service of the writ in Scotland, still under the discretion given by Ord. XI. r. 1a, such service ought not to be authorised, as it was more convenient and proper that the trusts of Scotch property held by Scotch trustees upon the trusts of a Scotch instrument should be administered by a Scotch than by an English court. Semble, that under Ord. XI. r. 1, there was no jurisdiction to order service of the writ in Scotland. *Creswell* v. *Parker*, 11 Ch. D. 601; 40 L. T. 599; 27 W. R. 897—C. A.

Payment of Debts.]—If a Dutchman be possessed of real estate in Holland, and personal estate in England, and devise his real estate to A., and his personal to B., the personal shall be first applied to pay debts in Holland, though real estate is liable there. *Anon.*, 9 Mod. 66.

A person domiciled in England, who was indebted in money upon bond, died intestate, leaving real estate in Scotland, and the bond debts were paid by the heir out of the produce of the real estate in Scotland:—Held, that the right of relief or demand against the personal estate, which by the law of Scotland is given to the heir who has paid movable debts, is capable of being made available in England, where the personal estate is the primary fund for the payment of all debts. *Winchelsea (Earl)* v. *Garetty*, 2 Keen, 293; 7 L. J., Ch. 99; 2 Jur. 367.

A testator, domiciled in England, dies seised of lands in a foreign country, which, by the law of that country, and also by the will, are charged with his debts; the assets, being insufficient for the payment of his simple contract debts, the produce of those lands must be applied among the simple contract creditors, according to the priorities recognised by the law of the country where the lands are situate. *Hanson* v. *Walker*, 7 L. J. (o.s.) Ch. 135.

A person died in England, having been adjudicated insolvent in Australia, and debts to a large amount having been proved in the insolvency and not satisfied:—Held, that even if the domicil of the deceased was English, a sum of money paid into the court of chancery, in England to his credit must be applied towards payment of the debts proved in the insolvency in Australia, in priority to any claim by an English administrator. *Davidson's Settlement, In re*, 42 L. J., Ch. 347; L. R. 15 Eq. 383; 21 W. R. 452.

—— **Priority.**]—The priorities of creditors are regulated by the domicil of the testator, though the personal assets may be situate and administered in another country. *Wilson* v. *Dunsany (Lady)*, 18 Beav. 293; 2 Eq. R. 706; 23 L. J., Ch. 492; 18 Jur. 762; 2 W. R. 288.

In the administration in England of the English assets of a foreigner who died domiciled abroad, no priority is given to English creditors over foreign creditors, but all take pari passu. *Klœbe, In re, Kannreuther* v. *Geiselbrecht*, 54 L. J., Ch. 297; 28 Ch. D. 175; 52 L. T. 19; 33 W. R. 391.

A domiciled Englishman with personal property in Scotland by a will in the English form, after bequeathing various legacies, gave the residue of his estate to his sons D. and H. equally, and appointed his three sons executors, two of whom, D. and H. proved the will in England and Scotland. D. lent H. various sums on memoranda of charge on his interest in his father's estate. H. was also indebted to an English insurance company, which became amalgamated with another having offices in London and Edinburgh, and the amalgamated company brought actions in England and in Scotland in respect of the debt due to them. D.'s co-executor who proved with him had notice of the memoranda of charge, part of the moneys secured by which was paid off. D. then filed a bill in England for an account of his father's estate and what was due to him on the memoranda of charge, and to restrain the proceedings at law by the insurance company:—Held, that the testator being a domiciled Englishman, and the executors not admitting assets, non constat that there would be any residue upon which the actions could attach, and therefore, upon the executors undertaking to obtain an administration decree, an order was made for an injunction to restrain any proceedings in Scotland involving the taking the accounts of the testator's estate, without prejudice to the establishment of their right to a charge against H.'s share, and without prejudice to any question of priority as between the company and the plaintiff in equity. *Baillie* v. *Baillie*, 37 L. J., Ch. 225; L. R. 5 Eq. 175; 17 L. T. 376; 16 W. R. 272.

When a debt is contracted by an Englishman in a foreign country, the provisions of the lex loci contractûs do not avail to entitle the creditor to payment of his debt out of equitable assets administered in this country in priority to other creditors. *Pardo* v. *Bingham*, L. R. 6 Eq. 485.

When, therefore, an Englishman residing in Venezuela, executed an instrument to secure repayment to G. of 1,600*l.*, and G. afterwards registered the instrument in the form prescribed by the law of Venezuela, and by virtue of such registration became entitled, according to that law, to be paid his debt out of the general assets of the debtor in priority to other creditors:—Held, nevertheless, that a fund in this country constituting equitable assets of the debtor must be divided among the creditors without regard to any such priority. *Ib.*

—— **Marshalling.**]—Real estate in Scotland of a testator domiciled in England must be administered according to Scotch law, and the personal estate being by the law of Scotland primarily liable for the personal debts, it follows that in respect of those debts pecuniary legatees are not entitled to a marshalling of assets against the heir-at-law. *Harrison* v. *Harrison*, 42 L. J., Ch. 495; L. R. 8 Ch. 342; 28 L. T. 145; 21 W. R. 164.

Other Matters.]—A fund of upwards of 13,000*l.* consols, representing the proceeds of sale of real estate, the absolute property of a foreign lunatic, which had been sold by order of the court under the powers of the Partition Act, 1868, was standing in court to the credit of the lunatic. The curator ad bona of the lunatic, duly appointed according to the law of the country in which the lunatic resided, and who according to that law had the fullest powers and control over the lunatic's real and personal estate, petitioned for the transfer of the fund to him:—Held, that the fund representing real estate sold under special legislation was subject

to the laws of this country relative to real estate, and must remain in court as a fund which might devolve upon the heir-at-law of the lunatic, and that the curator ad bona was only entitled to receive the dividends. *Grimwood* v. *Bartels*, 46 L. J., Ch. 788 ; 25 W. R. 843.

An action was brought against the executors and trustees of a will to recover a share of the proceeds of sale of a house in Dresden, which had been sold by C. S. H., the testator in the action. The plaintiffs alleged that, upon the death of Colonel H., a domiciled Irishman, who died in February, 1853, one moiety of the house, subject to a certain life interest therein, devolved by Saxon law, as to three-fourth parts thereof, on G. G., his daughter. That lady died in 1863, leaving her husband, J. G., surviving her, and he thereupon, by Saxon law, became entitled to all her property, movable and immovable, including her interest in the house. The plaintiffs were the administrator and the next of kin of J. G., who died intestate. The defendants denied the alleged title of the plaintiffs, and contended that C. S. H. held the house as sole and legal owner for his own use and benefit. All the parties interested were resident within the jurisdiction :—Held, that this being a contested claim to real property situate in Dresden, the question must be determined by the law of Saxony as to immovables ; and where the only ground for instituting proceedings in this country was the fact that the defendants were resident here, the court had no authority to adjudicate on the case, and the action must therefore be dismissed. *Hawthorne, In re, Graham* v. *Massey*, 52 L. J., Ch. 750 ; 23 Ch. D. 743 ; 48 L. T. 701 ; 32 W. R. 147.

The English courts, in giving effect to a bequest of personal property of a testator dying domiciled abroad, only adopt the law of the place of domicil as it stands at the time of the testator's death, and do not consider any subsequent retrospective changes made in that law by the legislature of the foreign country. *Aganoor's Trusts, In re*, 64 L. J., Ch. 521 ; 13 R. 677.

E. having died in Ireland intestate, letters of administration were granted in Ireland to the plaintiff. Part of his assets being in India, the plaintiff sent out a power of attorney to F. & Company in India, who procured letters of administration to be granted to them in India for the use and benefit of the plaintiff, received the Indian assets, paid the Indian debts, and remitted the surplus to their agents in England. The Irish letters of administration were sealed in England :—Held, that the agents in England were bound to hand over the fund to the plaintiff, and could not require the concurrence of the next of kin, they not having taken any legal proceedings to prevent the plaintiff from receiving the assets. *Eames* v. *Hacon*, 50 L. J., Ch. 740 ; 18 Ch. D. 347 ; 45 L. T. 196 ; 29 W. R. 877—C. A.

A British-born subject died domiciled in a British colony. At the time of his death he was possessed of personal property, locally situated in Scotland. Probate of his will was taken out in Scotland, for the purpose of administering his property, and out of the fund thus obtained by the executors legacies were paid to the legatees residing in Scotland :—Held, that legacy duty was not payable in respect of these legacies. *Thompson* v. *Advocate-General*, 12 Cl. & F. 1 ; 13 Sim. 153 ; 9 Jur. 217.

VII. CONTRACTS.

a. In General.

Capacity to Contract.]—A married woman, domiciled in France, entered into a contract in England respecting her reversionary interest in trust money invested in the English funds :—Held, that the French law determined her capacity to make the contract. *Guepratte* v. *Young*, 4 De G. & Sm. 217.

When the cause of action occurs in Scotland, and infancy is pleaded, the defendant must shew that infancy is a legal defence to the demand, by proving the law of that country in that respect. *Male* v. *Roberts*, 3 Esp. 163 ; 6 R. R. 823.

Interpretation.]—Primâ facie the law of the country where the contract is made will govern it, and decide what the law as to the contract is ; but the court must look at the circumstances of each contract, and consider, having regard to the nature of the contract and the other circumstances of the case, by what law it is to be governed. *Missouri Steamship Co., In re, Monroe's Claim*, 58 L. J., Ch. 721 ; 42 Ch. D. 321 ; 61 L. T. 316 ; 37 W. R. 696 ; 6 Asp. M. C. 423—C. A.

The law of the country where a contract is made, or is to be performed, furnishes the rules for expounding the nature and extent of its obligations ; but the law of the country where it is sought to enforce performance of a contract governs all questions as to the remedy and mode of proceeding, including lapse of time. *Fergusson* v. *Fyffe*, 8 Cl. & F. 121.

The lex loci contractûs, and the law applicable to cases of money charged as a rent payable out of land, where no provision as to the place of payment is made by the instrument, are inapplicable to a case where the instrument itself furnishes the means of interpretation. In ambiguous contracts, the domicil of the parties, the place of execution, the purpose, and the various provisions and expressions of the instrument, are material to be considered in the construction. *Lansdowne* v. *Lansdowne*, 2 Bligh, 60 ; 21 R. R. 43—H. L. (Ir.)

Where a contract is made between persons domiciled in a foreign country, and in a form known to the law of that country, the court, in administering the rights of parties under it, will give it the same construction and effect as the foreign law would have given to it. *Anstruther* v. *Adair*, 2 Myl. & K. 513.

A deed in the Scotch form, made between parties, some of whom were domiciled in Scotland and others in England, construed according to Scotch law so far as it affected the Scotch parties, and according to English law, so far as it affected the English parties. *Duncan* v. *Campbell*, 12 Sim. 616.

The rule governing the interpretation of a contract made in one country, to be performed wholly or partly in another country, is, that the law of the country where the contract is made governs as to the nature of the obligation and the interpretation of it, if the parties to the contract are either subjects of a power there ruling, or as temporary residents owe that power a temporary allegiance. In either case they must be understood to submit to the law there prevailing, and agree to its action on their contract. *Peninsular and Oriental Steam Navigation Co.* v. *Shand*, 3

Moore, P. C. (N.S.) 272 ; 6 N. R. 387 ; 11 Jur. (N.S.) 771 ; 12 L. T. 808 ; 13 W. R. 1049.

It is immaterial that such agreement so to be ruled by the lex loci contractûs is not so expressed in terms ; it is equally an agreement, in fact, presumed de jure ; and a foreign court interpreting or enforcing a contract so made on any contrary rule defeats the intention of the parties, as well as neglects to observe the recognised comity of nations. *Ib.*

The law of a country where a contract is to be enforced, must govern the construction of such contract. *Don* v. *Lippmann*, 5 Cl. & F. 1—H. L. (Sc.)

A court having before it a contract made between parties living under different systems of law, is not bound as a matter of law to apply either the lex loci solutionis or the lex loci contractûs ; the question is what law the parties intended to govern the contract. *Hamlyn* v. *Talisker Distillery*, [1894] A. C. 202 ; 6 R. 188 ; 71 L. T. 1 ; 58 J. P. 540—H. L. (Sc.)

Incorporating Foreign Law.]—A reference to foreign law in any English contract does not incorporate the foreign law, but merely affects the interpretation of the contract. *Dever, Ex parte, Suse, In re*, 56 L. J., Q. B. 552 ; 18 Q. B. D. 660—C. A.

When reliance is placed upon a difference between the law of England and the law of a foreign state, the party alleging the same is bound, by witnesses or books of authority, to shew that there is such a difference. *Smith* v. *Gould*, 4 Moore, P. C. 21 ; 6 Jur. 543. Cp. *Bentinck* v. *Willink*, 2 Hare, 1.

An instrument executed by foreigners in a foreign country must, on a demurrer be construed according to the obvious imports of its terms, unless there are allegations in the bill, that according to the law of the country in which it was executed, the true construction of it is different. *Spain* (*King*) v. *Machado*, 4 Russ. 225 ; 6 L. J. (o.s.) Ch. 61 ; 28 R. R. 56.

—— **In a Foreign Language.**]—When a contract is made in a foreign country, and in a foreign language, an English court, having to construe it, must first obtain a translation of the instrument ; secondly, an explanation of the terms of art (if any) ; thirdly, evidence of the foreign law applicable to it ; and, fourthly, evidence of any peculiar rules of construction which may exist in that law ; and must then itself interpret the instrument on ordinary principles of construction. *Di Sora* v. *Phillipps*, 10 H. L. Cas. 624—H. L. (E.) S. P., *Chatenay* v. *Brazilian Submarine Telegraph Co.*, 60 L. J., Q. B. 295 ; [1891] 1 Q. B. 79 ; 63 L. T. 739 ; 39 W. R. 65—C. A.

Informalities — Registration.] — A contract made in a foreign country, the laws of which require the contract to be registered before it can be sued upon there, may nevertheless be enforced here if the want of registration does not affect the validity. *Melbourn, Ex parte*, 40 L. J., Bk. 25 ; L. R. 6 Ch. 64 ; 23 L. T. 578 ; 19 W. R. 83.

Stamp and Revenue Laws.]—A document which, by the law of a foreign country, is not admissible in evidence for want of a stamp, may nevertheless be admitted in this country. *Bristow* v. *Sequeville*, 5 Ex. 275 ; 3 Car. & K. 64 ; 19 L. J., Ex. 289 ; 14 Jur. 674.

But where by the foreign law the want of a stamp renders the contract void, it cannot be enforced here. *Ib.*

The courts of this country will not take notice of the revenue laws of foreign states. *Planche* v. *Fletcher*, 1 Dougl. 251.

An agreement made in a foreign country cannot be used here, if it appears that by the laws of that country it would not have been available there without a stamp. *Alves* v. *Hodgson*, 7 Term Rep. 241 ; 2 Esp. 528 ; 4 R. R. 433. S. P., *Clegg* v. *Levy*, 3 Camp. 166.

A plaintiff cannot recover upon a written contract made in Jamaica, which, by the laws of that country, is void for want of a stamp. *Ib.*

Where an action was brought for money lent in France, and unstamped receipts were produced in proof of the loan, evidence to shew that by the law of France such receipts required stamps to render them valid, was rejected, on the ground that the courts of this country will not notice the revenue laws of foreign states. *James* v. *Catherwood*, 3 D. & R. 190.

b. Particular Contracts.

In relation to Funds in England.]—Locus regit actum is a canon of general jurisprudence, and must be assumed, in the absence of contrary evidence, to apply to a system of foreign law. *Guepratte* v. *Young*, 4 De G. & Sm. 217.

A married woman, domiciled in France, entered into a contract in England respecting her reversionary interest in trust money invested in the English funds, which was substantially valid according to French law, although invalid according to English law ; but the contract was not entered into in the manner prescribed by French law, which requires that there should be as many original instruments as there are distinct parties to the contract :—Held, that the French law gave capacity to make the contract, but that the English law regulated the form of it, and that therefore the contract was valid ; and it was enforced by decree. *Ib.*

Made in England between Merchants residing there, for Delivery in London of Goods shipped Abroad by Foreign Company—Vis major.]—The defendants, a London firm, contracted in London to sell to the plaintiffs, merchants in London, 20,000 tons of Algerian esparto, to be shipped by a French company at an Algerian port, at certain prices, according to specified qualities, on board vessels to be provided by the plaintiffs in London, and to be paid for by the plaintiffs in London by cash on or before arrival of the ship or ships at her or their port of destination, less interest at 5 per cent. per annum for the unexpired portion of three months from date of bill of lading, for the full amount of the invoice based on shipping weight. The defendants caused to be delivered, and were paid for, 9,000 tons of esparto, but failed to deliver the remaining 11,000 tons. In an action for this breach of contract :—Held, that the contract was an English contract and to be construed and dealt with according to the law of this country ; and consequently, that it was no answer to say that by the French law (which prevailed at the port of shipment) the defendants were excused from performing their contract if prevented from so doing by "force majeure," viz., the prohibition by the constituted authorities of the export of esparto from Algeria, by reason of an insurrection and consequent hostilities in that country. *Jacobs* v. *Crédit Lyonnais*,

53 L. J., Q. B. 156; 12 Q. B. D. 589; 50 L. T. 194; 32 W. R. 761—C. A.

Assignment of Debts.]—To an action for money payable by the defendant to the plaintiff, he pleaded that C., a joint debtor, resided in California in America, within the jurisdiction of a court there. That by the law of California a creditor might voluntarily assign his debt to another person who might in his own name sue the debtor. That the plaintiff being in California assigned the debt to R. there, and R. in his own name sued the defendant and C. for that and other debts in a court there, having jurisdiction for the recovery of such assigned debts, and recovered judgment, and the defendant and C. were liable to be sued by R. in this country upon the judgment. That the judgment was for an entire sum, making no distinction between the debts, and was partly satisfied by the levy of a sum less than the amount of the judgment, and not applicable to any one of the debts recovered more than to any other. Replication, that the law of California was that the assignee might re-assign to the creditor the debt or so much thereof as was unsatisfied, and the creditor might sue in his own name for so much, notwithstanding the assignee in the meantime had recovered judgment, unless the whole was actually levied. That R., before he had received any part of the debt or before any sum applicable thereto had been levied, re-assigned to the plaintiff, by reason whereof the plaintiff became entitled to sue for the debt in his own name as if there had been no such assignment as mentioned in the plea:—Held, that, assuming the plea to shew that the assignment made in California by the law of that country transferred the exclusive right to sue, it was answered by the replication. *Thompson* v. *Bell*, 3 El. & Bl. 236; 23 L. J., Q. B. 159; 18 Jur. 603.

Assignment of Policy of Assurance — Lex loci.]—The plaintiff sued the trustees of an English life assurance company as assignee from her husband of a policy of life assurance granted by the company. The assignment to the plaintiff was made in Cape Colony, the assignor being then domiciled in that colony, where he remained until death. By the law of Cape Colony such an assignment was void, because the assignee was the wife of the assignor:—Held, that the law of Cape Colony applied to the assignment of the policy, and that the defendants were entitled to judgment. *Lee* v. *Abdy*, 17 Q. B. D. 309; 55 L. T. 297; 34 W. R. 653.

Foreign Share Certificates—Dealings in England.]—Transactions as to certificates of shares in a foreign company taking place in England between persons domiciled here are to be decided by English law; but what is effectual to transfer the shares in the foreign country, by the laws of that country. *Colonial Bank* v. *Cady*, 60 L. J., Ch. 131; 15 App. Cas. 267; 63 L. T. 27; 39 W. R. 17—H. L. (E.)

Certificates negotiated in England—Foreign Securities.]—In an action to determine whether a bank were entitled to certain certificates of American securities:—Held, that as the question whether the bank was to be deemed rightfully in possession of the certificates turned upon transactions in England it was to be decided by English and not by American law, though the consequences of being rightfully in possession of them depended on American law. *Williams* v. *Colonial Bank*, 57 L. J., Ch. 826; 38 Ch. D. 388; 59 L. T. 643; 36 W. R. 625—C. A.

Shipping—Affreightment—Law of the Flag—"Lex loci contractûs"—Intention of Parties.]—Primâ facie the law of the country where the contract is made will govern it and decide what the law as to the contract is; but the court must look at the circumstances of each contract, and consider, having regard to the nature of the contract and the other circumstances of the case, what law it is to be governed by. *Missouri Steamship Co., In re, Monroe's Claim*, 58 L. J., Ch. 721; 42 Ch. D. 321; 61 L. T. 316; 37 W. R. 696; 6 Asp. M. C. 423—C. A.

A British company domiciled in England contracted to convey, in a British-owned ship, cattle belonging to an American citizen residing at Boston, Massachusetts, from Boston to Liverpool. The contract, which was made on behalf of the company by their American agent, contained a stipulation that the company should not be liable for negligence of the master and crew. According to the law of Massachusetts this stipulation was void as contrary to public policy. According to the law of England it was good. The ship was stranded off the coast of Wales through the negligence of the master and crew:—Held, that, having regard to the nature of the contract, and the other circumstances of the case, the contract must be governed by the law of England, and therefore the shipper was not entitled to damages for the loss of his cattle. *Ib.*

—— **Bill of Lading—Collision between Ships belonging to same Owners—Excepted Perils.**]—The plaintiffs shipped goods on board one of the defendants' ships, the "Kroon Prins," under a bill of lading, which was in the English language, and described the defendants by their corporate name, and which excepted, amongst other things, "collision and accidents, loss or damage from any act, neglect or default whatsoever of the pilots, master or mariners or other servants of the company in navigating the ship." The goods were lost by the "Kroon Prins" coming into collision on the high seas with the "Atjeh," which also belonged to the defendants; and the jury found that, though both ships were in fault, the chief blame was to be attached to the "Atjeh." The defendant company, which was composed entirely of English shareholders, in addition to being registered in England as a limited company, was also registered in Holland as a Dutch company, which was in fact a bare trustee of the ships for the English company. The ships also were registered as Dutch ships, and carried the Dutch flag. Such registration was for the purposes of trading to and from Dutch ports. The ships were not registered under the merchant shipping acts as British ships. In an action to recover the value of the goods, based, first, on the contract to carry safely contained in the bill of lading; and secondly, in tort:—Held, that, so far as the action was based on contract, the defendants, as owners of the "Kroon Prins," were relieved from liability for the negligence of their servants on board that ship by reason of the exceptions in the bill of lading, which was an English contract, and must be construed accordingly; also that the defendants were not liable either expressly or impliedly under the bill of lading, which had reference only to the carrying

ship the "Kroon Prins," for the negligence of their servants on board the "Atjeh." *Chartered Mercantile Bank of India, London, and China* v. *Netherlands India Steam Navigation Co.*, 52 L. J., Q. B. 220; 10 Q. B. D. 521; 48 L. T. 546; 31 W. R. 445; 47 J. P. 260—C. A.

Held, also (per Brett, L.J.), that both the ships were English and not Dutch ships, notwithstanding that they were registered in Holland as Dutch ships and carried the Dutch flag, inasmuch as the nationality of a ship depends upon the question of ownership. *Ib.*

—— **Port of Distress—Sale of Cargo—Law of the Flag.**]—The plaintiffs, who were British subjects, shipped pepper at Singapore, on board the German ship "August," to be carried with other cargo to London. The ship met with bad weather, and was obliged to put into Cape Town, the ship and portions of her cargo having sustained damage. The master, acting on the advice of surveyors, sold a portion of the plaintiff's pepper, with other cargo. In an action for breach of contract and for conversion:—Held, that the conduct of the master in selling the pepper in question was to be determined by German law, that being the law of the flag. *The August*, 60 L. J., P. 57; [1891] P. 328; 66 L. T. 32; 7 Asp. M. C. 110.

—— **Bottomry Bond—Foreign Ship.**]—The owner of cargo who ships it on board a foreign vessel, ships it to be dealt with by the master according to the law of the flag, that is, the law of the country to which the vessel belongs, unless that authority be limited by express stipulation at the time of the shipment. Therefore a bond made by the master of a foreign ship hypothecating cargo laden on board such ship if valid according to the law of the flag of the ship, will be enforced by the English Admiralty Court, on the arrest of the ship and cargo at the port of London (the port of discharge within the meaning of the bond), although the conditions imposed by English law as essential to the validity of such bond have not been complied with. *The Gaetano and Maria*, 51 L. J., P. 67; 7 P. D. 137; 46 L. T. 835; 30 W. R. 766; 4 Asp. M. C. 535—C. A.

—— **Carrier—Loss of Luggage—Special Contract.**]—S., being in England, took from the P. and O. Company, and paid for, a ticket for the passage from Southampton to Alexandria, and from Suez to Mauritius. In the body of the ticket the engagement of the company was stated to be subject to the conditions and regulations indorsed thereon. S. signed this ticket. There was indorsed a notice containing the following clause, "that the company does not hold itself liable for damage to, or loss or detention of, passengers' baggage." S. lost one package of his luggage during the voyage. No evidence was given of any negligence on the part of the company:—Held, that the contract was governed by the law of England, and that by the terms of the special contract the company was not liable for the loss of the package. *Peninsular and Oriental Steam Navigation Co.* v. *Shand*, 3 Moore, P. C. (N.S.) 272; 6 N. R. 387; 11 Jur. (N.S.) 771; 12 L. T. 808; 13 W. R. 1049.

—— **Sale of Ship—Prior Mortgage.**]—Certain shipbuilders in America built several ships, mortgaged them there, sent them to England for sale, sold them there, and paid the mortgagees in America. The mortgages were duly registered in America; but notice of the mortgage having been indorsed on the certificate of registry in one case, and having impeded the sale, it was agreed that no such notice should be indorsed in future. Another ship was accordingly sent over and sold; the shipbuilders received the purchase-money, and failed, leaving the mortgagee unpaid. The mortgagee filed a bill to establish his claim against the purchaser:—Held, that the rights to the ship acquired under American law must be recognised; but that the purchase, having taken place in this country, must be governed by English law. *Hooper* v. *Gumm*, 36 L. J., Ch. 605; L. R. 2 Ch. 282; 15 W. R. 464; 16 L. T. 107.

Held, also, that that which furnishes the title to a ship in America will furnish the title to the ship in this country. *Ib.*

—— **Seaman—Action for Wages.**]—Foreign seamen at a foreign port enter into articles with the master, who is also a foreigner, for a voyage on board a foreign ship, and thereby agree amongst other things, not to institute any suit against the master in foreign countries, or cite him before any judge or magistrate, but that they will abide by the maritime code of their own country and the adjudication of their own courts. Having made this agreement in their own country, they cannot maintain an action in England against the master for wages, though the ship and cargo be confiscated in an English port, and the voyage thereby ended. *Gienar* v. *Meyer*, 2 H. Bl. 603; 3 R. R. 520. S. P., *Johnson* v. *Machielsne*, 3 Camp. 44; 13 R. R. 745.

—— **Marine Insurance.**]—The agent of the Albion Insurance Company had an office in Glasgow, at which J. P. and others, the owners of a steam vessel, effected an insurance, receiving from the company's agent a contract, importing generally that a policy corresponding with the memorandum, would be prepared at the office in London, and delivered to the assured, or their order, "on the third Monday in the ensuing month, or on any subsequent day." The policy that was sent down, and which was never shewn to or demanded by the assured, contained a clause that "it should be suspended and remain out of force during the time the steamboat might be at sea." At the end of the year the policy was renewed through the agent at Glasgow, who delivered to the assured a memorandum, signed by the company's secretary in London, signifying that the above policy had been renewed, but no notice of the exception was ever communicated to the assured. The vessel was shortly afterwards destroyed by fire on her passage from Liverpool to Dublin:—Held, that the memorandum was the contract of the parties, which had not been fulfilled by the company, who were therefore liable for damages; that the act 6 Geo. 1, c. 18 (repealed, see 6 Geo. 4, c. 91), so far as it declares all policies executed by six persons, other than the London Insurance and Royal Exchange Assurances, to be absolutely void, does not extend to Scotland; and that a contract so entered into was a Scotch and not an English contract. *Pattison* v. *Mills*, 2 Bli. (N.S.) 519; 1 Dow & Cl. 342—H. L. (Sc.)

A policy of marine insurance was effected with English underwriters by an English mer-

chant upon goods shipped in a French ship, and it was thereby provided that general average was to be payable as per judicial foreign statement. The ship was damaged by a collision and put into port for repairs, the cargo, however, being uninjured. The master not having funds to do the necessary repairs, gave a bottomry bond on ship, freight and cargo. The ship and freight proving insufficient to satisfy the bond, the assured had to pay the deficiency in order to obtain possession of his goods:—Held, that the policy was not to be construed according to French law, except so far as the parties had expressly stipulated that it should be, and that there being no loss by perils of the sea according to English law, the assured could not recover from the underwriters the amount which he had paid as above mentioned. *Greer* v. *Poole*, 49 L. J., Q. B. 463; 5 Q. B. D. 272; 42 L. T. 687; 28 W. R. 582.

—— **Insurance in London — Goods Shipped Abroad by undisclosed Principals.**]—The defendants, an English firm, traded with D., a Spanish shipping agent at Havannah. The plaintiffs, who were Spanish merchants at Havannah, consigned a cargo of goods to the defendants through the agency of D. The defendants knew that D. was acting for a third party who was alluded to as the "interesado," but the name of the plaintiffs was not disclosed. The defendants effected an insurance in London on the ship in the name of themselves, and for the benefit of all parties interested. The ship having been lost, the policy-money was paid to the defendants, and D. being insolvent, the plaintiffs claimed the whole of the money after deducting the premiums and expenses. The defendants claimed a lien for the balance of their general account due from D.:—Held, that the questions must be determined according to English law, and not according to the law of Spain, the law of Spain only being material with regard to the nature and extent of the authority given by the plaintiffs to D. *Maspons* v. *Mildred*, 51 L. J., Q. B. 604; 9 Q. B. D. 530; 47 L. T. 318; 30 W. R. 862—C. A. Affirmed sub nom. *Mildred* v. *Maspons*, 53 L. J., Q. B. 33; 8 App. Cas. 874; 32 W. R. 125—H. L. (E.)

—— **Repairs—Lien.**]—A bill stated that the plaintiffs entered into certain contracts with D. for the repair of the steamship "Great Eastern," and that those contracts were afterwards transferred by D. to a French company, with limited liability, having offices in France and England. The bill further alleged that, according to the law of France, directors of companies were personally liable for debts incurred by their companies under certain provisions and requisites were complied with, and that those requisites had not been complied with, and it was prayed that certain goods on board the "Great Eastern," upon which the plaintiffs had a lien under the terms of their contract, might be sold, and the proceeds applied towards payment of their claim; and that if the assets of the company should be insufficient, the directors might be declared personally liable to make good the deficiency. Demurrer for want of equity by E., one of the directors, overruled the allegations (assumed to be true) being sufficient to shew that he was a director at the time the contracts were entered into; that the directors were personally liable under the French law; that the court had the power of taking the accounts of the company, inasmuch as it had an office in England; and that E. was a proper party to the taking of such accounts and to the sale of the goods. *Bower* v. *Société des Affréteurs du Great Eastern*, 17 L. T. 490.

—— **War Risk—Destruction of Cargo by Enemy—Right to Compensation.**] — The plaintiffs, underwriters, granted to the defendants valued policies of insurance, including war risks, on a cargo of a United States merchant ship. Such cargo during the insured voyage was totally destroyed by the "Alabama," a cruiser of the Confederate States then at war with the United States of America; and the plaintiffs paid to the defendants, as and for an actual total loss, the amounts named in the policies, but the real value of the cargo exceeded the sum so paid. The loss of this cargo formed one of the items of claims made by the United States against Great Britain, in respect of the damage done by the "Alabama" and other Confederate cruisers, which was referred to arbitration, and resulted in an award under which Great Britain paid the sum awarded for compensation to the United States. Afterwards the United States passed an Act of Congress for constituting a court for the distribution of this sum amongst its subjects who had been injured and whose claims should be allowed by that court under the provisions of such act, by which it was declared in effect that no claim should be allowed for which the party injured had received compensation from any insurer; but that if such compensation should be not equal to the loss actually suffered, allowance might be made for the difference; and that no claim should be allowed by or on behalf of any insurer, either in his own right or of that of the party insured. The defendants claimed in such court and received a sum out of such compensation-money for so much of their loss as exceeded the sum insured. The plaintiffs having paid for a total loss, sued the defendants for the compensation-money they had so received:—Held, (Baggallay, L.J., dissenting), that this money was no part of the salvage, but was given to the defendants under the Act of Congress as a pure gift, and that therefore the plaintiffs were not entitled to recover it. *Burnand* v. *Rodocanachi*, 51 L. J., Q. B. 548; 7 App. Cas. 823; 47 L. T. 277; 31 W. R. 65; 4 Asp. M. C. 576—H. L. (E.)

c. ILLEGALITY.

Illegality by the Lex loci contractûs.]—It is contrary to principle that a court of justice should give greater effect to a foreign contract that it would have by the lex loci contractûs. *Talleyrand* v. *Boulanger*, 3 Ves. 447; 4 R. R. 58.

A document which, by the law of a foreign country, is not admissible in evidence for want of a stamp, may nevertheless be admitted in this country. *Bristow* v. *Sequeville*, 5 Ex. 275; 3 Car. & K. 64; 19 L. J., Ex. 289; 14 Jur. 674. S. P., *James* v. *Catherwood*, 3 D. & R. 190.

But where by the law of a foreign country the want of a stamp renders the contract void, it cannot be enforced here. *Ib.* S. P., *Alves* v. *Hodgson*, 7 Term Rep. 241; 2 Esp. 528; 4 R. R. 433: *Clegg* v. *Lery*, 3 Camp. 166.

A. and B. were Spanish subjects resident in Spain; A. having entered into a mercantile

contract with the Spanish government agreed with B. to allow him a share of the profits. Some years afterwards B. died, and A. went first to France and afterwards came to England. After he had left Spain he frequently wrote to the plaintiffs (who were resident in France, but had taken out administration to B. in this country), promising to settle with them for B.'s share of the profits of the contract, but not having done so they filed a bill against him to enforce the agreements. A. pleaded that the agreement was illegal and void by the laws of Spain, as at the time it was entered into B. held an office of trust and confidence under the Spanish government, and the plea averred that the entering into the agreement was a crime against the laws of Spain, subjecting the parties to pains and penalties and a criminal prosecution. It was objected that the particular law of Spain by which the agreement was nullified ought to have been set forth, and that A. after he had left Spain had recognised the agreement, and promised to perform it. The court, however, allowed the plea. *Heriz* v. *Riera*, 11 Sim. 318; 10 L. J., Ch. 47; 5 Jur. 20.

—— **Police Laws.**]—Money won at play, or lent for the purposes of gambling in a country where the games in question are not illegal, may be recovered in the courts of this country. *Quarrier* v. *Colston*, 1 Ph. 147; 12 L. J., Ch. 57; 6 Jur. 959.

—— **Exporting Contraband of War.**]—A contract between two subjects of a neutral state to export contraband of war to a belligerent is not unlawful in the neutral state. *Chavasse, Ex parte, Grazebrook, In re*, 6 N. R. 6; 34 L. J., Bk. 17; 11 Jur. (N.S.) 400; 12 L. T. 249; 13 W. R. 627.

Informalities — Registration.]—A contract made in a foreign country, the laws of which require the contract to be registered before it can be sued upon there, may nevertheless be enforced here, if the want of registration does not affect the validity. *Melbourn, Ex parte*, 40 L. J., Bk. 25; L. R. 6 Ch. 64; 23 L. T. 578; 19 W. R. 83. *Holthausen, Ex parte, Scheibler, In re*, 44 L. J., Bk. 26; L. R. 9 Ch. 722; 31 L. T. 13.

Illegality according to the Lex fori.]—When a court of one country is called upon to enforce a contract entered into in another, it is not enough that the contract should be valid according to the law of the latter, for if any part of the contract is inconsistent with the law and policy of the former, the contract will not be enforced, even as to another part of it which may not be open to this objection, and may be the only part remaining to be performed. *Hope* v. *Hope*, 8 De G. M. & G. 731; 26 L. J., Ch. 417; 3 Jur. (N.S.) 454; 5 W. R. 387.

Therefore, where an Englishman married a Frenchwoman, and they resided in France, where their children were born, and suits were instituted between them in both countries, and were compromised by an agreement, of which part was, that the wife would facilitate proceedings for a divorce, and another part was, that one of the children should remain with its mother, and a third part related to the payment of an allowance to the wife:—Held, that even supposing the parties to be domiciled in France, and the agreement to be governed by French law, and to be valid according to that law, and to have been performed as to the parts which were invalid according to English law, it could not be enforced here as to any part of it. *Ib.*

—— **Champerty.**]—An agreement entered into in France, but intended to be carried out in England, of such a nature, that if entered into in England it would have been void for champerty, cannot be enforced in England. *Grell* v. *Levy*, 16 C. B. (N.S.) 73; 10 Jur. (N.S.) 210; 9 L. T. 721; 12 W. R. 378.

—— **Agreement contrary to Policy.**]—If an agreement contrary to the policy of the English law is entered into in a country by the law of which it is valid, an English court will not enforce it. The policy of the English law in favour of trade applies to foreigners trading in England equally with English subjects. *Rousillon* v. *Rousillon*, 49 L. J., Ch. 338; 14 Ch. D. 351; 42 L. T. 679; 28 W. R. 623; 44 J. P. 663.

d. How Affected by the Lex fori.

In General.]—The law of the country where a contract is made, or is to be performed, furnishes the rules for expounding the nature and extent of its obligation; but the law of the country, where it is sought to enforce performance of a contract, governs all questions as to the remedy and mode of proceeding, including lapse of time. *Fergusson* v. *Fyffe*, 8 Cl. & F. 121—H. L. (Sc.)

The law of a country where a contract is to be enforced, must govern the enforcement of such contract. *Don* v. *Lippmann*, 5 Cl. & F. 1—H. L. (Sc.)

The distinction between that part of the law of a foreign country where a personal contract is made which is adopted and that which is not adopted by our courts, is, that so much of the law as affects the rights and merits of the contract, all that relates ad decisionem litis, is adopted from the foreign country—so much of the law as affects the remedy only, all that relates ad litis ordinationem, is taken from the lex fori of that country where the action is brought. In the interpretation of this rule, the time of limitation of the action is governed by the law of the country where the action is brought, and not by the lex loci contractus. *Hubert* v. *Steiner*, 2 Scott, 304; 2 Bing. (N.C.) 202; 1 Hodges, 206; 2 D. P. C. 781; 4 L. J., C. P. 233.

In a suit between parties resident in England, on a contract made between them in a foreign country, the contract is to be interpreted according to the foreign law, but the remedy must be taken according to the law here. *De la Vega* v. *Vianna*, 1 B. & Ad. 284; 8 L. J. (O.S.) K. B. 388.

The rules of the lex fori, where a question is raised between or by or against foreigners, are not to be applied to matters affecting the substance of the remedy, but only to matters affecting the form. *Cope* v. *Doherty*, 2 De G. & J. 614; 27 L. J., Ch. 600; 4 Jur. (N.S.) 699; 6 W. R. 695.

Statutes of Limitation.]—The law of prescription or limitation is a law relating to procedure, having reference only to the lex fori; and where a court entertains a cause of action which originated in a foreign country, the rule is to

adjudicate according to the law of that country, yet the court proceeds according to the prescription of the country in which it exercises jurisdiction. *Ruckmaboye* v. *Lulloobhoy Mottichund*, 8 Moore, P. C. 4 ; 5 Moore, Ind. App. 234.

Where a claim is made in an administration suit in England by an Indian creditor of the testator, the English Statute of Limitations must be applied as part of the lex fori. *Finch* v. *Finch*, 45 L. J., Ch. 816 ; 35 L. T. 235.

4th Section of Statute of Frauds.]—The contract mentioned in the 4th section of the Statute of Frauds is not absolutely void if not in writing, as required by the statute, that section relating to the mode of procedure, and not to the contract itself. Consequently such parol contract, though made in a foreign country, where it is good and capable of being enforced, cannot be sued on in this country. *Leroux* v. *Brown*, 12 C. B. 801 ; 22 L. J., C. P. 1 ; 16 Jur. 1021 ; 1 W. R. 22.

c. NEGOTIABLE INSTRUMENTS.

Bills of Exchange and Promissory Notes.]—A bill payable in France, though drawn in England, is a foreign bill, and notice of dishonour, according to the French law, is sufficient. *Hirschfeld* v. *Smith*, 1 H. & R. 284 ; 35 L. J., C. P. 177 ; L. R. 1 C. P. 340 ; 12 Jur. (N.S.) 523 ; 14 W. R. 455.

In an action by indorsee against payee and indorser of a bill of exchange drawn in England, and accepted payable in France, by a resident in France, the indorsee and indorser being both domiciled in England :—Held, that the bill, being payable in France, was a French bill. *Rothschild* v. *Currie*, 4 P. & D. 737 ; 1 Q. B. 43 ; 10 L. J., Q. B. 77.

A bill of exchange was drawn and accepted in Paris and made payable in England. The drawer and acceptor were living there. No rate of interest was expressed to be payable on the bill : —Held, that the default being made in England, interest was payable according to the English and not the French law. *Cooper* v. *Waldegrave (Earl)*, 2 Beav. 282.

As between the holder of a bill and the drawer, the lex loci contractus of the drawer and of the indorser, and not of the acceptor, governs the liabilities of the drawer and indorser respectively. *Allen* v. *Kemble*, 6 Moore, P. C. 314 ; 13 Jur. 287.

Bills of exchange, of which the plaintiffs in London claimed to be the owners, were sent to New York to the defendant, A., who had undertaken as agent to collect the moneys due upon them. The bills came into the possession of B. in New York. B. sued in an American court. In those proceedings a commission issued to examine witnesses, and the bills were handed over to C., who was appointed commissioner. The plaintiffs alleged that the bills of exchange came into the possession of B., and subsequently of that of B. and C., by a breach of duty on the part of A. towards the plaintiff, and asked that the bills might be handed over to them, or for a perpetual injunction to restrain C. from parting with them :—Held, that the court had no jurisdiction to make such decree. *London and Mediterranean Bank* v. *Stratton*, 21 L. T. 415 ; 18 W. R. 107.

—— **Indorsee against Acceptor.**]—To an action by the indorsee of the drawer against the acceptor of a bill of exchange drawn in England, accepted in England, and payable in England, it is no answer that the indorsement was made in France, and was not conformable to the law of France ; nor in such action is it any answer that the drawer indorsed the bill immediately to the plaintiff, and that the plaintiff and the drawer, when the bill was made and indorsed, were resident and domiciled in France, and were subjects of that empire. *Lebel* v. *Tucker*, 8 B. & S. 830 ; 37 L. J., Q. B. 46 ; L. R. 3 Q. B. 77 ; 17 L. T. 244 ; 16 W. R. 338.

Action on a bill of exchange by indorsees against acceptor. Plea, that he and S. carried on business in London and at Rio ; at the former place under the firm of M., S. & Co. ; at the latter under the firm of S. & M. ; that S. & M. drew the bill on M., S. & Co., payable to their own order, and indorsed it to the plaintiffs for a bonâ fide debt. Afterwards, and before the bill was accepted, S. & M. stopped payment, and made an arrangement with their creditors, the plaintiffs being parties to it, the effect of which, according to the law of Rio, was, that S. & M. were absolutely discharged from the debt for which the bill was indorsed to the plaintiffs ; that the bill was accepted after such discharge, and in ignorance of it. The plea also stated, that part of the arrangement was, that the holders of bills drawn by S. & M. upon M., S. & Co. should be considered as creditors for cash paid, but that the dividends should be deposited in a bank until presentation and protest of the bills not having been paid ; and the payment in London being verified, the sums so deposited should be divided amongst the creditors :—Held, that the plea was bad as an answer, as it did not shew that the acceptor would have been discharged by the law of Rio, or by the agreement ; nor did the agreement shew that the drawee would be discharged from accepting the bill, or released from paying it, if he did accept it. *Hartley* v. *Manton*, 5 Q. B. 247 ; Dav. & M. 410 ; 13 L. J., Q. B. 61 ; 8 Jur. 169.

—— **Foreign Indorsement.**]—Bills of exchange were drawn in France by a domiciled Frenchman in the French language, in English form, on an English company, who duly accepted them. The drawer indorsed the bills and sent them to an Englishman in England :—Held, that the acceptor could not dispute the negotiability of the bills by reason of the indorsements being invalid according to French law. *Marseilles Extension Ry. and Land Co., Smallpage and Brandon, In re*, 55 L. J., Ch. 116 ; 30 Ch. D. 598.

—— **Indorsed in Blank Abroad when Overdue.**] —A Norwegian firm purchased a share of a ship from A., a domiciled Englishman, on the terms of paying 800*l.* to A. and a debt of 300*l.* due to a firm consisting of A. and B. Part of the purchase-money was paid by an inland bill of exchange, payable to the order of the purchasers. This bill was indorsed in Norway by the purchasers to their agent, by whom it was indorsed in blank and handed over in Norway to the agent of A. and his firm. While in his hands it was seized in execution for a private debt of B.'s, and the validity of the execution was established by a judicial proceeding. After the bill was overdue it was sold by auction by the judicial officer, and was subsequently re-sold to a Swedish bank, who had no notice of any adverse claim upon it. By the law of Norway and Sweden it was proved

that the judicial sale conferred a complete title on the purchaser, and that a bonâ fide purchaser for value of an overdue bill of exchange took it freed from all equities. The bill was claimed by A. and his firm:—Held, that as between claimants not parties to the bill, the law of Norway ought to prevail, and that the bank had a complete title to the bill. *Alcock* v. *Smith*, 61 L. J., Ch. 161; [1892] 1 Ch. 238; 66 L. T. 126—C. A.

—— **Promissory Note made in France—Indorsed in Blank.**]—Where a promissory note was made in France, and indorsed in blank by the payee in that country, the maker and payee both at the times of making and indorsing the note being domiciled there:—Held, that, as no action could have been maintained upon it in the French courts of law, in the name of the indorsee, the indorsement according to the law of France, operating as a procuration only, and not as a transfer, so no action could be maintained by him in our courts. *Trimby* v. *Vignier*, 4 M. & Sc. 695; 1 Bing. (N.C.) 151; 6 Car. & P. 25; 3 L. J., C. P. 246.

Scrip of Bonds.]—The scrip of a foreign government, issued by it on negotiating a loan (which scrip promises to give to the bearer, after all instalments have been duly paid, a bond for the amount paid, with interest), is by the custom of all the stock markets of Europe a negotiable instrument, and passing by mere delivery to a bonâ fide holder for value. English law follows this custom—and any person taking it in good faith obtains a title to it independently of the title of the person from whom he took it. *Goodwin* v. *Robarts*, 45 L. J., Ex. 748; 1 App. Cas. 476; 35 L. T. 179; 24 W. R. 987—H. L. (E.)

The scrip promised to give the bearer a bond for the amount paid. A person who took this scrip as being negotiable, could not, after he had negligently allowed another person the means of transferring (even fraudulently) the possession of it to a bonâ fide holder, be heard to deny that the instrument was a negotiable instrument transferable to bearer by delivery. *Ib.*

Who is contracting Party.]—In the case of such scrip, issued by a foreign government and circulated in England by means of an agent here, who is to receive the instalments, and give acknowledgments for their payment, and to deliver the bonds when they are issued, the contracting party is the foreign government, and not the English agent. *Ib.*

f. Other Matters.

Discharge or Extinguishment of Debts—Effect in other Countries.]—A debt or liability arising in any country may be discharged by the laws of that country, and such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the courts of that country, but in every other country. *Ellis* v. *M'Henry*, 40 L. J., C. P. 109; L. R. 6 C. P. 228; 23 L. T. 861; 19 W. R. 503.

The discharge of a debt or liability by the law of a country other than that in which the debt arises does not relieve the debtor in any other country. Where the discharge is created by the legislature or laws of a country which has a paramount jurisdiction over another country in which the debt or liability arose, or by the legislature or laws which govern the tribunal in which the question is to be decided, such a discharge may be effectual in both countries in the one case, or in proceedings before the tribunal in the other case. *Ib.*

A discharge of an insolvent debtor upon a cessio bonorum by the Court of Session in Scotland, is no answer to an action brought by an English subject in a court in this country to recover a debt contracted in England, although it appeared that the plaintiff opposed the discharge of the defendant in the Scotch court. *Phillips* v. *Allan*, 8 B. & C. 477; 2 Man. & Ry. 576; 7 L. J. (O.S.) K. B. 2; 32 R. R. 450.

Semble, that it would be an answer to the action if the plaintiff had claimed to have the benefit of the Scotch law, and to take a distributive share of the property of the insolvent. *Ib.*

—— **Foreign Bankruptcy or Liquidation, Discharge by.**]—A party to a contract made and to be performed in England is not discharged from liability under such contract by a discharge in bankruptcy or liquidation under the law of a foreign country in which he is domiciled. *Gibbs* v. *Société des Métaux*, 59 L. J., Q. B., 510; 25 Q. B. D. 399; 63 L. T. 503—C. A.

Arbitrations.]—By agreement between A. and B. made in France, any disputes which might arise between them were to be submitted by them to two arbitrators, merchants (négociants), respectively named by them, who, in case of disagreement, were to have power to name an umpire. The two or the three referees might also be named by a particular court, at the request of either party:—Held, that the court might appoint an arbitrator who was not a merchant; and also that an act by which it annulled B.'s nomination of an arbitrator, on the ground that he was a foreigner, and appointed not two other arbitrators, but one, a Frenchman, and not a merchant, to act as referee with the nominee of A., must be taken to be legal according to the French law, till the contrary was distinctly proved. *Alivon* v. *Furnival*, 1 C. M. & R. 277; 4 Tyr. 751; 3 D. P. C. 202; 3 L. J., Ex. 241.

Where on breach of an agreement entered into in France, and to be performed there, French arbitrators awarded a sum, including the profits which the plaintiff would have made had the agreement been fulfilled:—Held, that the sum might be recovered in an action here on the award, as not being shewn to be contrary to French law. *Ib.*

What Law applicable.]—A deed in the Scotch form, made between parties, some of whom were domiciled in Scotland and the others in England, construed partly according to the law of Scotland, and partly according to the law of England; that is to say, so far as it concerned the Scotch parties, according to the Scotch law, and so far as it concerned the English parties, according to the English law. *Duncan* v. *Campbell*, 12 Sim. 616; 6 Jur. 667.

Pleading.]—A simple allegation that a foreign instrument, depending on foreign law, is null and void, is too vague. *Brunswick* (*Duke*) v. *Hanover* (*King*), 2 H. L. Cas. 1. Affirming 6 Beav. 1; 13 L. J., Ch. 107; 8 Jur. 253.

VIII. TORTS.

Assault committed Abroad.]—An action will lie in respect of an assault or other tort committed by an English subject on another English subject beyond this realm, provided that the foreign law prevailing on the spot gives compensation or damages for the offence to the party injured. *Seymour (Lord)* v. *Scott*, 1 H. & C. 219; 1 N. R. 129; 32 L. J., Ex. 61; 9 Jur. (N.S.) 522; 8 L. T. 511; 11 W. R. 169—Ex. Ch.

Trespass to Foreign Lands.]—An action for damages for trespass to land situate in a foreign country, founded on a disputed claim of title to such land, cannot be tried in the courts of this country. *British South African Co.* v. *Companhia de Moçambique*, 63 L. J., Q. B. 70; [1893] A. C. 602; 6 R. 1; 69 L. T. 604—H. L. (E.)

Order XXXVI. r. 1 (R. S. C., 1883), which abolished local venues, is a rule of procedure only, and does not affect the jurisdiction of the courts of this country. The Judicature Acts and Rules deal with procedure only, and do not confer any new right of action. *Ib.*

Collision between British and Foreign Vessel on High Seas.]—In an action in personam brought by the owners of a British vessel against the owners of a Spanish vessel to recover damages caused to the British vessel by collision with the Spanish vessel on the high seas, the defendants pleaded that they were Spanish subjects, and that if there was any negligence on the part of those in charge of the Spanish vessel it was negligence for which the master and crew alone, and not the defendants, were liable according to the law of Spain:—Held, bad on demurrer. *The Leon*, 50 L. J., P. 59; 6 P. D. 148; 44 L. T. 613; 29 W. R. 916; 4 Asp. M. C. 404.

The owners of a foreign ship claimed damages for a collision between their ship and an English ship in Belgian waters. The owners of the English ship pleaded that, by the Belgian laws, pilotage was compulsory in the place where the collision occurred. The owners of the foreign ship replied that, according to the Belgian law, the owners of the English ship remained liable notwithstanding that the pilotage was compulsory:—Held, that the claim, being founded on a tort committed in the territory of a foreign state, the party claiming reparation in a British court was not entitled to the benefit of the foreign law against the admitted provisions of the statute law of England, and the practice of the Court of Admiralty in respect of compulsory pilotage, by which no such liability as provided by the Belgian law existed, as it is contrary to principle and authority to hold that an English court will enforce a foreign municipal law, and give a remedy in the shape of damages, in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed. *The Halley*, 7 Moore, P. C. (N.S.) 263; 37 L. J., Adm. 33; L. R. 2 P. C. 193; 18 L. T. 879; 16 W. R. 998.

Libel.]—A foreigner, resident abroad, may maintain an action in England for a libel published concerning him here. *Pisani* v. *Lawson*, 6 Bing. (N.C.) 90; 8 Scott, 180; 8 D. P. C. 57; 9 L. J., C. P. 12; 3 Jur. 1153.

Liability for Negligence.]—Declaration for an injury done to a ship of the plaintiffs on the high seas, by her being run foul of by a ship of the defendant, under the care, direction, and management of his mariners and servants. Plea, that the ship secondly mentioned ran foul of the plaintiff's ship on a part of the high seas, situate between the kingdoms of England and France, and out of the British dominions; that at the time the defendant was a subject of the king of the French, and was a holder and proprietor of shares in, and acting director of, a society or company established in France by royal ordinance, according to the laws of that kingdom; and that, at the time of the collision, the company, being subjects of the king of the French, were the owners of the ship, and by their mariners and servants were navigating the same as subjects of the king of the French for objects for which the company was established, and upon that part of the high seas before mentioned; and the company by their mariners and servants committed the grievances in the declaration; and that the defendant never was possessed of or interested in the ship, otherwise than as such holder and proprietor of shares; that by the law of France the defendant was not responsible for or liable to be sued or impleaded individually, or in his own name or person, in respect of the causes of action in the declaration mentioned; but the company alone by their style or title, or the master or person in command of the ship for the time being, was responsible for, and liable to be sued and impleaded for, the causes of action; and that the defendant never was master or in command of the ship:—Held, that, if the true construction of this plea was, that, by the law of France, the defendant was not liable, inasmuch as a body established by the French law, and analogous to an English corporation, were the proprietors of the ship, and alone liable for the acts of the master, it disclosed a good defence to the action; but that, if the plea only meant that in the French courts the mode of proceeding would be to sue the defendant jointly with the other shareholders of the company under the name of their association, it was bad, it being no objection to a suit in this country, that it would have been instituted in a different form in the country where the cause of action arose. *General Steam Navigation Co.* v. *Guillon*, 11 M. & W. 877; 13 L. J., Ex. 168.

—— **English Ships injuring Foreign Piers.**]—An English company, possessed of a pier in a port in Spain, instituted a cause of damage against an English ship for negligently injuring the pier. The shipowners pleaded that by the law of Spain the masters and mariners of a ship, and not the owners, were liable for negligent navigation:—Held, that the case was governed by the law of Spain, and that that part of their answer ought not to be struck out. *The M. Moxham*, 46 L. J., P. 17; 1 P. D. 107; 34 L. T. 559; 24 W. R. 650—C. A.

Trespass to and Conversion of Chattels—Process of Foreign Court.]—The courts of this country will not entertain an action for trespass to and conversion of a ship, seized under a process of attachment in a foreign court, and for malicious process for a false claim, until after the plaintiff has obtained a favourable termination of the proceedings in the foreign court; the presumption being omnia rite esse acta. *Taylor* v. *Ford*, 29 L. T. 392; 22 W. R. 47.

IX. JURISDICTION OF ENGLISH COURTS.

a. In General.

Over Foreign Sovereigns.]—*See* col. 179, ante.

Action in England.]—In order that an action may lie between parties in this country in respect of an act committed in a foreign country, the act must be one which if committed in this country would be actionable, and one which is not innocent according to the law of the country where it was committed; but it is not necessary that it should be the subject of civil proceedings in that country. The rule laid down in *Phillips* v. *Eyre* (10 B. & S. 1004; 40 L. J., Q. B. 28; L. R. 6 Q. B. 1) and *The M. Moxham* (46 L. J., P. 17; 1 P. D. 107; 24 L. T. 559; 24 W. R. 650) applied. *Machado* v. *Fontes*, 66 L. J., Q. B. 542; [1897] 2 Q. B. 231; 76 L. T. 588; 45 W. R. 565—C. A.

In considering what power and jurisdiction is conceded to Great Britain within the territories of a foreign state, it must be borne in mind that in transactions, whether political or mercantile, a difference subsists between Oriental and Christian states. *Papayanni* v. *Russian Steam Navigation and Trading Co.* or *The Laconia*, 2 Moore, P. C. (N.S.) 162; 33 L. J., Adm. 11; 9 Jur. (N.S.) 1160; 3 N. R. 219; 9 L. T. 37; 12 W. R. 90.

No state can claim jurisdiction as a matter of right within the territorial limits of another independent state. *Ib.*

Between two Christian states all claim to jurisdiction of any kind, or exemption from jurisdiction, must be founded on treaty, or engagements of similar validity; but the same strict forms would not be required in the intercourse between a Christian and an Oriental nation. *Ib.*

The Ottoman government has acquiesced in allowing to the British government, within the Ottoman dominions, jurisdiction between British subjects and the subjects of other Christian states. *Ib.*

Concurrent Jurisdiction.]—The plaintiff and defendant companies were proprietors of lines of railway in a foreign state and of offices in this country. The plaintiffs sued for the use and occupation of their station in the foreign state by the defendants, who stated in defence that the two companies were both concessionnaires of the foreign state; that the station was built upon land granted by that state; and that by the express provisions of the laws of that state powers of adjusting all rights arising out of the respective claims of the two companies were vested in the government of that state:—Held, that there was nothing in these allegations of the defendants to oust the jurisdiction of the courts of this country. *Buenos Ayres Ry.* v. *Great Northern Ry. of Buenos Ayres*, 46 L. J., Q. B. 224; 2 Q. B. D. 210; 36 L. T. 148; 25 W. R. 367.

Action in England—Similar Action pending Abroad.]—The court will not stay proceedings in an action commenced in this country against a foreigner by a plaintiff who has already commenced an action against him, for the same cause of action, in a court of his own country, on the ground of the pendency of the proceedings abroad. *Cox* v. *Mitchell*, 7 C. B. (N.S.) 55; 29 L. J., C. P. 33; 6 Jur. (N.S.) 225; 1 L. T. 8; 8 W. R. 45. S. P., *Dillon (Lord)* v. *Alvarez*, 4 Ves. 357; 4 R. R. 206.

A suit pending in England is not a good plea in bar to a subsequent suit in the plantations for the same matter. *Bayley* v. *Edwards*, 3 Swanst. 703; 19 R. R. 289—P. C.

A plea of a suit pending in a foreign or colonial court between the same parties, cannot be pleaded in bar to relief sought in a suit in chancery in England between the same parties relative to the same matters. *Ostell* v. *Lepage*, 5 De G. & Sm. 95; 21 L. J., Ch. 501; 16 Jur. 404; 1 W. R. 18. *S. C.* on appeal, 2 De G. M. & G. 892.

In an action of collision a judgment of a foreign court given in a cause between the same parties cannot be pleaded as an estoppel unless such judgment was obtained prior to the institution of the action in this country; there being no res judicata, but lis alibi pendens, when the plaintiff instituted his action here, he can claim to proceed to judgment in this country if he chooses. *The Delta, The Erminia Foscolo*, 45 L. J., P. 111; 1 P. D. 393; 35 L. T. 376; 25 W. R. 46.

—— **Restraining Suit in Foreign Court.**]—A., an Englishwoman by birth, intermarried with B., a natural-born Italian subject, and domiciled in Italy. In 1865, she being then domiciled in England, and some years prior to her marriage, made a will, and thereof appointed the plaintiff (her brother) executor. After her death, which happened in Italy in 1873, a contest arose between her executor and her husband (the defendant) as to the validity of the will. An agreement of compromise was come to between them, and in pursuance of it the plaintiff obtained probate of the will in common form. In 1878, the defendant produced an alleged holographic will of his deceased wife, which bore date December, 1872, and revoked the earlier will. Thereupon the plaintiff commenced a suit in this court, claiming probate in solemn form of the will of 1865. The defendant appeared under protest, but filed a defence and counter-claim, setting up the alleged will of 1872; and he at the same time commenced a suit for a decree affirming its validity in the Civil and Correctional Tribunal of Naples. In these circumstances the court refused to grant an injunction restraining the defendant from proceeding with the Italian suit. *Dawkins* v. *Simonetti*, 50 L. J., P. 30; 44 L. T. 266; 29 W. R. 228—C. A.

B., resident in San Francisco, brought an action against C. in England alleging that C. had been B.'s agent to purchase for him goods in England, that B. had recently discovered that C. had in the accounts rendered charged more for the goods than he had paid for them, and asking for an account against C. as agent. C. by his statement of defence denied agency, alleged that he had as principal sold the goods to B., insisted on the accounts rendered as settled accounts, and alleged that a large balance was due. C. then commenced an action in San Francisco against B. to recover the amount which he so alleged to be due. B. moved to restrain this action:—Held, that the action ought not to be restrained, for that there was no primâ facie inference that the bringing the action abroad, during the pendency of an action in England in which the matters in dispute could be determined, was vexatious, since the course of procedure in San Francisco might be such as to

give advantages to C. of which he was entitled to avail himself, and that the burden lay on B. to prove that C.'s action was vexatious, which he had failed to do. *Hyman* v. *Helm*, 24 Ch. D. 531; 49 L. T. 376; 32 W. R. 258—C. A.

And see further, PRACTICE (*Staying Proceedings*).

—— **Criminal Proceeding preceding Civil Remedy.**]—If by the laws of a foreign state there is a civil remedy for a wrong done there, the fact that by those laws criminal proceedings must precede the civil remedy there, constitutes no bar or defence to an action in this country. *Scott* v. *Seymour* (*Lord*), 31 L. J., Ex. 457; 8 Jur. (N.S.) 568; 6 L. T. 607; 10 W. R. 739. Affirmed, on appeal, 1 H. & C. 219; 1 N. R. 129; 32 L. J., Ex. 61; 9 Jur. (N.S.) 522; 8 L. T. 511; 11 W. R. 169—Ex. Ch.

Extra-territorial Criminal Jurisdiction.]—The ruler of an independent state in India granted to the British government civil and criminal jurisdiction along a line of railway running through the territories:—Held, that this jurisdiction only extended to offences committed on the railway and to matters connected with the administration of the railway, and did not amount to a cession of territory, or justify the arrest of a person on the railway for an offence committed in another part of India in no way connected with it. *Sayad Muhammad Yusuf-ud-Din* v. *Reg.*, 76 L. T. 813—P. C.

All crime is local. The jurisdiction over crime belongs to the country where the crime is committed, and, except over her own subjects, her Majesty and the imperial legislature have no power whatever. *Macleod* v. *Att.-Gen. for New South Wales*, 60 L. J., P. C. 55; [1891] A. C. 455; 65 L. T. 321; 17 Cox, C. C. 341—P. C.

What Law applicable.] — The rule as to property and civil contracts, that an act, unless intended to take effect elsewhere, shall, as regards its effects and incidents, if a conflict of law arises between the lex loci and the lex fori, be governed by the former, applies also to the case of an act causing a personal injury. If such an act is either enjoined or rendered lawful by the law of the country where it is done, an action cannot be maintained here in respect of it. *Phillips* v. *Eyre*, 10 B. & S. 1004; 40 L. J., Q. B. 28; L. R. 6 Q. B. 1; 22 L. T. 869—Ex. Ch.

If, in any case, the rights of foreigners out of their own country are governed by their own laws, it is not by force of those laws themselves, but by the law of the country in which they may be adopting those laws as part of their own laws for the purpose of regulating such rights. *Caldwell* v. *Van Vlissengen*, 9 Hare, 425; 21 L. J., Ch. 97; 16 Jur. 115.

When a foreign rule is repugnant to the fundamental principles of the lex fori, or when it is contrary to religion or sound morality, the doctrine of comity ought not to be followed. *Fenton* v. *Livingstone*, 3 Macq. H. L. 497; 5 Jur. (N.S.) 1183; 7 W. R. 671.

If the adoption of the law of the domicil would occasion a prejudice to the rights of other states and their citizens, or if it would contravene a prohibitory enactment, the comity of nations would not require its adoption. *Ib.*

Primâ facie, and unless the contrary be expressed or be implied from the absolute necessity of the case, every legislature must be presumed to have intended by its enactments to regulate the rights which should subsist between its own subjects, and not to affect the rights of foreigners, whether by way of restricting or augmenting their natural rights. *Cope* v. *Doherty*, 2 De G. & J. 614; 27 L. J., Ch. 600; 4 Jur. (N.S.) 699; 6 W. R. 695.

—— **Penal Laws.**]—Penalties imposed by a foreign law must be enforced in the courts of that country, and not in England. *The Louis*, 2 Dod. 255.

Ousting Jurisdiction.]—English courts will give effect to a stipulation in a contract, entered into in a foreign country between foreigners, not to institute proceedings in any other courts than those of the country of the contracting parties, and refuse to entertain an action on matters arising out of the contract. *Gienar* v. *Meyer*, 2 H. Bl. 603; 3 R. R. 520. S. P., *Johnson* v. *Machielsne*, 3 Camp. 44; 13 R. R. 745.

See further, ARBITRATION.

Plea to the Jurisdiction.]—Claim, stating that the plaintiffs and defendants were each of them limited companies, with registered offices in London; that the action was brought for rent of a railway station in Buenos Ayres (into possession of which the defendants were put by the plaintiffs), and for part of the costs of constructing lines of railway and approaches to the station. Defence, that the plaintiff and defendant companies were domiciled in the Argentine Republic, and carried on business there; that the premises in question were constructed on land which was the property of the republic, and that the plaintiffs and defendants were joint concessionnaires under the republic of certain easements appurtenant thereto. That the construction of the premises was directed by the government of the republic, and was for the benefit and convenience of the citizens of Buenos Ayres, and that by the laws of the republic powers of adjusting all rights arising out of the construction, and applicable to the claim of the plaintiffs, were vested in the government, and that the contract (if any) as to the cost of the construction was made at Buenos Ayres, and was subject to the law of the place of contract, and that the republic had assumed jurisdiction over the plaintiffs' claim:—Held, that the defence was bad, as both parties to the action were within the jurisdiction of the English courts, and the facts alleged did not shew that the Argentine Republic had exclusive jurisdiction over the claim. *Buenos Ayres and Ensenada Port Ry.* v. *Great Northern Ry. of Buenos Ayres*, 46 L. J., Q. B. 224; 2 Q. B. D. 210; 36 L. T. 148; 25 W. R. 367.

b. OF COURT OF CHANCERY.

In General.]—The Court of Chancery will not entertain a suit in respect of a foreign contract, in which the parties are foreign subjects and the subject-matter is in a foreign country, although the plaintiff's claim is in respect of moneys in the possession of a second defendant as stakeholder, and who is within the jurisdiction. *Matthaei* v. *Galitzin*, 43 L. J., Ch. 536; L. R. 18 Eq. 340; 30 L. T. 455; 22 W. R. 700.

Bill filed by a foreigner against another foreigner, and against an English company formed for working a Russian mine, to restrain

the English company from paying to a foreigner part of the profits of the mine which were claimed by the plaintiff, by way of commission, and also for an account of profits against the company. Demurrer allowed. *Ib.*

The courts in England will not, unless there is equity to justify them in so doing, interfere to restrain, by injunction, proceedings taken in a foreign court. *Fletcher* v. *Rodgers*, 27 W. R. 97—C. A.

Mere hardship or inconvenience is not sufficient to justify such interference. *Ib.*

If a plaintiff domiciled in this country sues a British subject here in respect of, or to be released from, a money demand by the defendant, and the defendant appears to the suit, the court will entertain it, although defendant may be actually residing abroad, and the whole subject-matter of the suit, ultra the mere personal claim of the plaintiff, may be in a foreign country and out of the jurisdiction of the court. *Drummond* v. *Drummond*, 37 L. J., Ch. 811; 18 L. T. 896; 17 W. R. 6.

Under circumstances, injunction granted to stay proceedings in Court of Session in Scotland. *Bushby* v. *Munday*, 5 Madd. 297; 21 R. R. 294.

Administration Action.] — An action was brought in England by an infant beneficiary to administer the estate of a testator domiciled in Scotland. The bulk of the estate was in Scotland, and four out of six trustees and executors were domiciled there. The will was proved both in Scotland and England. The trustees all appeared to the writ, without protest, and at their suggestion an inquiry was directed whether the action was for the plaintiff's benefit, which resulted in a decision that it was. At the trial (the English assets having been meanwhile transferred to Scotland) the trustees objected to the jurisdiction of the court. No proceedings had been taken to administer the estate in the Scotch court:—Held, first, that the court had jurisdiction to order an administration; secondly, that, under the circumstances of the case, it had no discretion in the matter, but was bound to make the order, though the action might be stayed before or after decree if it appeared that proceedings were pending in a Scotch court equally beneficial to the plaintiff. Dicta of Lord Westbury in *Enohin* v. *Wylie* (10 H. L. Cas. 1) disapproved. *Ewing* v. *Orr-Ewing*, 53 L. J., Ch. 435; 9 App. Cas. 34; 50 L. T. 401; 32 W. R. 573—H. L. (E.)

In an action commenced in Scotland by the residuary legatees against the trustees, after the decision in the above case in the Court of Appeal, but before the hearing in the House of Lords, claiming, inter alia, declarator that the trustees were bound to administer the estate in Scotland, subject to the Scotch law, and under the authority and jurisdiction of the Scotch courts alone; the Court of Session granted an interlocutor finding in the terms of the declaratory conclusions of the summons, and interdicted the trustees from accounting to anyone otherwise than to the judicial factor appointed by the court:—Held, on appeal to the House of Lords, that the decerniture in terms of the declaratory conclusions of the summons, which in effect affirms the exclusive competency of the Scottish jurisdiction, was not supported by statute or authority; and, therefore, that part of the principal interlocutor, and that part of the interdict relating to accounting, must be reversed. *Ewing* v. *Orr-Ewing*, 10 App. Cas. 453; 53 L. T. 826—H. L. (Sc.)

A testator of English birth and domicil died possessed of real and personal estate in Holland. A decree for the administration of his real and personal estate was made in the Court of Chancery, but subsequently proceedings were taken in the Dutch courts by the testator's daughter, alleging that his domicil was in reality in Holland, and seeking distribution of the estate, movable and immovable, as upon an intestacy, according to the laws of that country. Upon a bill filed to restrain these proceedings:—Held, that, in the absence of proof that the Dutch suit could proceed as to the real estate alone without affecting the personal estate, an interlocutory injunction had been properly awarded by Stuart, V.-C.; but Knight Bruce, L.J., was of opinion that the injunction ought to be confined to proceedings as to the personal estate. *Hope* v. *Carnegie*, L. R. 1 Ch. 320; 12 Jur. (N.S.) 284; 14 L. T. 117; 14 W. R. 489.

A testator died, domiciled in Jersey, leaving a widow and two infant children. By his will he gave the whole of his personal property, subject to a certain annuity to his wife, to his children. He died possessed of 13,000*l.* of English consols, and also of certain property in Jersey. The principal part of the latter consisted of a share in the property of a certain partnership, which had since his death become insolvent. His widow and two others were his executrix and executors. A gentleman resident in Jersey was shortly after the testator's death appointed "tuteur" of the infant children in accordance with the law of Jersey. The widow married again, and with the two children came to reside in England. An action was commenced in the Chancery Division by the infant children for administration of the testator's real and personal estate, and for the appointment of guardians. Leave was given for the service of the writ out of the jurisdiction on the "tuteur" and executors in Jersey; but after service, and before appearance, they moved to discharge the order, on the ground that the proceedings were wrongly instituted in this country:—Held, that, inasmuch as the plaintiffs were resident in England, and the bulk of the property was in England, there was no reason why the action should not be brought there. *Lane, In re, Lane* v. *Robin*, 55 L. T. 149.

Upon a bill filed in the Court of Chancery in England by creditors, decree was made to execute the trust of a deed, by which lands in Ireland were vested in trustees for the payment of debts. The debtor, a peer of the realm, did not answer the bill, or appear at the hearing of the original suit, but filed an answer to a supplemental suit, and by cross bill impeached the debts as fraudulent, and opposed the proceedings by counsel in various stages of the supplemental suits; by the decree in these suits an injunction and a receiver was appointed. But it being found impracticable to execute the decree, a bill was filed in the Court of Chancery in Ireland to carry the former decree into execution:—Held, reversing the judgment of the court below, that, under the circumstances, the court had jurisdiction, and the propriety of the English decree might be examined in the suit in Ireland; but that if part of it was sustainable, it might so far be executed by aid of the Irish court, although other parts might be erroneous. *Houldditch* v. *Donegal* (*Marquis*), 8 Bli. (N.S.) 301; 2 Cl. & F. 470—H. L. (Ir.)

A plaintiff, in England, filed a bill for an

account against the executors of a deceased partner, some of whom were in Jamaica, but acting in concert with the others, who were in England; the partnership property being in Jamaica:—Held, upon a plea to the jurisdiction by the executors resident in Jamaica, that the suit was properly instituted in this country. *Hendrick* v. *Wood*, 9 Jur. (N.S.) 117.

B., who was held by the Scotch courts to have been a domiciled Scotchman, died in England, and his executor and universal legatee obtained probate in Scotland. He also sought to obtain probate in England, but the will was disputed by B.'s next of kin. There was an agreement to compromise the matter, but it eventually failed, and the executor's application to procure the seal of the English Probate Court was unsuccessful. The next of kin filed a bill for administration in England and Scotland, and for a receiver, and obtained an order to serve the executor with a copy of the bill, on which was indorsed an order for a receiver, and injunction in Scotland. On a motion by the executor to discharge this order on the ground that the jurisdiction was in England:—Held, that the executors ought not to have been so served; that the order for service as to the receiver and injunction must be discharged, but not as to service of a copy of the bill, the next of kin having consented at the request of the executor to enable him to get the seal affixed in the English Probate Court. *Hawarden* (*Viscountess*) v. *Dunlop*, 2 Dr. & Sm. 155; 7 L. T. 237; 10 W. R. 683.

Account.]—A., an Englishman domiciled in France, entered into a contract in France with B., a Frenchman, for carrying out jointly certain mercantile undertakings. In the course of the transactions large sums of money came into the hands of C. & D., foreign merchants in business in London. A. filed a bill against B., C. & D., alleging that, under the contract with B., he was entitled to participate in the profits of the undertaking, and praying for an account from C. & D. of the money in their hands, and that they might be restrained from handing it over to B. The defendants moved to stay all further proceedings in the suit pending certain proceedings in the French courts instituted by A. against B., in which a construction would be put upon the French contract:—Held, that there being portions of the relief sought as to which the defendants were bound to answer, the motion, which was in the nature of a demurrer, could not be sustained, and must be refused with costs. *Wilson* v. *Ferrand*, L. R. 13 Eq. 362; 26 L. T. 387.

Demurrer to a bill for an account of waste committed in Ireland overruled. *Kennedy* v. *Cassilis* (*Earl*), 2 Swanst. 323.

Bill filed by a foreigner against another foreigner, and against an English company formed for working a Russian mine, to restrain the English company from paying to a foreigner part of the profits of the mine which were claimed by the plaintiff, by way of commission, and also for an account of profits against the company. Demurrer allowed. *Matthaei* v. *Galitzin*, 43 L. J., Ch. 536; L. R. 18 Eq. 340; 30 L. T. 455; 22 W. R. 700.

Election.]—A domiciled Scotchman by his will gave certain benefits to his wife, and she after his death filed a bill claiming her right by the law of Scotland to elect between such benefits and one-third of his movables, and her terce in his heritable estate, and praying that the value of the objects between which she had to elect should for the purpose of her election be ascertained by the court. The devisee of the Scotch real estate, who was also residuary legatee, and one of the executors filed a cross bill praying for a general administration of the personalty:—Held, that under the circumstances the court had jurisdiction to direct such inquiries as might be necessary to guide the wife in exercising her right of election, and as far as possible to give effect to it. *Douglas* v. *Douglas*, 41 L. J., Ch. 74; L. R. 12 Eq. 617; 25 L. T. 530; 20 W. R. 55.

Erroneous Foreign Judgment.]—A plaintiff, a domiciled colonial subject, against whom judgment had been recovered in the colonial court, took the benefit of the laws in force in the colony for the relief of insolvents. He subsequently desired to appeal to the Privy Council against the judgment, but his assignee refused to allow his name to be used for that purpose. The assignee having come over to this country, the plaintiff filed a bill against him, alleging that if the judgment was set aside, as it probably would be, there would be a large surplus coming to him, and praying that the assignee might be ordered to allow his name to be used for the purpose of an appeal, upon a proper indemnity being given. To this bill a demurrer was put in:—Held, that the colonial court was the proper jurisdiction, and as the plaintiff had not shewn that he was not without remedy there, the demurrer must be allowed. *Smith* v. *Moffatt*, 35 L. J., Ch. 219; L. R. 1 Eq. 397; 12 Jur. (N.S.) 22; 14 W. R. 242.

Fraud.]—An injunction to restrain the prosecution of a suit in Scotland to enforce a real security granted on a suggestion of fraud, afterwards dissolved, notwithstanding the remedy in cases of fraud might be more effectual than in the Court of Session, the question on the whole being likely to be more conveniently litigated and concluded there than here. *Jones* v. *Geddes*, 1 Ph. 724.

Partition.]—Demurrer to a bill for a partition of lands in Ireland allowed. *Kennedy* v. *Cassilis* (*Earl*), 2 Swanst. 323.

Partnership.]—A., a resident in England, and the sole member of a Liverpool firm, entered into a partnership with B. and C., residents in Hayti, in a business to be carried on at Hayti. The Liverpool firm acted as the agents of the Haytian firm. B. was admitted as a partner in the Liverpool firm. C. died, and the winding-up of the Haytian firm was committed by agreement to A. and B. A. died, leaving B. sole survivor in each firm. B. and the Haytian legal representatives of C. engaged in cross suits in Hayti, in which certain settled accounts were established. The representatives of A., whose assets were all in England, was not a party to the Haytian suit:—Held, on a bill filed by the administrator of C. in England, that there was jurisdiction in the Court of Chancery to wind up the partnership in Hayti, and to take the accounts of that firm and of the agency of the Liverpool firm; and decree accordingly. *Maunder* v. *Lloyd*, 2 J. & H. 718; 1 N. R. 123; 11 W. R. 141.

Held, also, that the law of Hayti was to regulate the transactions of the Haytian firm. *Ib.*

The principles governing the jurisdiction in partnership cases are analogous to the rules of the civil law. Three circumstances must be

found to exist, but any one of them will support the required jurisdiction; first, the domicil of the defendant in the suit must be within the territorial jurisdiction of the court; secondly, the subject of the suit must also be within it; and thirdly, the partnership contract must be entered into, or be to be performed within that jurisdiction. *Cookney* v. *Anderson*, 32 L. J., Ch. 305; 1 N. R. 77; 8 Jur. (N.S.) 1220; 7 L. T. 491. Affirmed 32 L. J., Ch. 427; 9 Jur. (N.S.) 736; 8 L. T. 295; 11 W. R. 629; 2 N. R. 140—L. JJ.

Where, therefore, a plaintiff when residing here filed a bill against the defendants, who were all domiciled in Scotland, to obtain a decree for the administration of the trusts of a Scotch deed relating to a mining partnership in Scotland, so that no one of the requisites, neither the forum domicilii, nor the forum loci rei sitæ, nor the forum contractûs, existed, a demurrer to the bill for want of equity was allowed. The circumstance of the ordering of service on the defendants out of the jurisdiction, and of their not moving to discharge such order:—Held, not to affect their right to demur. *Ib.*

Two Portuguese subjects carried on business in partnership in one business at Lisbon. One of them carried on his own business at the same place, and the other carried on his own business in London. The Portuguese resident was also agent at Lisbon for the other in another business. The partnership was dissolved, and the Portuguese resident came on a visit to England, whereupon the other filed a bill for accounts, and obtained a writ of ne exeat regno against him. Upon a motion to discharge the writ:—Held, that the question of debt or no debt must be governed by the law of Portugal alone; and it not appearing with sufficient clearness that a debt existed, and the plaintiff having omitted to state that the debt, if any, would be endangered by the departure of the defendant, the writ was discharged. *Vanzeller* v. *Vanzeller*, 15 Jur. 115.

Patent.]—Foreigners in this country, as well as British subjects, are liable to actions for the injury done by their infringing upon the sole and exclusive right granted by the Crown to patentees of inventions, in conformity with the law and constitution of this country; and the powers of the court of equity, which are founded on the insufficiency of the legal remedy, must be enforced against them as well as against British subjects. *Caldwell* v. *Van Vlissengen*, 9 Hare, 415; 21 L. J., Ch. 97; 16 Jur. 115.

Trade Mark or Description.]—A foreign manufacturer has a remedy by suit, in this country, for an injunction and account of profits against a manufacturer here who has committed a fraud upon him by using his trade mark for the purpose of inducing the public to believe that the goods so marked are manufactured by the foreigner. *Collins Co.* v. *Brown*, 3 Kay & J. 423; 3 Jur. (N.S.) 929; 5 W. R. 676.

This relief is founded upon the personal injury caused to the foreigner by the defendant's fraud, and exists, although he resides and carries on his business in another country, and has no establishment here, and does not even sell his goods in this country. *Ib.*

Semble, a person on whom an injury is fraudulently committed may have a remedy in the courts of any country where the fraud occurs, and even although he is at the time an alien enemy. *Ib.*

An alien can in the courts of this country sue to restrain the fraudulent appropriation of his trade mark, although the goods on which such trade mark is affixed are not usually sold by him in this country. *Collins Co.* v. *Reeves*, 4 Jur. (N.S.) 865; 6 W. R. 717.

Copyright.]—*See* COPYRIGHT.

Preserving Property in Medio.]—Where courts of Scotland have power to preserve property pendente lite instituted there, this court has no jurisdiction to that end. *Cruikshank* v. *Roharts*, 6 Madd. 104.

A person holding by the warrant of her majesty the office of judicial assessor to the native princes, and being also chief justice of her majesty's dominions on the Gold Coast of Africa, took possession of the personal effects of a British subject who died intestate, domiciled at Cape Coast Town, in Africa, and claimed to be the official administrator of these assets by usage, in his capacity of judicial assessor, and as such to be entitled to 7½ per cent. commission upon them. He afterwards transmitted part of the assets to this country to be sold, and the proceeds carried to the account of the intestate's estate, and came to this country himself on leave of absence for a short time. The father of the intestate, being his sole next of kin, obtained letters of administration to him in England, and filed his bill against the judicial assessor for administration and for a receiver. And upon motion for a receiver in the suit:—Held, that the Court of Chancery had jurisdiction to sustain the application, as the assets and the judicial assessor were both in this country, whatever might be the nature of his authority; and that, there being the danger of his taking the assets again out of the jurisdiction, although he might be the proper representative of the intestate in Africa, a good case was made for the appointment of a receiver. *Hervey* v. *Fitzpatrick*, 1 Kay, 421; 2 Eq. R. 444; 23 L. J., Ch. 564; 2 W. R. 338, 365.

An inquiry as to the nature and extent of the jurisdiction exercised by her majesty at Cape Coast Town, in the administration of personal estate of persons dying there intestate, and the manner of exercising such jurisdiction, directed to the Colonial Office, under the provisions of 6 & 7 Vict. c. 94. *Ib.*

But a motion that the defendant might pay into court proceeds of assets in his own hands was refused. *Ib.*

A company of shipowners, on whose behalf the defendant, as their broker, had effected policies, had instituted proceedings in a competent court in Genoa against the defendant for an account, to which suit he had appeared, and, before final decree in the foreign court, he commenced actions in England against the insurers upon one of the policies which had resulted in a loss:—Held, that it was competent for the company to file a bill to restrain the action, and to have a receiver of the policy-moneys pending the foreign litigation. *Transatlantic Co.* v. *Pietroni*, Johns. 604; 6 Jur. (N.S.) 532. *But see* as to the first point, *Bayley* v. *Edwards*, 3 Swanst. 703; 19 R. R. 289. *Venning* v. *Lloyd*, 1 De G. F. & J. 193; 29 L. J., Ch. 152; 6 Jur. (N.S.) 81; 1 L. T. 277; 8 W. R. 117. *Hyman* v. *Helm*, 24 Ch. D. 531; 49 L. T. 376; 32 W. R. 258—C. A.

Stakeholder.]—A fund belonging to foreigners out of the jurisdiction was by arrangement

among them sent by A., one of their number, to English agents for distribution among the persons entitled. A., having endeavoured to get back the fund and misapply it, one of the foreigners filed a bill to restrain the misapplication and for the administration of the fund. A plea to the jurisdiction by the English agents disallowed, although the fund was not so invested as to enable the court to order service on the defendants abroad. *Central Railroad and Banking Co. of Georgia* v. *Mitchell*, 2 H. & M. 452; 11 Jur. (N.S.) 258; 12 L. T. 73; 13 W. R. 428.

When a bill is filed against a stakeholder in this country, and against persons out of the jurisdiction, whom the plaintiff cannot serve, owing to the nature of the property, if the plaintiff uses his best endeavours to bring them in, by giving them notice of the proceedings, and they refuse to appear, the fund will be distributed in their absence. *Ib.*

The Court of Chancery will not entertain a suit with respect to a foreign contract, in which the parties are foreign subjects, and the subject-matter is in a foreign country, although the plaintiff's claim is in respect of moneys in the possession of a second defendant as stakeholder and who is within the jurisdiction. *Matthaei* v. *Galitzin*, 43 L. J., Ch. 536; L. R. 18 Eq. 340; 30 L. T. 455; 22 W. R. 700.

Actions relating to Lands Abroad.]—This court having jurisdiction in personam, upon an equity arising out of transactions concerning lands abroad, particularly if in the British dominions, a purchase of an estate in the West Indies by a creditor under his own execution was upon the circumstances held only a security for the debt, the expenses of the proceedings and incumbrances paid by him, with interest and subject thereto a reconveyance was decreed. *Cranstown* (*Lord*) v. *Johnston*, 3 Ves. 170; 3 R. R. 80.

Specific Performance.]—The court will specifically enforce against a foreigner a contract of sale made abroad, if the subject-matter of the contract is within its jurisdiction. *Hart* v. *Herwig*, 42 L. J., Ch. 457; L. R. 8 Ch. 860; 29 L. T. 47; 21 W. R. 663.

Therefore, when a contract was made abroad for the sale of a foreign vessel to be delivered in this country, the court granted an interim injunction to restrain the removal of the ship from an English port, allowing substituted service of the notice of motion on the captain. *Ib.*

—— **Relating to Land Abroad.**]—A contract between domiciled Englishmen relating to immovable property in a foreign country is governed by English law, and is therefore cognisable by the courts of this country, although it has been adjudicated upon by the courts of the country in which the estate is situate. *Cood* v. *Cood*, 33 Beav. 314; 3 N. R. 275; 33 L. J., Ch. 273; 9 Jur. (N.S.) 1335.

A. and B. were entitled to real estate in Chile. A., who was residing there, wrote to B. in this country, offering to purchase his interest in the property. B. replied in terms which would warrant A. in concluding that he had accepted the offer. Nothing further was done on either side during a period of thirteen years to ratify or annul the contract:—Held, that B. was barred by lapse of time from disputing the existence of the contract. *Ib.*

—— **Against Purchaser with Notice.**]—Although a purchaser to whom land out of the jurisdiction of the court has been agreed to be sold by a person within the jurisdiction, may sue him for a specific performance of the agreement, or may possibly enforce a lien for money paid by the plaintiff on account of the price, he cannot sue here a third person to whom the vendor has afterwards sold the property, although such third person had notice of the former contract, there being no privity of contract before the two purchasers. *Norris* v. *Chambres*, 3 De G. F. & J. 583; 7 Jur. (N.S.) 689; 9 W. R. 794.

Nor will the court interfere if the matter is the subject of litigation in a foreign court which has the means of deciding upon and enforcing the rights of the parties. *Ib.*

—— **Delivery of Title Deeds.**]—A contract was entered into at Boulogne, where the plaintiff was resident, between him and the defendant, who was resident in Ireland, for the sale of land in Ireland. A receiver had been appointed by the Irish Court of Chancery. A bill was filed in this country asking that certain deeds relating to the property might be ordered to be given up. A plea by the defendant that the court had no jurisdiction was allowed. *Blake* v. *Blake*, 18 W. R. 944.

Trusts.]—An English lady married in England a domiciled Scotchman and a settlement in the English form was executed. The settled property was wholly in England, and the trustees resided in England. The marriage was subsequently dissolved for the wife's adultery, by the Scotch court. The effect of such a dissolution, according to Scotch law, is that the person against whom the decree is made is treated as dead for the purposes of the marriage settlement, and the question arose whether Scotch or English law was applicable. The husband brought an action in Scotland, in which the trustees were nominal plaintiffs, for the construction of the settlement; another action was brought in England by the wife for the administration of the trusts of the settlement:—Held, on motion by the wife to stay the Scotch action, that, under the circumstances, it was more convenient that the questions should be decided in the English action; and that the husband and trustees must therefore be restrained from proceeding with the Scotch action. *Hearn* v. *Glanville*, 48 L. T. 356.

Restraining Proceedings in Foreign Courts.]—If the circumstances of a case are such as would make it the duty of a court of equity in this country to restrain a party from instituting proceedings in another court here, they will also warrant it in imposing on him a similar restraint with regard to proceedings in a foreign court. *Carron Iron Co.* v. *Maclaren*, 5 H. L. Cas. 416; 24 L. J., Ch. 620; 3 W. R. 597.

The fact of a foreigner having property in this country, enables a court of equity here to make effectual an injunction issued to him, but, especially in the case of a foreigner who seeks no assistance from the courts here, the issuing of such injunction ought clearly to be shewn to be required as conducive to justice. *Ib.*

When there is a plain equity in favour of an injunction, and the representatives of the real and personal property, who seek it, are in this,

the court will grant it, and restrain proceedings in the courts of a foreign country. *Ib.*

In such a case the court will decide upon a consideration of all the circumstances and require parties here to take or direct such steps in a foreign court as the ends of justice require. *Ib.*

The particular provisions of the foreign law applicable to a transaction, proceedings as to which in a foreign court are thus restrained, must not be regarded. *Ib.*

An incumbrancer on immovable property situate in a foreign country, who has instituted legal proceedings in that country for the purpose of enforcing his rights, will not be restrained by injunction from prosecuting such proceedings, even though the mortgagor is a company in course of winding up, at all events if the party seeking to restrain him may appear before the foreign tribunal and assert his rights. *Moor* v. *Anglo-Italian Bank*, 10 Ch. D. 681; 40 L. T. 620; 27 W. R. 652.

Injunction to restrain the defendants from suing in Ireland upon a bill of exchange given by the plaintiff for a gambling debt under the circumstances continued. Jurisdiction of the Court of Chancery to stay the proceedings of parties in foreign courts. *Portarlington (Lord)* v. *Soulby*, 3 Myl. & K. 104; 4 L. J., Ch. 241.

If the proceedings in a foreign court will enable this court more satisfactorily to dispose of the question between the parties, this court will permit such proceedings to go on to an adjudication; but it will not give such permission, where the adjudication of the foreign court between the parties there, whatever it may be, will not preclude the question which the plaintiffs in this court may think proper to raise against the plaintiffs in the proceedings in the foreign court. *Bunbury* v. *Bunbury*, 1 Beav. 318; 8 L. J., Ch. 297; 3 Jur. 644.

Where the title of a party does not turn on the law of a foreign country in the first instance, though it may ultimately, but on a preliminary question, which this court is not only as competent as the foreign court to decide upon, and, according to the position of the parties, much more competent, inasmuch as this court has all the parties before it, this court will not allow the proceedings in the foreign court to go on, involving the same question, with the chance of the two courts arriving at opposite conclusions. *Ib.*

The courts in England will not, unless there is equity to justify them in so doing, interfere to restrain by injunction proceedings taken in a foreign court. Mere hardship or inconvenience is not sufficient to justify such interference. Sect. 25, sub-s. 8, of the Judicature Act, 1873, does not alter the former practice as to injunctions, but is only intended to do away with certain technical objections. *Fletcher* v. *Rodgers*, 27 W. R. 97—C. A.

An injunction was granted to restrain the plaintiff from prosecuting a suit, not brought to a hearing in Ireland, the subject-matter of that suit being the same as that of a suit instituted in the Court of Chancery, and in which that court had pronounced a decree refusing the relief sought by the plaintiff. *Booth* v. *Leycester*, 1 Keen, 579.

Injunction to restrain proceedings in the court of session in Scotland, dissolved under the circumstances. *Kennedy* v. *Cassillis (Earl)*, 2 Swanst. 313.

Whether property is to be administered according to the English or Scottish notions of equity, is dependent on the national character of the parties and the property to be affected by the decree. *Ib.*

The Court of Session is a court of law and of equity. *Ib.*

The Court of Chancery in England has no power to restrain an Irish creditor for proceeding to recover his claim against the estate of an intestate deceased debtor, domiciled and leaving property in Ireland. An Irish creditor cannot be compelled to prove his claim in England, or to forego his rights to recover in Ireland, he being in no privity to the English suit. *Browne* v. *Roberts*, Ir. R. 5 Eq. 540; 19 W. R. 115—Ir. Ch. App.

—— **Where Remedies in English and Foreign Court are not identical.**]—The Court of Chancery will interfere by injunction to restrain a plaintiff from prosecuting two distinct suits in different courts for the same object, either in this or a foreign country. But a plaintiff may carry on proceedings in one court to establish a demand, and in another court to obtain security, which the former court is unable to give him, for what should be found due to him. *Wedderburn* v. *Wedderburn*, 4 Myl. & Cr. 855; 9 L. J., Ch. 205; 4 Jur. 661. Affirming 2 Beav. 208; 4 Jur. 66.

Plaintiffs had obtained a decree for an account in the Court of Chancery in England, against defendants, some of whom resided in Scotland, and had estates there. The plaintiffs then instituted proceedings in the Court of Session in Scotland, for the same purposes as the English suit, and also to obtain a lien on the Scotch estates of the defendants. The Court of Chancery granted an injunction, on the application of the defendants, to restrain the plaintiffs from proceeding with the suits in the Court of Session, except for the purpose of procuring security for what might be found due to them. *Ib.*

There is no primâ facie inference that the bringing an action abroad, during the pendency of an action in England in which the matters in dispute can be determined, is vexatious, since the course of procedure in the foreign forum may be such as to give to the party invoking the assistance of the foreign forum, advantages of which he is entitled to avail himself, and the burden lies on the party disputing the right to bring the foreign action to prove that it is vexatious. *Hyman* v. *Helm*, 24 Ch. D. 531; 49 L. T. 376; 32 W. R. 258—C. A.

An injunction granted on terms, to restrain proceedings instituted in Demerara to recover real estate there, and an order made for a consignee and manager of the estate and produce; it appearing to the court that there were many other questions between the parties connected with the estate, which could be more conveniently determined together in this country. *Bunbury* v. *Bunbury*, 1 Beav. 318; 8 L. J., Ch. 297; 3 Jur. 664.

Before this court interposes upon an interlocutory application to stay proceedings in a suit by reason of a decree or judgment in a foreign country, it must be satisfied that the foreign decree or judgment does justice and covers the whole subject of the suit. *Ostell* v. *Le Page*, 2 De G. M. & G. 892. Reversing 5 De G. & Sm. 95; 21 L. J., Ch. 501; 16 Jur. 1134; 1 W. R. 18.

A motion to stay proceedings pending the determination of proceedings in French courts refused, thereby portions of the relief sought as to which the defendant was bound to answer. *Wilson* v. *Ferrand*, L. R. 13 Eq. 362; 26 L. T. 387.

—— **Before Decree for Administration.**]—A testator domiciled in England gave his real and personal property, situate in England and Scotland, to be divided between two of his sons, and appointed his three sons executors. The will was proved in England by two of the sons. At the death of the testator the other son, one of the residuary legatees, was indebted to an insurance company carrying on business in Scotland and England, who obtained judgment in an action in Scotland against such son, and proceeded in Scotland against the executors to arrest the amount in their hands, to whom the indebted son was entitled. The court, upon the executors undertaking to obtain forthwith an administration decree in England, granted an injunction to restrain the proceedings in Scotland against the executors. *Baillie* v. *Baillie*, 37 L. J., Ch. 225; L. R. 5 Eq. 175; 17 L. T. 376; 16 W. R. 272.

—— **After Decree for Administration.**]—After a decree for administration of a testator's estate in England and Ireland, an incumbrancer upon the Irish estate having come in and proved his debt, restrained from proceeding in a creditors' suit instituted by him in the Court of Chancery in Ireland, receiving the costs up to the time of his having notice of the decree, and paying the costs of the application. *Beauchamp* v. *Huntley* (*Marquis*), Jac. 546; 23 R. R. 143.

The court will not interfere by injunction to restrain a foreign creditor resident abroad from suing for his debts in the courts of his own country, although a decree has been made here for the administration of the estate of the debtor, and the foreign creditor has come in under the decree, and filed evidence to prove his debt in the administration action. *Boyse, In re, Crofton* v. *Crofton*, 49 L. J., Ch. 689; 15 Ch. D. 591; 29 W. R. 169.

The court has no power to restrain an Irish creditor from proceeding to recover his claim against the estate of an intestate deceased debtor, domiciled and leaving property in Ireland. An Irish creditor cannot be compelled to prove his claim in England, and to forego his rights to recover in Ireland, he being in no privity with the English suit. *Browne* v. *Roberts*, 5 Ir. Eq. R. 540; 19 W. R. 115—Ir. Ch. App.

A British subject, entitled to real and personal estate, both in England and in the Netherlands, died domiciled in England, leaving a will by which he gave to trustees, upon certain trusts, all his property here and abroad; but as to his foreign property so far only as he could dispose of it according to the law of the country where it was situate. A decree was made in England for the administration of his estate. Subsequently, one of his children instituted proceedings in the Netherlands, for the administration of both his real and personal estate in that country. Stuart, V.-C., made an order restraining the prosecution of the pending proceedings in the Netherlands, and the taking any other proceedings there as to the personal estate. On appeal from this order:—Held, by Knight Bruce, L.J., that the order ought not to have absolutely restrained the appellant from carrying on the pending proceedings in the Netherlands, but ought to have left her at liberty to carry them on as to the real estate—if she could do so without proceeding as to the personal estate; but by Turner, L.J., that the order ought not to be thus varied, the appellant not having shewn that the proceedings could be carried on as regarded the real estate alone. *Hope* v. *Carnegie*, L. R. 1 Ch. 320; 12 Jur. (N.S.) 284; 14 L. T. 117; 14 W. R. 489.

A company was chartered in Scotland for the manufacture of iron. Its manufactory and chief office of management were there, it had agents for the sale of the goods in different parts of Scotland and England, and it possessed real estate in both countries. A., a large shareholder in the company, and possessed of real and personal property in England and Scotland, was the company's agent for the sale of goods in London, and was domiciled here. When he died, he made a will in the English form, and appointed as his executors persons who were resident in both countries; his heir was one of these persons, and was also the person who succeeded him in the London agency of the country. Probate of the will was taken out in England, and such of the executors as thought fit to apply to the Scotch court were, according to the Scotch law, confirmed in the execution of the will. An administration suit was instituted in the Court of Chancery, and the usual order for a general account of the debts and assets made. After the date of this order, the company took proceedings in the Scotch courts against the real and personal estate of the testator in Scotland. Notice of an injunction, at the suit of the executors, was served on the company's agent in London and on the company's manager in Scotland; the company did not appear, and the injunction was issued. The company then moved to dissolve the injunction. No order was made:—Held, that the injunction could not be maintained. *Carron Iron Co.* v. *Maclaren*, 5 H. L. Cas. 416; 24 L. J., Ch. 620; 3 W. R. 597. *And see* the further litigation between the same parties, nom. *Maclaren* v. *Stainton*, *Maclaren* or *Stainton* v. *Carron Co.*, 21 Beav. 152; 26 L. J., Ch. 332; 25 L. J., Ch. 577; 2 Jur. (N.S.) 49.

A decree was made in an administration suit against executors, which directed an account of the testator's debts, and an inquiry as to incumbrances affecting the real estate. The usual advertisements for creditors were published. P. thereupon claimed specific performance of an agreement by the testator for a lease to him of lands in Ireland. The executors did not dispute the agreement. P. commenced proceedings against the executors and trustees in Ireland. Upon motion by the executors, an injunction was granted restraining him from prosecuting the suit in Ireland. *Eustace* v. *Lloyd*, 35 L. T. 900; 25 W. R. 211.

—— **Creditors' Trust Deed.**]—Trustees for creditors, after decree for execution of trusts, restrained from proceeding in a suit in Court of Chancery in Ireland having same objects. *Harrison* v. *Gurney*, 2 Jac. & Walk. 563; 22 R. R. 211.

—— **Bankruptcy.**]—The Court of Chancery has jurisdiction to grant an injunction, at the suit of the asignees of a bankrupt, to restrain the obligee under a heritable bond, executed by the bankrupt before his bankruptcy, from proceed-

ing in the Court of Session in Scotland, to obtain payment of his debt out of a real estate in Scotland belonging to the bankrupt at the date of the bond, and thereby charged with the debt; but it will not exercise that jurisdiction, if the circumstances of the case render its interference unadvisable, as if the question between the parties might, upon the whole, be more conveniently litigated, and with a more conclusive result there than here. *Jones* v. *Geddes*, 1 Ph. 724; 14 Sim. 606.

Where a debtor became bankrupt in England, having real estate in Scotland:—Held, that this state of circumstances gave no jurisdiction to the Court of Chancery to restrain a creditor who had not proved under the bankruptcy from proceeding in an action against the assignees in Scotland, for the purpose of recovering out of the real estate there an amount equal to the dividend which would have been payable upon the debt. The grounds on which the Court of Chancery restrains creditors from proceeding against an executor after a decree for administration do not exist in such a case. *Pennell* v. *Roy*, 3 De G. M. & G. 126; 22 L. J., Ch. 409; 17 Jur. 247; 1 W. R. 237.

—— **Foreclosure Action after Action for Redemption.**]—Injunction to stay proceedings on bill to foreclose in foreign court, redemption being in progress in Court of Chancery here, granted. *Beckford* v. *Kemble*, 1 Sim. & S. 7; 1 L. J. (o.s.) Ch. 5; 24 R. R. 143.

Jurisdiction upon a Contract concerning an Estate in a Colony.]—But the question upon the construction of the contract, for a security by way of mortgage, having been before a court of competent jurisdiction in the colony, and a foreclosure and judicial sale directed, the allegations of fraud being merely general and denied, an injunction was refused. *White* v. *Hall*, 12 Ves. 321; 8 R. R. 324.

—— **Action respecting Testamentary Disposition.**]—A., an English woman by birth, intermarried with B., a natural-born Italian subject, and domiciled in Italy. In 1865, she being then domiciled in England, and some years prior to her marriage made a will, and appointed the plaintiff (her brother) executor thereof. After her death, which happened in Italy, in 1873, a contest arose between her executor and her husband (the defendant) as to the validity of the will. An agreement of compromise was come to between them, and in pursuance of it the plaintiff obtained probate of the will in common form. In 1878, the defendant produced an alleged holographic will of his deceased wife, which bore date December, 1872, and revoked the earlier will. Thereupon the plaintiff commenced a suit in this court, claiming probate in solemn form of the will of 1865. The defendant appeared under protest, but filed a defence and counterclaim, setting up the alleged will of 1872; and he at the same time commenced a suit for a decree affirming its validity in the Civil and Correctional Tribunal of Naples. In these circumstances, the court refused to grant an injunction restraining the defendant from proceeding with the Italian suit. *Dowkins* v. *Simonetti*, 50 L. J., P. 30; 44 L. T. 266; 29 W. R. 228—C. A.

—— **On the Ground of Convenience.**]—An English lady married in England a domiciled Scotchman, and a settlement in the English form was executed. The settled property was wholly in England, and the trustees resided in England. The marriage was subsequently dissolved, for the wife's adultery, by the Scotch court. The effect of such a dissolution, according to Scotch law, is that the person against whom the decree is made is treated as dead, for the purposes of the marriage settlement, and the question arose whether Scotch or English law was applicable. The husband brought an action in Scotland, in which the trustees were nominal plaintiffs, for the construction of the settlement; another action was brought in England by the wife for the administration of the trusts of the settlement:—Held, on motion by the wife to stay the Scotch action, that, under the circumstances, it was more convenient that the questions should be decided in the English action; and that the husband and trustees must therefore be restrained from proceeding with the Scotch action. *Hearn* v. *Glanville*, 48 L. T. 356.

Other Matters.]—The plaintiff, W. A., a domiciled Scotchman, through his stockbroker in England, had various transactions for the feigned purchase and sale of shares and stock in railway and other companies; it was never intended that they should be completed by delivery of the stock, being merely time bargains, a gambling for differences between the prices at which the shares or stock were nominally purchased and sold. The brokers obtained from W. A. a deposit of certain shares as security for any balance which might be due to them, and also stipulated for a bond or judge's order, both in England and Scotland, as a further security. The defendants rendered an account, and then sold the deposited shares; but as the proceeds did not discharge the balance due to them, they brought an action against him in the sheriff's court in Scotland for the balance, and arrested his goods there, and a commission was issued for the purpose of taking evidence in England. W. A. then filed his bill in England, asking discovery, and for an account, and for an injunction to restrain the defendants from proceeding with the action in Scotland, at the same time offering to pay what was due, and submitting all his property in Scotland, subject to the arrestments, to the jurisdiction of this court. Upon a general demurrer to the bill:—Held, that the illegality of the transaction could not be then considered; that it was no ground for stopping the proceedings in a foreign court; that from the allegation that evidence of the transactions could not, by the law of Scotland, be received in the sheriff's court from the plaintiff and the defendants, there was ground to suppose that complete justice could not be done there. The demurrer was, therefore, overruled, and the costs were made costs in the cause. *Ainslie* v. *Sims*, 23 L. J., Ch. 161.

Injunction granted on interlocutory application in court of chancery in Ireland to restrain proceedings at law there, is not of itself sufficient ground to obtain injunction in this court to restrain proceeding on same matter in King's Bench here. But a final judgment might have been otherwise. *Ball* v. *Storie*, 1 Sim. & S. 210; 1 L. J. (o.s.) Ch. 214; 24 R. R. 170.

R. contracted to let a house and moor in Scotland to the plaintiff for the months of August and September, at the rent of 800*l.*; and after-

wards let it at the same rent to B. In August the plaintiff filed an original bill against R. and B. for specific performance of the contract, and obtained an injunction restraining B. from taking possession. This injunction was dissolved on appeal upon the terms of B. paying the 800*l.* into court. In September R. commenced an action of reduction in a Scotch court against the plaintiff to obtain the rescission of the contract. In October the plaintiff amended his bill, and moved to restrain R. from prosecuting the Scotch action:—Held, that the order made on the appeal had in effect decided that the Court of Chancery was the proper tribunal to decide the question, and an injunction was granted accordingly. *Oakeley* v. *Ramsay*, 27 L. T. 745.

c. COMMON-LAW COURTS.

Foreign Land — Trespass.]—An action for damages and trespass to land situate in a foreign country, founded on a disputed claim of title to such land, cannot be tried in the courts of this country. *British South Africa Co.* v. *Companhia de Moçambique*, 63 L. J., Q. B. 70; [1893] A. C. 602; 6 R. 1; 69 L. T. 604—H. L. (E.)

Ord. XXXVI. r. 1 (R. S. C. 1883), which abolishes local venues, is a rule of procedure only, and does not affect the jurisdiction of the courts of this country. The Judicature Acts and Rules deal with procedure only, and do not confer any new right of action. *Ib.*

—— **Use and Occupation.**]—The plaintiff and defendant companies were proprietors of lines of railway in a foreign state, and of offices in this country. The plaintiffs sued for use and occupation of their station in the foreign state by the defendants, who stated in defence that the two companies were both concessionnaires of the foreign state; that the station was built upon land granted by that state; and that by the express provisions of the laws of that state powers of adjusting all rights arising out of the respective claims of the two companies were vested in the government of that state:—Held, that there was nothing in these allegations of the defendants to oust the jurisdiction of the courts of this country. *Buenos Ayres Ry.* v. *Great Northern Ry. of Buenos Ayres*, 46 L. J., Q. B. 224; 2 Q. B. D. 210; 36 L. T. 148; 25 W. R. 367.

—— **Recovery of Arrears of Rent-charge.**]—An action of debt having been brought for arrears of a rent-charge upon lands in Australia prior to the commencement of the Judicature Act:—Held, that the venue in such action was local, and that it could not therefore be maintained in this country. *Whitaker* v. *Forbes*, 45 L. J., C. P. 140; 1 C. P. D. 51; 33 L. T. 582; 24 W. R. 241—C. A.

Interpleader.]—Semble, that a foreigner resident abroad is not within the Interpleader Act. *Patorni* v. *Campbell*, 12 M. & W. 277; 1 D. & L. 397; 13 L. J., Ex. 85; 7 Jur. 1139.

In respect of Torts.]—*See* ante, col. 295.

d. SUBMISSION TO JURISDICTION.

If a plaintiff domiciled in this country sees a British subject here in respect of, or to be released from, a money demand by the defendant, and the defendant appears to the suit, this court will entertain it although the defendant may be residing abroad, and the whole subject-matter of the suit, ultra the mere personal claim of the plaintiff, may be in a foreign country and out of the jurisdiction of this court. *Drummond* v. *Drummond*, 37 L. J., Ch. 811; 18 L. T. 896; 17 W. R. 6.

The court will not interfere by injunction to restrain a foreign creditor resident abroad from suing for his debts in the courts of his own country, although a decree has been made here for the administration of the estate of the debtor, and the foreign creditor has come in under the decree, and filed evidence to prove his debt in the administration action. *Boyse, In re, Crofton* v. *Crofton*, 49 L. J., Ch. 689; 15 Ch. D. 591; 29 W. R. 169.

A policy was affected with an assurance company carrying on business both in Edinburgh and London, and after the death of the insured the insurance money was claimed, on the one hand, by a mortgagee in England, and, on the other, by a trustee under a Scotch sequestration. The trustee raised an action in the Court of Session in Scotland, and the mortgagee instituted a suit in the Court of Chancery in England, each of them being a party to the litigation commenced by the other. An order was made in the suit for payment of the policy-moneys into court without prejudice to letters of arrestment which had issued in Scotland. By the decree in the suit an account was directed of what was due to the mortgagee on his securities, and he was declared entitled to a lien on the policy-moneys for what should be so found due. The trustee attended before the chief clerk on the taking of the accounts, and on further consideration the moneys in court were ordered to be paid to the mortgagee:—Held, on appeals by the trustee from the interlocutory order and decrees, that the appeals ought to be dismissed, the Lord Chancellor holding that the appellant had acquiesced in the decrees by attending before the chief clerk, and the Lords Justices holding (dissentiente the Lord Chancellor) that the circumstance of the action in Scotland having been brought to an issue before the commencement of the suit in the Court of Chancery was not a ground for refusing to make the order and decrees under appeal. *Venning* v. *Lloyd*, 1 De G. F. & J. 193; 29 L. J., Ch. 152; 6 Jur. (N.S.) 81; 1 L. T. 277; 8 W. R. 117.

R. contracted to let a house and moor in Scotland to the plaintiff for the months of August and September, at the rent of 800*l.*; and afterwards let it at the same rent to B. In August the plaintiff filed an original bill against R. and B. for specific performance of the contract, and obtained an injunction restraining B. from taking possession. This injunction was dissolved on appeal upon the terms of B. paying the 800*l.* into court. In September, R. commenced an action of reduction in a Scotch court against the plaintiff to obtain the rescission of the contract. In October the plaintiff amended his bill, and moved to restrain B. from prosecuting the Scotch action:—Held, that the order made on the appeal had in effect decided that the Court of Chancery was the proper tribunal to decide the question, and an injunction was granted accordingly. *Oakeley* v. *Ramsey*, 27 L. T. 745.

X. PROCEDURE.

a. PARTIES TO SUE AND TO BE SUED.

Power of Foreigner, incapacitated Abroad from suing, to sue in English Courts.]—The courts of this country will not recognise a state of disability not known to the law of this country. A French subject adjudicated a "prodigal" by a French Court, though by French law unable to sue without his "Conseil Judiciaire," can sue in the courts of this country independently. *Worms* v. *De Valdor*, 49 L. J., Ch. 261; 41 L. T. 791; 28 W. R. 346.

Bankruptcy or Insolvency.]—It was proved that two out of three provisional syndics may, by the law of France, sue to recover debts due to a bankrupt, and without the previous authority of the Juge Commissaire:—Held, that they may so sue in this country unless the French law is shewn to be contrary. *Alivon* v. *Furnival*, 1 C. M. & R. 277; 4 Tyr. 751; 3 D. P. C. 202; 3 L. J., Ex. 241. And see *Huber* v. *Steiner*, 4 M. & Sc. 828.

Held, also, that the act of the two syndics sufficiently implied the absence or want of consent of the third, without shewing his absence or want of consent. *Ib.*

A fund in court representing the share to which a person was entitled in default of appointment ordered to be paid to official assignee in his insolvency. *Davidson's Settlement Trusts, In re*, 42 L. J., Ch. 347; L. R. 15 Eq. 383; 21 W. R. 452. *Lawson's Trusts, In re*, 65 L. J., Ch. 95; [1896] 1 Ch. 175; 73 L. T. 571; 44 W. R. 280.

Husband and Wife Partners in Trade.]—Where a husband and wife carry on trade as partners in Spain, they cannot sue as such in our courts, nor maintain a joint action against persons resident in this country, to recover the amount of a balance due to the partnership account, without proof being given that by the law of Spain a feme covert is permitted to trade; and it is doubtful whether an action could be maintained by both, even on such proof being given. *Cosio* v. *de Bernales*, 1 Car. & P. 266; Ry. & Moo. 102; 28 R. R. 775.

Representative of Deceased Person.]—When judgment has been obtained in a foreign court by the foreign administrator of a creditor against an English debtor who has since died, and whose estate was being administered in England:—Held, that the foreign administrator could prove without taking out an English administration to his intestate. *Macnichol, In re, Macnichol* v. *Macnichol*, L. R. 19 Eq. 81; 31 L. T. 566; 23 W. R. 67.

A woman became, by the law of France, donee of the universality of the succession of her deceased husband and was thereby entitled to all his property, claims and causes of action, and became personally liable to his debts. After her husband's death, she was compelled to pay certain bills of exchange on which he was liable as indorser. She thereupon took proceedings in France, and obtained a judgment to recover the amount against the acceptor:—Held, that she might sue upon this judgment in this country in her own name, without taking out administration. *Vanquelin* v. *Bouard*, 15 C. B. (N.S.) 341; 3 N. R. 122; 33 L. J., C. P. 78; 10 Jur. (N.S.) 566; 9 L. T. 582; 12 W. R. 128.

b. LEX FORI.

Generally.] — Questions which resolve into matters of procedure are to be governed by the lex fori. *Seymour (Lord)* v. *Scott*, 1 H. & C. 209; 1 N. R. 129; 32 L. J., Ex. 61; 9 Jur. (N.S.) 522; 8 L. T. 511; 11 W. R. 169—Ex. Ch.

The rules of the lex fori, where a question is raised between or by or against foreigners, are not to be applied to matters affecting the substance of the remedy, but only to matters affecting the form. *Cope* v. *Doherty*, 2 De G. & J. 614; 27 L. J., Ch. 600; 4 Jur. (N.S.) 699; 6 W. R. 695.

When a foreign rule is repugnant to the fundamental principles of the lex fori, or when it is contrary to religion or sound morality, the doctrine of comity ought not to be followed. *Fenton* v. *Livingstone*, 3 Macq. H. L. 497; 5 Jur. (N.S.) 1183; 7 W. R. 671.

If the adoption of the law of the domicil would occasion a prejudice to the rights of other states and their citizens, or if it would contravene a prohibitory enactment, the comity of nations would not require its adoption. *Ib.*

Right to Arrest Foreigner.]—One foreigner may arrest another in England for a debt which accrued in Portugal while both resided there, though the Portuguese law does not allow of arrest for debt. *De la Vega* v. *Vianna*, 1 B. & Ad. 284; 8 L. J. (O.S.) K. B. 388. And see *Young* v. *Wildey*, 4 L. J., C. P. 253.

The court refused to discharge a foreigner out of custody, on the ground that the debt for which he had been arrested was the balance of a demand, upon which the plaintiff had received a dividend, under proceedings in the country where the debt was contracted similar to our own proceedings in bankruptcy; though it was sworn by a competent person, that the law of the foreign country did not warrant an arrest under such circumstances. *Brettilot* v. *Sandos*, 4 Scott, 201; 1 Jur. 182.

Statute of Frauds.]—The contract mentioned in the 4th section of the Statute of Frauds is not absolutely void if not in writing, as required by the statute, that section relating to the mode of procedure, and not to the contract itself. Consequently such parol contract, though made in a foreign country, where it is good and capable of being enforced, cannot be sued on in this country. *Leroux* v. *Brown*, 12 C. B. 801; 22 L. J., C. P. 1; 16 Jur. 1021; 1 W. R. 22.

Statutes of Limitation.]—The law of a country where a contract is enforced govern all questions as to remedy and mode of proceeding, including those applicable to lapse of time. *Fergusson* v. *Fyffe*, 8 Cl. & F. 121—H. L. (Sc.) And see *Cooper* v. *Waldegrave (Earl)*, 2 Beav. 282.

Where a claim is made in an administration suit in England by an Indian creditor of the testator, the English Statute of Limitations must be applied. *Finch* v. *Finch*, 45 L. J., Ch. 816; 35 L. T. 235.

Statutes of Limitation relate to matters of procedure, and therefore are governed by the lex fori, or the law of the country in which the action is brought. *Alliance Bank of Simla* v. *Carey*, 49 L. J., C. P. 781; 5 C. P. D. 429; 44 J. P. 735.

The law of prescription or limitation is a law relating to procedure, having reference only to the lex fori; and where a court entertains a cause of action which originated in a foreign country, the rule is to adjudicate according to the law of that country, yet the court proceeds according to the prescription of the country in which it exercises jurisdiction. *Ruckmaboye* v. *Lulloobhoy Mottichund*, 8 Moore, P. C. 4; 5 Moore, Ind. App. 234.

Ship—Collision—Limitation of Damages.]—Sections 504 and 514 of the 17 & 18 Vict. c. 104, limiting the damages to be recovered in cases of collision, by reference to the value of the vessel doing the injury, and the freight, do not apply to a collision on the high seas between foreign ships of which the owners are foreigners. *Cope* v. *Doherty*, 2 De G. & J. 614; 27 L. J., Ch. 600; 4 Jur. (N.S.) 699; 6 W. R. 695.

Where, therefore, two foreign ships, of which the owners were foreigners, came into collision with each other at sea, and a bill was filed by the owners of the ship inflicting the injury against the owners of the injured ship, for the purpose of restricting, under the provisions of the 17 & 19 Vict. c. 104, the liability of the owners of the former ship to the value of such ship and its freight, the court dismissed, with costs, an appeal from the decision of the Vice-Chancellor, allowing a demurrer to such bill. *Ib.*

Quære, whether the demurrer would have been allowed if one of the two ships had been British, or if the collision had taken place in a British river or a British port. *Ib.*

c. EVIDENCE.

Proof of Foreign Laws.]—Foreign laws must be proved as facts, if a question arises on their existence. *Mostyn* v. *Fabrigas*, Cowp. 174.

In an action founded on foreign laws properly brought before the courts here, they will receive evidence of such laws, and give judgment accordingly upon the contract. *Crawford* v. *Witten*, Lofft, 154; 1 Dougl. 4, n.

The law of France, as to marriage, proved by the production of a book, purporting to be published at the royal printing office, stated by oral testimony to be authorised to print the laws of France by the government; the book also being proved by the same testimony to contain the law of France. *Lacon* v. *Higgins*, 1 D. & R., N. P. 38; 3 Stark. 17; 25 R. R. 779.

A professional or an official witness, giving evidence as to a foreign law, may refer to foreign law books to refresh his memory, or to correct or confirm his opinion; but the law itself must be taken from his evidence. *Sussex Peerage*, 11 Cl. & F. 85; 8 Jur. 793.

A foreign written law may be proved by parol evidence of a witness learned in the law of that country. *De Bode (Baron)* v. *Reg.*, 8 Q. B. 208; 10 Jur. 217.

When the question at issue in an English court is what is the foreign law on the subject, and an expert refers in his evidence to sections of the foreign code, as supporting the propositions for which he vouches, the English court may refer to and construe those sections. *Concha* v. *Murietta*, 40 Ch. D. 543; 60 L. T. 798—C. A. But see *Cocks* v. *Purday*, 2 Car. & K. 269.

As cases arise, in which the rights of parties litigating in English courts cannot be determined without ascertaining to some extent what is the foreign law applicable in such cases, foreign law and its application, like any other results of knowledge and experience in matters of which no knowledge is imputed to a judge, must be proved as facts are proved, by appropriate evidence, i.e. by properly qualified witnesses, or by witnesses who can state from their own knowledge and experience, gained by study and practice, not only what are the words in which the law is expressed, but also what is the proper interpretation of those words, and the legal meaning and effect of them as applied to the case in question. *Nelson (Earl)* v. *Bridport (Lord)*, 8 Beav. 527; 10 Jur. 871.

Witnesses, in giving their testimony on a foreign law, may, if they think fit, refer to laws or to treaties, for the purpose of aiding their memory upon the subject of their examination; but, in general, it is the testimony of the witness, and not the authority of the law or of the text writer, detached from the testimony of the witness, which is to influence the judge. *Ib.*

An inquiry as to the nature and extent of the jurisdiction exercised by her majesty at Cape Coast Town, in the administration of personal estate of persons dying there intestate, and the manner of exercising such jurisdiction, directed to the colonial office, under 6 & 7 Vict. c. 94. *Herrey* v. *Fitzpatrick*, Kay, 421; 2 Eq. R. 444; 23 L. J., Ch. 564; 2 W. R. 338.

—— **Burden of Proof.**]—Where reliance is placed upon a difference between the law of England and the law of a foreign state, the party is bound, by witnesses or books of authority, to shew that there is such a difference. *Smith* v. *Gould*, 4 Moore, P. C. 21; 6 Jur. 543.

Locus regit actum is a canon of general jurisprudence, and must be assumed, in the absence of contrary evidence, to apply to a system of foreign law. *Guepratte* v. *Young*, 4 De G. & S. 217.

Where the cause of action accrues in Scotland, and infancy is pleaded, the defendant must shew that infancy is a legal defence to that demand, by proving the law of that country in that respect. *Male* v. *Roberts*, 3 Esp. 163; 6 R. R. 823.

—— **Who competent to prove.**]—The law of a foreign country on a given subject may be proved by any person who (though not a lawyer or a person who, by reason of his having filled any public office, may be presumed to be acquainted with the law) is or has been in a position to render it probable that it would make himself acquainted with it. *Vander Donckt* v. *Thellusson*, 8 C. B. 812; 19 L. J., C. P. 12.

Therefore, an hotel-keeper in London, a native of Belgium, who stated that he had formerly carried on the business of a merchant and commissioner of stocks in Brussels, was permitted to prove the law of Belgium on the subject of the presentment of a promissory note made in that country, payable at a particular place. *Ib.*

A Roman Catholic bishop, holding the office of coadjutor to a vicar-apostolic in this country, is, in virtue of that office, to be considered as a person skilled in the matrimonial law of Rome, and, therefore, admissible as a witness to prove that law. *Sussex Peerage*, 11 Cl. & F. 85; 8 Jur. 793.

An opinion of a Scotch advocate was in evidence. The judge considering that there was implied therein an opinion on a question of Scotch law raised in the suit, decided the question on that evidence. *Macdonald* v. *Macdonald*,

41 L. J., Ch. 566; L. R. 14 Eq. 60; 26 L. T. 685; 20 W. R. 739.

On a trial for bigamy a woman was called as a witness, who stated that she was present at a ceremony performed in a private house in Scotland, by a minister of some religious denomination; that she herself was married in the same way, and that parties always married in Scotland in private houses:—Held, that she was not a competent witness to prove the law of Scotland as to marriage, and that her evidence did not prove the fact of a marriage. *Reg.* v. *Povey*, Dears. C. C. 32; 22 L. J., M. C. 19; 17 Jur. 120; 1 W. R. 40; 6 Cox, C. C. 83.

A Jewess may be permitted to give parol evidence of her own divorce in a foreign country, according to the custom of the Jews there. *Ganer* v. *Lanesborough* (*Lady*), 1 Peake, 18; 3 R. R. 647.

A witness whose knowledge of the law of a foreign country is derived solely from his having studied it at a university in another country, is incompetent to prove what the law of that foreign country is. *Bristow* v. *Sequeville*, 5 Ex. 275; 19 L. J., Ex. 289; 14 Jur. 674; 3 Car. & K. 64.

A witness whose knowledge of the law of a foreign country is derived solely from having studied it, is incompetent to prove the operation or effect of such law. *Bonelli, In Goods of*, 45 L. J., P. 42; 1 P. D. 69; 34 L. T. 32; 24 W. R. 255.

An English barrister practising in Canadian appeals before the privy council is not competent to give evidence as an expert as to the validity, according to the law of Canada, of a marriage solemnised in that country. *Cartwright* v. *Cartwright*, 26 W. R. 684.

Foreign Contract in Foreign Language.]—Where a contract is made in a foreign country, and in a foreign language, an English court, having to construe it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art (if any); thirdly, evidence of the foreign law applicable to it; and, fourthly, evidence of any peculiar rules of construction which may exist in that law; and must then itself interpret the instrument on ordinary principles of construction. *Di Sora* (*Duchess*) v. *Phillips*, 10 H. L. Cas. 624; 33 L. J., Ch. 129—H. L. (E.)

Question for Judge or Jury.]—Foreign law and the construction of a foreign contract, just as much as the construction of an English contract, are matters for the decision of the judge, after having the foreign law, or the language of the foreign contract interpreted to him, by the evidence of foreign experts, and are not in any case questions for the jury. *Copin* v. *Adamson*, 43 L. J., Ex. 161; L. R. 9 Ex. 345; 31 L. T. 242; 22 W. R. 658.

d. Other Matters.

Criminal Proceedings preceding Civil Remedy.]—If by the laws of a foreign state there is a civil remedy for a wrong done there, the fact that by those laws criminal proceedings must precede the civil remedy there, constitutes no bar or defence to an action in this country. *Scott* v. *Seymour* (*Lord*), 31 L. J., Ex. 457; 8 Jur. (N.S.) 568; 6 L. T. 607; 10 W. R. 739. Affirmed on appeal, 1 H. & C. 219; 1 N. R. 129; 32 L. J., Ex. 61; 9 Jur. (N.S.) 522; 8 L. T. 511; 11 W. R. 169—Ex. Ch.

Matter of Defence arising Abroad.]—To an action by a trustee of a Scotch bankrupt for money received by the defendant for the use of the plaintiff, as trustee, after the bankruptcy, and for interest upon money due from the defendant to the plaintiff, as trustee, forborne to the defendant at his request, it is a good defence that there were mutual credits between the bankrupt and the defendant, and that, by the Scotch law, the trustee is only entitled to sue for the balance. *Macfarlane* v. *Norris*, 2 B. & S. 783; 31 L. J., Q. B. 245; 9 Jur. (N.S.) 74; 6 L. T. 492.

Pleading—Action on Bond—Executed Abroad informally.]—To an action on a bond the defendant pleaded that the bond was executed at Calais, in France, where he was domiciled; that certain forms in the plea mentioned were not adopted on its execution, nor did he belong to certain classes of persons therein described; and that by reason of the premises, by the law of France, the bond never was binding upon the defendant:—Held, that the plea was argumentative, and inferential in its mode of stating the law of France, and therefore bad. *Benham* v. *Mornington* (*Earl*), 4 D. & L. 213; 3 C. B. 133; 13 L. J., C. P. 221; 10 Jur. 618.

—— **Pleading Matters of Procedure.**]—To an action against a single defendant, for a breach of an agreement to build a vessel, entered into between the plaintiffs and C. & Co., the defendant pleaded that there was a trading partnership or firm domiciled and carrying on business in Scotland by the name of C. & Co., and that the agreement was an agreement made in Scotland by the plaintiffs with the firm, and was to be performed wholly in Scotland without the jurisdiction of the English courts and within the jurisdiction of the Scotch courts; and by the law of Scotland the firm was and is a distinct person from any or the whole of the individual members of whom it consists, and of whom the defendant is one; and the firm, by the law of Scotland, is capable of maintaining the relation of debtor and creditor separate and distinct from the obligations of the partners as individuals, and can hold property, and has the capacity of suing and being sued as such separate person by the name of C. & Co.; that the agreement was made by the firm as such separate person and not jointly and severally by the individual members; that at the date of the agreement the firm consisted of certain individual members, who are all domiciled in Scotland; and that by the law of Scotland the defendant was, as a partner in C. & Co., in the making of the agreement, liable to the plaintiffs for the satisfaction of any judgment which might be obtained against the firm or the whole of the individual partners jointly for any breaches of the agreement, and it is a condition precedent to any individual liability attaching to the defendant as an individual member of the firm in respect of the agreement that the firm, as such person, or the whole individual partners jointly, should first have been sued and that judgment should have been recovered against the firm or the whole of the partners jointly, and that the plaintiffs have not sued the firm of C. & Co., nor the whole of the partners jointly, nor recovered judgment

against it or them:—Held, that the matters stated in the plea were matters of procedure, and that the plea was therefore bad. *Bullock* v. *Caird*, 44 L. J., Q. B. 124; L. R. 10 Q. B. 276; 32 L. T. 814: 23 W. R. 827.

Interpretation of Foreign Law.]—Foreign law and the construction of a foreign contract, just as much as the construction of an English contract, are matters for the decision of the judge, after having the foreign law, or the language of the foreign contract, interpreted and explained to him by the evidence of foreign experts, and are not in any case questions for a jury. *Copin* v. *Adamson*, 43 L. J., Ex. 161; L. R. 9 Ex. 345; 31 L. T. 242; 22 W. R. 658.

Revenue Laws.]—The courts of this country will not take notice of the revenue laws of foreign states. *Planché* v. *Fletcher*, 1 Dougl. 251.

XI. FOREIGN JUDGMENT.

General Principles on which enforced.]—The courts of this country consider the defendant bound:—

(1.) Where he is a subject of the foreign country in which the judgment has been obtained.

(2.) Where he was resident in the foreign country when the action began.

(3.) When the defendant in the character of plaintiff has selected the forum in which he is afterwards sued.

(4.) Where he has voluntarily appeared.

(5.) Where he has contracted to submit himself to the forum in which the judgment was obtained.

(6.) And possibly where the defendant has real estate within the foreign jurisdiction, in respect of which the cause of action arose whilst he was within that jurisdiction. *Rousillon* v. *Rousillon*, 49 L. J., Ch. 338; 14 Ch. D. 351; 42 L. T. 679; 28 W. R. 623; 44 J. P. 663.

The true principle on which foreign judgments are enforced in England is, that there is a duty or an obligation to submit to the decree of a court of competent jurisdiction, and anything which negatives that duty is a defence to the action. *Schibsby* v. *Westenholz*, 40 L. J., Q. B. 73; L. R. 6 Q. B. 155; 24 L. T. 93; 19 W. R. 587.

The sentence of a foreign court of competent jurisdiction, is evidence of res judicata, and is not to be called in question in a collateral cause in the courts of this kingdom. *Hamilton* v. *Dutch East India Co.*, 8 Bro. P. C. 264—H. L. (Sc.)

A foreign judgment of a competent court is conclusive, and not open to examination by another court, unless the judgment impeached carries on the face of it manifest error; as if it is shewn to have been obtained by fraud, or to be wanting in the condition of natural justice. Such judgment cannot be applied to persons other than those who were parties to the litigation decided by it, except in cases where the judgment is in rem. *Messina* v. *Petrococchino*, 41 L. J., P. C. 27; L. R. 4 P. C. 144; 26 L. T. 561; 20 W. R. 451.

A judgment of a foreign court is conclusive, inter partes, where there is nothing on the face of the judgment which a court here can inquire into. *Simpson* v. *Fogo*, 1 H. & M. 195; 1 N. R. 422; 32 L. J., Ch. 249; 9 Jur. (N.S.) 403; 8 L. T. 61; 11 W. R. 418.

But the courts of this country may disregard a foreign judgment, inter partes, if it appears on the record: 1. To be manifestly contrary to natural justice. 2. Or to be based on domestic legislation not recognised by foreign countries. 3. Or to be founded on a misapprehension of what is the law of this country. 4. Or to be founded upon a distinct refusal to recognise the laws of the country under which the title to the subject-matter of litigation arose. *Ib.*

The same rules apply to judgments of colonial courts. *Ib.*

As to the third ground, however, see contra, *Castrique* v. *Imrie*, 39 L. J., C. P. 350; L. R. 4 H. L. 414; 23 L. T. 48; 19 W. R. 1—H. L. (E.)

The judgment of a foreign court on a subject-matter not within its jurisdiction is not binding in this country. *Price* v. *Dewhurst*, 4 M. & Cr. 76; 8 L. J., Ch. 57.

The courts of this country will not take notice of the penal laws of foreign countries. *Folliott* v. *Ogden*, 1 H. Bl. 123, 135; 3 Term Rep. 726; 4 Bro. P. C. 111; 2 R. R. 736—H. L. (E.)

The acts of confiscation passed in the several states of North America, after the declaration of independence and before the treaty of peace, by which this country acknowledged their independence, are to be considered as a nullity in courts of law in this country. *Ib.*

Upon the effect of judgments in foreign courts, see *Phillips* v. *Hunter*, 2 H. Bl. 402; 2 R. R. 353—Ex. Ch.

Effect of.]—A foreign judgment is primâ facie evidence of a debt, and that everything was done in the court in which it was obtained that was necessary to support it. *Arnott* v. *Redfern*, 3 Bing. 353; 11 Moore, 209; 4 L. J. (O.S.) C. P. 89; 2 Car. & P. 88.

A foreign judgment is only evidence of a debt. *Hawksford* v. *Giffard*, 56 L. J., P. C. 10; 12 App. Cas. 122; 56 L. T. 32.

The judgments of courts of concurrent jurisdiction are evidence only where the very same matter comes distinctly in issue between the same parties. *Mackintosh* v. *Smith*, 4 Macq. H. L. 913.

The judgments of courts of exclusive jurisdiction are evidence, whether the matter arises incidentally, or is the matter directly in issue. *Ib.*

—— **Foreign Judgment in Personam.**]—The Admiralty Division of the High Court of Justice cannot entertain a suit in rem on a foreign judgment in personam for damages arising out of a collision:—Semble, a foreign judgment in rem for damages by collision can be sued upon in England in rem. *The City of Mecca*, 50 L. J., P. 53; 6 P. D. 106; 44 L. T. 750; 4 Asp. M. C. 412—C. A.

—— **As an Estoppel.**]—Judgment was given by competent tribunals in France against Garcias, in an action brought by him against persons with whom he had been connected in a loan transaction, for the purpose of obtaining from them an account and payment of his share of the profits of the loan. He afterwards filed a bill in the Court of Chancery against some of the same persons, and for the same purposes, charging that the proceedings and judgment of the French tribunals were contrary to justice, and were not final and conclusive, and also that subsequently to the date of the said judgment further profits accrued to the defendant from the

said loan, and he claimed a right to a share of them :—Held, that a plea of the foreign proceedings and judgment—set forth in substance and effect—filed by the defendants to the bill, supported by averments that the matters in issue in the foreign tribunals were the same as the matters put in issue by the bill, covered the whole of the matters comprised in the bill, and was a sufficient answer thereto. In pleading a foreign judgment, it is not necessary to set forth the proceedings and judgment at length. *Ricardo* v. *Garcias*, 12 Cl. & F. 368 ; 9 Jur. 1019.—H. L. (E.)

Statute of Limitations.]—If a man recovers a judgment or sentence in France for money due to him, the debt must be considered here only as a debt on simple contract, and the Statute of Limitations will run upon it. *Dupleix* v. *de Roven*, 2 Vern. 540.

Unreasonable Delay in enforcing a Foreign Judgment.]—A foreigner resident abroad will not be assisted, after the lapse of thirteen years, to enforce a foreign judgment in England against the executors of a foreigner who had died domiciled here, when the party against whom the foreign judgment was obtained survived it four years without any proceedings having been taken to enforce it in England, and when his estate, since his death, had been administered in England. *Reimers* v. *Druce*, 23 Beav. 145 ; 26 L. J., Ch. 196 ; 3 Jur. (N.S.) 147 ; 5 W. R. 211. On appeal, the suit was compromised, 23 Beav. 158, n. ; 26 L. J., Ch. 201, n. ; 3 Jur. (N.S.) 229 ; 5 W. R. 402.

What Judgments enforceable—Must be final and conclusive.]—An action cannot be brought in this country upon a foreign judgment for the recovery of a debt, if the judgment does not finally and conclusively (subject to an appeal to a higher court) settle the existence of the debt so as to become res judicata between the parties. *Nouvion* v. *Freeman*, 59 L. J., Ch. 337 ; 15 App. Cas. 1 ; 62 L. T. 189 ; 38 W. R. 581—H. L. (E.) Cp. *Patrick* v. *Sheddon*, col. 340, post.

By Spanish law in certain cases summary or "executive" proceedings can be taken to recover a debt, and the plaintiff if successful obtains a "remate" judgment for the recovery of a sum of money. Such a judgment is final in those proceedings unless reversed or varied on appeal. In such proceedings the defendant can plead certain limited defences, but cannot set up any defence affecting the validity of the contract. Either plaintiff or defendant, if unsuccessful in the "executive" proceedings, may in the same court and in respect of the same subject-matter take ordinary or "plenary" proceedings, in which all defences and the whole merits of the matter may be gone into. In the "plenary" proceedings the "remate" judgment cannot be set up as res judicata or otherwise. A "remate" judgment can be enforced by the plaintiff on giving security, although either an appeal or "plenary" proceeding may be pending. A "plenary" judgment renders the "remate" judgment inoperative and requires restoration of any moneys paid under it :—Held, that since a "remate" judgment does not finally and conclusively establish the existence of a debt no action can be brought upon it in this country. *Ib.*

A plea of judgment recovered in a foreign court of competent jurisdiction must shew that the judgment is final and conclusive between the parties, according to the law of the place where such judgment is pronounced. *Frayes* v. *Worms*, 10 C. B. (N.S.) 149.

An action will not lie upon a judgment of a foreign court, unless it clearly appears by the transcript of the proceedings that the defendant was subject to the jurisdiction of the foreign court, and that the judgment pronounced against him was final, and for a definite sum. *Obicini* v. *Bligh*, 1 M. & Scott, 477 ; 8 Bing. 335 ; 1 L. J., C. P. 99. Overruling *Molony* v. *Gibbons*, 2 Camp. 502 ; 11 R. R. 778.

An action will not lie on a decree of a foreign court whereby the defendant is ordered to pay a certain sum of money to the plaintiff on a certain day, first deducting thereout the defendant's costs, to be taxed by the proper officer, where the defendant's costs have not been taxed either at his own request or upon an ex parte proceeding at the instance of the plaintiff. *Sadler* v. *Robins*, 1 Camp. 253.

Process of Attachment.]—Quære, whether a plea to an action brought against a defendant in this country, upon a contract made and executed in France, that the debt had been attached (saisie arrêtée), pursuant to the Code de Procédure Civile, by creditors of the plaintiff in that country, is any answer, either legal or equitable. *Simian* v. *Miller*, 1 C. B. (N.S.) 686.

Judgment having been signed on the ground that such a plea was not issuable, the court set aside the judgment only upon the terms of the defendant bringing the amount claimed into court. *Ib.*

—— **Political and Penal Laws.**]—The courts of this country will not take notice of the penal laws of foreign countries. *Folliott* v. *Ogden*, 1 H. Bl. 123, 135 ; 3 Term Rep. 726 ; 4 Bro. P. C. 111 ; 2 R. R. 736—H. L. (E.)

The acts of confiscation passed in the several states of North America, after the declaration of independence and before the treaty of peace, by which this country acknowledged their independence, are to be considered as a nullity in courts of law in this country. *Ib.*

An ordinance made by the government of Denmark, pending hostilities with Great Britain, whereby all ships, goods, money, and money's worth, of or belonging to English subjects, were declared to be sequestrated and detained ; and all persons were commanded within three days to transmit an account of debts due to English subjects, in default of which they were to be proceeded against in the exchequer ; in consequence of which, a suit depending in a Danish court for recovering a debt due from a Danish to a British subject was not further prosecuted, and the debt was afterwards paid by the Danish subject, at the rate specified by the ordinance, to commissioners appointed in virtue of the ordinance to receive payment, upon production of whose receipt the Danish court quashed the suit :—Held, to be no answer to an action against the Danish subject to recover the same debt in the courts of this country, for the ordinance, not being conformable to the usage of nations, was void. *Wolff* v. *Oxholm*, 6 M. & S. 92 ; 18 R. R. 313.

By the law of New York, 1875, c. 611, s. 21, it is provided that if any certificate by an officer of a corporation is false in any material representation, the officer who shall have signed the same shall be liable for the debts of the corporation.

The appellant having obtained judgment in an action against the respondent in New York for the unpaid balance of a loan to a company, of which the respondent was an officer, on the ground that the respondent had given a false certificate, sued the respondent in the High Court of Ontario to enforce this judgment :—Held, that a proceeding, to come within the rule that the courts of one country do not execute the laws of another, must be in the nature of a suit in favour of the state whose law has been infringed, and that the action in New York was not penal in such a sense as to oust the jurisdiction of a foreign court. *Huntington* v. *Attrill*, 62 L. J., P. C. 44; [1893] A. C. 150; 68 L. T. 326; 41 W. R. 575; 57 J. P. 404—P. C.

—— **Judgment in rem.**]—The master of a ship owned by an English joint-stock company, limited, which was loading cargo at Bombay for Hamburg, was induced by a fraud perpetrated upon him to sign bills of lading for goods which in fact were never put on board. The defendants, whose registered place of business was in England, became the indorsees of the bills of lading for value and without notice of the fraud. Before the arrival of the ship at Hamburg a petition for winding up the plaintiff company was filed, upon which a winding-up order was subsequently made. The defendants had notice of the winding-up proceedings. By German law a claim for non-delivery of cargo confers a legal lien upon the ship. Upon the arrival of the ship at Hamburg she was arrested under proceedings taken against her in Germany on behalf of the defendants to enforce this lien. The German court ordered the ship to be sold, declared that the defendants had a lien upon her in priority to all creditors except those claiming for necessaries and wages, and ordered the lien to be satisfied out of the proceeds of the sale. Neither the plaintiff company nor the liquidator were parties to the proceedings in the German court. In an action by the liquidator in the name of the company to recover from the defendants the monies paid to them in satisfaction of their lien by order of the German court as moneys received to the use of the company :—Held, that the proceedings in the German court being proceedings in rem, the judgment was binding upon all persons, whether parties to the proceedings or not, and consequently the defendants were entitled to retain as against the company or the liquidator the moneys paid to them under the judgment. *Oriental Inland Steam Co., In re, Scinde Ry., Ex parte* (43 L. J., Ch. 699; L. R. 9 Ch. 557), distinguished. "*Minna Craig*" *Steamship Co.* v. *Chartered Mercantile Bank of India*, 66 L. J., Q. B. 339; [1897] 1 Q. B. 460; 76 L. T. 310; 45 W. R. 338—C. A.

How far Examinable.]—An adjudication of a foreign court, acting within the jurisdiction conferred upon it by the state within whose lawful control the subject-matter adjudicated upon is found, is conclusive against all the world, even though it professes to proceed on an assumption of the law of another country and that assumption is erroneous. *Castrique* v. *Imrie*, 39 L. J., C. P. 350; L. R. 4 H. L. 414; 23 L. T. 48; 19 W. R. 1—H. L. (E.) S. P., *Godard* v. *Gray*, 40 L. J., Q. B. 62; L. R. 6 Q. B. 139; 24 L. T. 89; 19 W. R. 348.

If the intention of the foreign court was to deal with the subject-matter of the suit, an inference arises that the adjudication was in rem, though the proceedings may have been instituted inter partes. *Ib.*

Such an intention will be inferred in the case of proceedings to enforce a maritime lien in a state subject to a code founded on the civil law, or where the supposed owners of the chattel, the property in which is dealt with by such court, have been necessarily summoned to attend the proceedings. *Ib.*

The master of a British ship drew a bill of exchange upon his owner for necessaries supplied to the ship in the course of her voyage. The owner, who had in the meantime mortgaged the ship and then become bankrupt, declined to accept the bill, and it was dishonoured at maturity. Afterwards, the ship having put into Havre, the holder of the bill indorsed it to a French subject, who commenced a suit upon it in the court there against the master and against the ship, and obtained judgment against the master, with privilege upon the ship, and the judgment having been affirmed by the superior court there, the vessel was sold. By the French law a mortgage or sale of the property in a ship while on its voyage, to the prejudice of creditors for necessaries supplied in the course of the voyage, is not recognised unless the transaction appears on the ship's papers. Also, in proceedings in a French court to enforce a maritime lien by sale of the ship, all who appear to be the owners of the ship must be summoned. The original owner and his assignee in bankruptcy were cited accordingly before the court at Havre, but they did not appear. After the decree for sale was made, the mortgagee instituted proceedings at Havre to replevy the ship; but his claim to intervene was disallowed in consequence of a mistaken view of English law adopted by the French court, though evidence of the English law was produced and admitted before it :—Held, that the judgment of the foreign court was a judgment in rem, and passed the property in the ship; and, as there was no suggestion of fraud, was unimpeachable in an English court of justice. *Ib.*

A British ship was duly mortgaged in England, and remained in the possession of the mortgagor, who afterwards sent her to New Orleans. There she was attached by a citizen of Louisiana, a creditor of the mortgagor, in an action commenced for the recovery of his debt, not being a proceeding in rem. The mortgagee intervened in the action, and claimed possession of the ship. The Supreme Court of Louisiana refused to recognise his title, though good by the law of England, assigning as a reason, on the face of the judgment, that the law of Louisiana did not recognise transfers of property in chattels without delivery of possession; that to admit the claim would be prejudicial to the citizens of Louisiana, and that the comity of nations did not extend to the case. The ship was then sold under a writ, in the nature of a fi. fa. in the action, and the proceeds were applied in favour of the creditors to the exclusion of the mortgagee. The ship having been brought to England, the mortgagee, whose debt was admitted to exceed the value of the ship, filed his bill to establish his claim against F. :—Held, that the judgment of the court of Louisiana was examinable for error on the face of it, by reason of its disregard of the comity of nations, and that the mortgagee was entitled to the ship. *Simpson* v. *Fogo*, 1 H. & M. 195; 1 N. R. 422; 32 L. J., Ch. 249;

9 Jur. (N.S.) 403; 8 L. T. 61; 11 W. R. 418. And see *S. C.*, 1 John. & H. 18; 29 L. J., Ch. 657; 6 Jur. (N.S.) 949: 2 L. T. 594; 8 W. R. 407.

Held, also, that the judgment was of the nature of a judgment, inter partes, as regarded the intervener. *Ib.*

Semble, that a foreign judgment, even in rem, may be examined and disregarded, if it appears on the face of it to have been founded on a perverse disregard of English law in a case properly subject to that law by the comity of nations. *Ib.*

A declaration stated that the captain of an English ship while on a voyage drew a bill of exchange on the owners for the necessary disbursements of the ship, and the bill was dishonoured at maturity; that the plaintiff had in the meantime become mortgagee of the ship; that by the French law a bonâ fide holder for value of such a bill, if a French subject, can take proceedings in rem in the French courts, and attach and sell the ship in a French port in order to pay the bill; that the defendants, being English subjects, and the holders of the bill after it had been dishonoured, conspired with a French subject, that they should indorse the bill to him without value, and that he should take proceedings in the French courts, and falsely represent that he was a bonâ fide holder for value; that this was accordingly done, and orders were thereby obtained from the French courts, that the ship should be attached and sold in a French port, and the plaintiff thus deprived of his property in lien:—Held that the declaration was bad, as an action could not be maintained while judgment in rem, though in a foreign court, and obtained as alleged, remained unreversed. *Castrique* v *Behrens*, 3 El. & El. 709; 30 L. J., Q. B. 163; 7 Jur. (N.S.) 1024; 4 L. T. 52.

Although, in an action in this country on a foreign or colonial judgment, the judgment is examinable to a certain extent, as for the purpose of shewing want of jurisdiction, or that the defendant was not summoned, or that the judgment was fraudulently obtained, yet such judgment is not examinable upon the merits, as, for the purpose of shewing that the contract sued upon was not made, or was procured by fraud, or that the judgment was erroneous. *Bank of Australasia* v. *Nias*, 16 Q. B. 717; 20 L. J., Q. B. 284; 15 Jur. 967.

A foreign judgment cannot, as between the same parties, be impeached in this country on the ground that it proceeded on a mistake of law. A foreign judgment binds, notwithstanding the discovery of fresh evidence, for the courts of this country will not either re-hear cases tried by, or hear appeals from, foreign tribunals; and if the judgment of a foreign court is erroneous the regular mode provided by every system of jurisprudence, of procuring it to be examined and reversed, ought to be followed. *Trufort, In re, Trafford* v. *Blanc*, 57 L. J., Ch. 135; 36 Ch. D. 600; 57 L. T. 674; 36 W. R. 163.

In an action to indemnify the plaintiff from all debts due from the late partnership of the plaintiff, the defendant, and B., and from all suits, proof of a copy of the proceedings in a foreign court in a suit there, instituted against the late partners for the recovery of a partnership debt, in which a decree passed against them for want of answer, per quod a sequestration issued against the plaintiff's estate, and he was obliged to pay the debt, is conclusive against the defendant; and the defendant is not at liberty to shew that the proceedings were erroneous. *Tarleton* v. *Tarleton*, 4 M. & S. 20.

The judgment of a foreign court having jurisdiction over the subject-matter cannot be questioned here, on the ground that the foreign court has mistaken the law of its own country, or has come, on the evidence, to an erroneous conclusion as to the facts. *Scott* v. *Pilkington*, 2 B. & S. 11; 31 L. J., Q. B. 81; 8 Jur. (N.S.) 557; 6 L. T. 21.

A judgment of a foreign court, having jurisdiction over the parties and subject-matter of the suit, cannot be impeached on the ground that it is erroneous upon the merits. *De Cosse Brissac* v. *Rathbone*, 6 H. & N. 301; 30 L. J., Ex. 238.

—— **Omnia ritè esse acta.**]—The presumption with regard to the judgment of a foreign court is that it is correct according to the law of the country to which it belongs, but when it is admitted by the parties that the law of the foreign tribunal has not been correctly declared by its judgment, such judgment will not be binding on an English court. *Meyer* v. *Ralli*, 45 L. J., C. P. 741; 1 C. P. D. 358; 35 L. T. 838; 24 W. R. 963.

The presumption when a foreign court has purported to act properly and within its jurisdiction, is omnia ritè esse acta. *Taylor* v. *Ford*, 29 L. T. 392; 22 W. R. 47.

A Greek ship with a cargo on board consigned to Malta, the port of destination, having encountered severe weather in her passage down the Black Sea, was obliged, for the preservation of her cargo, to jettison her boats, spars and cables, and being disabled, put into Constantinople, where the captain applied to the Greek consular court, and obtained an order for a survey of the ship and cargo, and a sentence of average settlement, with the appointment of a curator, who, by virtue of the authority conferred on him, hypothecated the cargo, and caused a bottomry bond to be executed thereon for freight and the necessary expenses of transhipping and forwarding the cargo. The cargo having been transhipped, arrived at Malta, where proceedings were taken in the court of commerce by the consignee to set aside the sentence of average settlement and to annul the bottomry bond. The court of commerce declared its incompetency to decide regarding the average settlement, but pronounced the bottomry bond null and void. On appeal to the court of appeal at Malta, that court reversed the decree of the court of commerce, so far as regarded its competency to decide the average act and settlement, and ordered, as regarded the decision of the nullity of the bottomry bond, that such decision should be set aside until a definite sentence on the average act and settlement should have been come to by the court of commerce. The court of commerce gave a decision on the case thus remitted against the consignee, which was equivalent to a nonsuit. On appeal from this decision, the appellate court at Malta was of opinion, that the captain having taken the legal course before the consular tribunal at Constantinople, and that court having, on the report of experts, appointed a curator of the cargo, and declared the voyage ended at Constantinople, such curator was the attorney for the owners of the cargo, and had authority to hypothecate the same; that where the formalities of a consular authority and verbal process justifying the expenses necessitating the loan are observed

the lender on bottomry is exonerated from justifying the necessity for the loan, or making inquiry as to the facts causing such necessity; and decided for the validity of the bond:—Held, that the Greek consular court at Constantinople being a competent court, having jurisdiction over a Greek ship and a cargo owned by Greek subjects, the sentence of that court was not open to examination by the court of commerce at Malta, and that it must be presumed, in the absence of manifest error or fraud, that the Greek consular court rightly interpreted and applied the Greek law, by which they had the power they exercised of deciding that Constantinople should be considered the place of the ship's destination, and the average adjusted according to the law in force at that place; and that the bottomry bond was, under the circumstances, necessary and valid. *Messina* v. *Petrococchino*, 41 L. J., P. C. 27; L. R. 4 P. C. 144; 26 L. T. 561; 20 W. R. 451.

How far Impeachable.]—A foreign court may settle the conditions on which it will exercise its jurisdiction; those conditions being fulfilled, it may exercise that jurisdiction, but the judgment given under such circumstances cannot claim extra-territorial authority unless pronounced in accordance with the rules of international public law. *Shaw* v. *Gould*, 37 L. J., Ch. 433; L. R. 3 H. L. 55; 18 L. T. 833—H. L. (E.)

The repugnancy to natural justice in respect of which a foreign judgment is impeachable in an action thereon is a repugnancy to natural justice in reference to the conduct or mode of procedure of the foreign court, and not in reference to the merits of the action. *Crawley* v. *Isaacs*, 16 L. T. 529.

A court which is called on to enforce a foreign judgment, may examine into that judgment, to see whether it has been rightfully obtained or not. *Don* v. *Lippmann*, 5 Cl. & F. 1—H. L. (Sc.)

A foreign judgment of a competent court is conclusive, and not open to examination by another court, unless the judgment impeached carries on the face of it manifest error; as if it is shewn to have been obtained by fraud, or to be wanting in the condition of natural justice. Such judgment cannot be applied to persons other than those who were parties to the litigation decided by it, except in cases where the judgment is in rem. *Messina* v. *Petrococchino*, 41 L. J., P. C. 27; L. R. 4 P. C. 144; 26 L. T. 561; 20 W. R. 451.

The transfer of personal property must be regulated by the law of the owner's domicil, and the disregard of that law by the courts of a foreign country is an infraction of the comity of nations, which justifies the Court of Chancery in decreeing a restitution, upon the property coming within its jurisdiction. *Liverpool Marine Credit Co.* v. *Hunter*, 37 L. J., Ch. 386; L. R. 3 Ch. 479; 18 L. T. 749; 16 W. R. 1090.

But if a creditor pursues the chattel of his debtor to a foreign country in which he knows that the rights of a third party will be disregarded, the Court of Chancery cannot interfere to restrain the proceedings taken by the creditor in the foreign country. *Ib.*

—— **Defence in Foreign Court.**]—That which constitutes a defence in a foreign court is not pleadable in an action upon the judgment in the courts of this country. *Vanquelin* v. *Bouard*, 15 C. B. (N.S.) 341; 3 N. R. 122; 33 L. J., C. P. 78; 10 Jur. (N.S.) 566; 9 L. T. 582; 12 W. R. 128. Cp. *Kelsall* v. *Marshall*, 1 C. B. (N.S.) 241; 26 L. J., C. P. 19; 2 Jur. (N.S.) 1142; 5 W. R. 114.

—— **Fraud.**]—Where an action is brought in England to enforce a foreign judgment, the defendant may raise the defence that the judgment was obtained by the fraud of the plaintiff even though the fraud alleged is such that it cannot be proved without re-trying the questions adjudicated upon by the foreign court. *Vadala* v. *Lawes*, 25 Q. B. D. 310; 63 L. T. 128; 38 W. R. 594—C. A.

A plea of fraud is a good defence to an action on a foreign judgment; and therefore the Court of Chancery will not, on the ground that such a judgment was obtained by fraud, interfere with the action. *Ochsenbein* v. *Papelier*, 42 L. J., Ch. 861; L. R. 8 Ch. 695; 28 L. T. 459; 21 W. R. 516.

When a foreign judgment by default, fraudulently obtained against a person who, at the time of the commencement of the action, was temporarily residing in a foreign country, is sought to be enforced by an action in England, if it appears that there is a good defence which may be pleaded at law, the Court of Chancery will not interfere by injunction to restrain the action, although it has concurrent jurisdiction in the matter. *Ib.*

The plaintiff sued upon a foreign judgment; the defendant alleged that the judgment had been obtained by the plaintiff by a fraudulent misrepresentation to the foreign court:—Held, upon demurrer, that this was a good ground of defence. *Abouloff* v. *Oppenheimer*, 52 L. J., Q. B. 1; 10 Q. B. D. 295; 47 L. T. 325; 31 W. R. 57—C. A.

A foreign judgment being equally conclusive against the debtor as an English judgment, may be set aside in equity for fraud. Therefore, where a bill is brought against a banker by his customer for an account, and for an injunction to restrain on a foreign judgment obtained by the banker from the customer in respect of their mutual dealings, and it appeared by specific allegations in the bill, that, notwithstanding the judgment, the balance of accounts was in favour of the customer:—Held, that the case made by the bill was primâ facie a case of fraud in the banker, which he was bound to answer, and, consequently, his demurrer was overruled, without reference to the question whether the bill was sustainable for the account. *Bowles* v. *Orr*, 1 Y. & C. 465. And see *Castrique* v. *Behrens*, 3 El. & El. 709; 30 L. J., Q. B. 163; 7 Jur. (N.S.) 1024; 4 L. T. 52.

—— **Obtained in Absence of Defendant.**]—A judgment of a foreign court, obtained in default of appearance against a party, cannot be enforced in an English court, when he, at the time when the suit was commenced, was not a subject of nor resident in the country in which the judgment was obtained; for there existed nothing imposing on the party any duty to obey the judgment. *Schibsby* v. *Westenholz*, 40 L. J., Q. B. 73; L. R. 6 Q. B. 155; 24 L. T. 93; 19 W. R. 587. S. P., *Turnbull* v. *Walker*, 5 R. 132; 67 L. T. 767.

The defendant, a Swiss subject, entered into an agreement with the plaintiffs, French subjects residing in France, when he was in France on a

temporary visit, he being then domiciled in Switzerland but residing in England. The plaintiffs afterwards obtained judgment against him in a French court for breach of the agreement. He was not in France at the commencement of or at any time during the action, and he had no notice of the proceedings, though the plaintiffs knew his address in England, where he was then still residing:—Held, that the judgment could not be enforced by an English court. *Rousillon* v. *Rousillon*, 49 L. J., Ch. 338; 14 Ch. D. 351; 42 L. T. 679; 28 W. R. 623; 44 J. P. 663.

Though the Court of Chancery will not enforce a decree of a foreign court obtained against a party in his absence and without notice, yet where it finds that the proceedings in the foreign court were rendered necessary by his resistance to a proper demand, it will order him to pay the costs of those proceedings by way of damages. *Griffin* v. *Brady*, 39 L. J., Ch. 136; 18 W. R. 130.

No territorial legislation can give jurisdiction which any foreign courts ought to recognise against absent foreigners who owe no allegiance or obedience to the power which so legislates. In all personal actions the courts of the country in which the defendant resides, not the courts of the country where the cause of action arose, should be resorted to. *Sirdar Gurdyal Singh* v. *Faridkote* (*Rajah*), [1894] A. C. 670; 11 R. 340—P. C.

In an action on a judgment or a decree of the Tribunal of Commerce at Brussels, a plea that the defendant was not at any time served with any process issuing out of that court, at the suit of the plaintiff, for the causes of action upon which the judgment or decree was obtained, nor had he at any time notice of any such process, nor did he appear in the court to answer the plaintiff, is bad, inasmuch as the plea does not shew that the proceedings against the defendant in the Belgian court were so conducted as to deprive the defendant of the opportunity of defending himself therein. *Reynolds* v. *Fenton*, 3 C. B. 187; 16 L. J., C. P. 15; 10 Jur. 668. Cp. *Buchanan* v. *Rucker* and other cases post, col. 343.

A. and his wife, who were by birth British subjects, but were afterwards domiciled at St. Croix, belonging to Denmark, returned to England, and there made a joint will, disposing of a mortgage at St. Croix, which belonged to them jointly; they afterwards made separate wills, which were proved in the Prerogative Court of Canterbury. After the death of the survivor, certain proceedings were instituted at St. Croix, by the executors named in the joint will, and a judgment was obtained for the establishment of that will. The court being of opinion that the court at St. Croix had no authority to decide as between the contending parties, the executor of the joint will, having come over to this country, was held liable to account to the parties beneficially interested under the separate wills for the assets of A., received at St. Croix. *Price* v. *Dewhurst*, 4 Myl. & Cr. 76; 8 L. J., Ch. 57; 2 Jur. 1006.

The judgment of a foreign court on a subject not within its jurisdiction is not binding in this country. *Ib.*

—— **Qualified Appearance.**]—It is no answer to an action upon the judgment of a foreign court that at the time of the proceedings in the foreign court the defendant was not resident or domiciled or under allegiance in the foreign country, and appeared in the foreign court as defendant merely to protect his property from seizure in case judgment by default should be given against him in the foreign court. *Voinet* v. *Barrett*, 55 L. J., Q. B. 39; 34 W. R. 161—C. A.

—— **Agreement to elect Domicil Abroad—No Notice of Proceedings.**]—To a declaration claiming a sum recovered by a judgment in a French court, the defendant pleaded that he was not a native of France, or at any time before judgment resident or domiciled within the jurisdiction of the French court, or served with any process or summons in the suit, nor did he appear therein; nor had he any notice or knowledge of any process or summons, or any proceedings in the suit, or any opportunity of defending himself. Replication, that the defendant was the holder of shares in a company having its legal domicil in Paris, and thereby became subject to all the liabilities, rights and privileges attaching or belonging to shareholders, and in particular to the conditions contained in the statutes or articles of association. That by those statutes or articles, it was provided and agreed that all disputes arising during the liquidation of the company between the shareholders of the company, the administrators, the commissioners, or between the shareholders themselves, with respect to the affairs of the company, should be submitted to the jurisdiction of the French court; that every shareholder provoking a contest must elect a domicil at Paris, and in default election might be made for him at the office of the imperial procurator of the civil tribunal of the department in which the office of the company was situated, and that all summonses should be validly served at the domicil formally or impliedly chosen. That the company became bankrupt, and by the law of France the amount unpaid upon the defendant's shares became payable to the plaintiff as the company's assignee in bankruptcy; that the defendant made default, and provoked a contest; that he never elected a domicil; that the plaintiff thereupon caused a summons to be served at the office aforesaid, which summons required the defendant to appear in the French court to answer the plaintiff's claim; that by the law of France that office was the defendant's implied domicil of election for the purpose of service, and the service was regular; and that the defendant was bound to appear, but did not, whereupon the plaintiff recovered judgment by default against him for the amount unpaid on his shares:—Held, that the replication was good, although it did not allege that the defendant ever had any notice or knowledge of the statutes or articles, or of their provisions. *Copin* v. *Adamson*, 45 L. J., Ex. 15; 1 Ex. D. 17; 33 L. T. 33; 24 W. R. 85—C. A. Cp. *Becquet* v. *McCarthy*, 2 B. & Ad. 951.

—— **In Cases of Divorce.**]—*See* ante, col. 226.

—— **Condemnation as Prize of War.**]—The sentence of a foreign court of admiralty, condemning a ship or goods as lawful prize, is not conclusive in the courts in this country as to the ground of condemnation, unless stated upon the face of it without ambiguity. It is competent to our courts to examine the sentence carefully, to see whether it proceeds on that which would be a just ground of condemnation by the law of

nations, or on another ground which would amount only to a breach of the municipal regulations of the condemning country. *Hobbs* v. *Henning*, 17 C. B. (N.S.) 791; 5 N. R. 406; 34 L. J., C. P. 117; 11 Jur. (N.S.) 223; 12 L. T. 205; 13 W. R. 431.

Procedure—Ord. XIV.]—An action upon a foreign judgment is an action for debt arising out of a contract within the meaning of Ord. III. r. 6, in which leave may be given to the plaintiff under Ord. XIV. to sign final judgment for the amount claimed. *Hodsoll* v. *Baxter* (28 L. J., Q. B. 61) followed. *Grant* v. *Easton*, 53 L. J., Q. B. 68; 13 Q. B. D. 302; 49 L. T. 645; 32 W. R. 239—C. A.

Pleading—Plea of no Jurisdiction.]—To a count upon a foreign judgment, a plea that the foreign court had no jurisdiction, because the defendant in the action there was not a trader and was not resident within a certain district, is bad, inasmuch as, consistently with it, the foreign court had jurisdiction over the person of the defendant and the subject-matter of the action, which was sufficient. *Vanquelin* v. *Bouard*, 15 C. B. (N.S.) 341; 3 N. R. 122; 33 L. J., C. P. 78; 10 Jur. (N.S.) 566; 9 L. T. 582; 12 W. R. 128.

—— **Prout patet per recordum.**] — A plea stating a judgment recovered in a foreign court, prout patet per recordum, is not a sufficient averment that such court was a court of record. *Smith* v. *Nicolls*, 7 Scott, 147; 5 Bing. (N.C.) 208; 7 D. P. C. 282; 1 Arn. 474; 8 L. J., C. P. 92.

A vice-admiralty court abroad is not a court of record. *Ib.*

—— **Pleading Foreign Judgment as a Defence to Proceedings Here.**]—Where a foreign judgment is relied upon as a defence to an action here, the defence should shew that the plaintiffs were subjects of, or resident in, or were present in, the foreign country when the action there was commenced, so as to be bound by reason of allegiance, or domicil, or temporary presence, by a decision of the court in which judgment was pronounced. *General Steam Navigation Co.* v. *Guillon*, 11 M. & W. 877; 13 L. J., Ex. 168.

C. being ordered by the Court of Probate to declare his interest to sustain a testamentary suit in respect of certain moneys in the English funds, alleged in his declaration, that by the law of Portugal the natural child of a man, not noble, dying intestate, and a bachelor is entitled to all the movable and immovable property of his father; and that C., in a suit of filiation and inheritance in the Portuguese courts, to which the defendant and her husband were parties, obtained a decree declaring C. to be the natural son of H. C., and to be entitled to his property, and ordering them to deliver to C. all property of H. C. which they had in their possession. The defendant admitted that the judgment of the Portuguese courts was in fact obtained. C. demurred on the ground that the judgment admitted by the plea established his interest:—The court held, that the judgment as pleaded was not conclusive as to C.'s interest to sustain a suit, overruled the demurrer without costs, and directed the parties to prove their respective cases. *Doglioni* v. *Crispin*, 35 L. J., P. 129; L. R. 1 H. L. 301; 15 L. T. 441. *See also cases* post, col. 347.

—— **Notice of Proceedings.**]—To an action upon a French judgment the defendant pleaded, that at the time of the commencement of the suit, and thence down to its termination, he was absent from France; and that he was not summoned to appear in, nor had he any notice or knowledge of, any of the proceedings. The plaintiff replied that the defendant was for a long time before the commencement of the suit resident in France; and there became indebted to the plaintiff who was a French subject; and that, by the French law, when a defendant is absent from the jurisdiction, a copy of the process in the action is served upon the procureur impérial, and another posted upon the door of the tribunal; and that then, if the defendant makes default, the plaintiff may proceed to judgment; that the defendant, after the accrual of the cause or action left France, and at the commencement of the action had no domicil or known place of abode in France; that the plaintiff instituted a suit against the defendant, and pursued the procedure before stated; that default was made by the defendant, and judgment recovered; and that the judgment was a valid and binding one by the law of France:—Held, that the defence was bad, as, consistently with its averments, the defendant might have been resident in France, or have had property there when the cause of action accrued; or might, through an agent, have been served with process. *Maubourquet* v. *Wyse*, Ir. R. 1 C. L. 471.

Held, by Fitzgerald and Hughes, BB., that the plaintiff was entitled to judgment, the plea being bad, and its defects not being aided by the replication. *Ib.*

Held, by Pigot, C.B., that the plaintiff, having alleged certain grounds of jurisdiction in his replication, they implicitly excluded all others; that the grounds so alleged were insufficient, the plaintiff having shewn that he had no cause of action; and that judgment ought to be for the defendant. *Ib.*

To an action on a French judgment the defendant pleaded, first that he was not duly served with process, that he had no notice of the action, nor had he the opportunity, according to the law, rules and regulations of the foreign court in which the judgment was obtained, of defending himself. The defendant pleaded, secondly, that the action upon which the judgment was obtained was upon a contract entered into in this country and not elsewhere; that before the judgment he was never resident or domiciled within the jurisdiction of the court, nor was he a native of France, nor did he ever owe allegiance to the country, nor was he at the time of contracting the alleged obligation in France or within the jurisdiction of the court:—Held, that the first of these two pleas was bad; and that the second was good. *Duflos* v. *Burlingham*, 34 L. T. 688.

—— **Judgment not applying to whole Cause of Action.**]—A first count was upon a contract to sell and deliver sound tares: breach, that the tares delivered were unsound. A second count was upon a promise properly to ship the tares: breach, that they were improperly shipped, and thereby damaged. Plea, that the plaintiff impleaded the defendant in a foreign court for not performing the identical promises in these counts, and that the court adjudged that the plaintiff had no cause of action in respect of the non-performance of the promises; and that such judgment was final and conclusive. In support of the plea a judgment of the foreign court was

produced, "That the plaintiff be barred of his claim against the defendant on account of a cargo of tares received by the ship M. S." From a statement of reasons appended to this judgment, and which was, in fact, a statement of the case, it appeared that part of the tares contracted for reached the plaintiff; that he had refused to accept them by reason of their unsound condition; that he had sold them under protest, and that he had instituted that suit to rescind the contract and recover back the money from the defendant; but that he was barred by lapse of time, having brought the suit too late by the law of the country in which the court sat, and in which the goods were shipped, and in which the defendant resided:—Held, first, that the judgment did not support the plea, inasmuch as it clearly was not applicable to the cause of action contained in the second count. *Callendar* v. *Dittrich*, 4 Man. & G. 68; 4 Scott (N.R.) 682; 1 D. (N.S.) 730.

Held, secondly, that the plea could not be taken divisibly, so as to be considered as applicable to the first count only. *Ib.*

—— **Replication to Plea.**]—To an action on a French judgment, the defendant pleaded that he was not during the accruing of the cause of action, or any part of the proceedings, resident in France, or within the jurisdiction of the court, nor subject to the laws of France; that he was never served with any process or notice whatever, nor had he any notice whatever of the proceedings in the action, nor did he appear in court or have any opportunity of defending himself against the claim, and the proceedings were taken in his absence, and without his knowledge, privity, and consent. Replication, that the defendant became a shareholder in a company in France, subject to all the liabilities and rights attaching thereto; that the defendant was resident in England, and by reason thereof, it became necessary, by the law of France, for the defendant to elect a domicil in France, at which the directors of the company might notify to him all proceedings relative to the company or the defendant as such shareholder; that by the law of France all legal proceedings affecting any person having his real domicil out of that kingdom, left for him at such elected domicil, were as valid as if left at his real domicil in France; that the defendant made election of a domicil at a place in Paris, and gave notice thereof to the plaintiff; that the assets of the company being insufficient to discharge their debts, the defendant as a shareholder was, by the law of France, liable to pay a certain sum, and to be sued for the same by the plaintiff; that the plaintiff for the recovery thereof caused a summons to be left at his elected domicil, requiring him to appear in court at a certain time and place; and that the defendant did not appear, according to the exigency of the summons, whereupon the plaintiff recovered judgment by default:—Held, first, that the facts stated in the replication afforded an answer to the plea. *Vallee* v. *Dumergue*, 4 Ex. 290; 18 L. J., Ex. 398.

Held, secondly, that the word notice in the plea meant actual notice alone, and consequently the replication did not amount to an argumentative denial of that notice, but consisted of a statement of facts, shewing that no such notice need be given. *Ib.*

To an action on a judgment recovered in Belgium, the defendant pleaded that he was not at any time resident or domiciled within the jurisdiction of the court wherein the judgment was recovered; nor was he a native of Belgium; and that he was not, at any time before the recovery of the judgment, served with any process or summons; nor did he appear in the action; nor had he, at any time before the recovery, any notice of or any means of defending himself against the action. Replication, that the judgment was founded upon a bill of exchange, drawn in Belgium, according to the laws in force in that country, and accepted by the defendant, payable at the house of a person, at Bruges, in Belgium; and that at the time of the acceptance the defendant resided in Belgium at such house, which was his last domicil and residence there; and that, by the law of Belgium, where a bill is accepted, payable at a particular place, such place may, for all purposes, and in all actions relating to such bill, be deemed the elected domicil of such acceptor; and further, that the summons by which the action was commenced was duly served upon the defendant at the abovementioned house; and that, by the law of Belgium, such service is good and sufficient to give the court jurisdiction; and that the issuing of the process, the service of the summons, and the proceedings in the action, were in accordance with the law of Belgium; and according to such law the judgment is valid and binding on the defendant:—Held, that the replication was bad for not stating what the law of Belgium was at the time of the acceptance of the bill of exchange. *Meens* v. *Thellusson*, 8 Ex. 638; 22 L. J., Ex. 239; 1 C. L. R. 157.

Pendency of Appeal.]—Where an action is brought on a judgment of a foreign court, the pendency of an appeal in the foreign court against such judgment is no bar to the action, although it may afford ground for the equitable interposition of the English court in which the action is brought to prevent the possible abuse of its process, and on proper terms to stay execution. *Scott* v. *Pilkington*, 2 B. & S. 11; 31 L. J., Q. B. 81; 8 Jur. (N.S.) 557; 6 L. T. 21.

Discovery in aid of Defence.]—A foreign judgment cannot be questioned in the courts in this country; therefore, a bill for a discovery and a commission to examine witnesses abroad, in aid of the plaintiff's defence to an action brought in this country on a foreign judgment, is demurrable. *Martin* v. *Nicolls*, 3 Sim. 458.

What Recoverable.] — The plaintiff, in an action on a foreign judgment, has a right to recover in sterling a sum which, according to the rate of exchange between England and the foreign country at the time of the judgment, would at that time be equal to the sum if paid in the currency of that country. *Scott* v. *Bevan*, 2 B. & Ad. 78; 9 L. J. (O.S.) K. B. 152.

Equitable Execution.]—Creditor by judgment in Jamaica, filing bill here (for satisfaction from rents and profits remitted, and to be remitted), must shew his judgment to differ from judgment here, so that he cannot affect the land. *Cathcart* v. *Lewis*, 1 Ves. J. 463; 3 Bro. C. C. 516.

Other Matters.]—When the rules of pleading in a court in a foreign country having jurisdiction over British subjects, are by petition and

answer, the several paragraphs of the answer can be read together, and not as in English pleadings treated as separate pleas. *Hart* v. *Gumpach*, 9 Moore, P. C. (N.S). 241; 42 L. J., P. C. 25; L. R. 4 P. C. 439; 21 W. R. 365.

The defendants, a French company, being indebted to the plaintiffs, allowed judgment to go against them by default on 4th April. On 8th April a receiver was appointed in England of the property (then in this country) the subject of the action, in which the defendants had an interest. On 15th April the defendants were declared by a French court to be in liquidation and a liquidator was appointed. By French law the appointment of a liquidator dates back ten days earlier than the date of his appointment:—Held, that the appointment of a liquidator in France could not be held to relate back so as to override the appointment by an English court of a receiver of property situate in England. *Mason and Barry* v. *La Société des Métaux*, 37 W. R. 735.

XII. SCOTCH AND IRISH JUDGMENTS.

a. Scotch Judgments.

Action on.]—An action lies on a Scotch judgment of horning against a Scotchman born, for a debt contracted in Scotland. *Douglas* v. *Forrest*, 4 Bing. 686: 1 M. & P. 663; 6 L. J. (O.S.) C. P. 157; 29 R. R. 695. S. P., *Hay* v. *Fisher*, 2 M. & W. 722; M. & H. 286; 6 L. J., Ex. 217; 1 Jur. 287.

An action may be maintained against a defendant resident in this country for costs awarded against him, after appearance, by a decree of the Court of Session in Scotland, in a suit for a divorce. *Russell* v. *Smyth*, 9 M. & W. 810; 1 D. (N.S.) 929; 11 L. J., Ex. 308.

But an interim or interlocutory order for payment of expenses made under 48 Geo. 3, c. 151, ss. 17, 18, in a suit in Scotland, by the Lords of Session, pending an appeal to the House of Lords, is an interlocutory order, on which an action cannot be maintained in England. *Patrick* v. *Shedden*, 2 El. & Bl. 14; 22 L. J., Q. B. 283; 17 Jur. 1154. S. P., *Paul* v. *Roy*, 15 Beav. 433; 21 L. J., Ch. 361. Cp. *Nouvion* v. *Freeman*, ante, col. 325.

—— **Plea as to Jurisdiction.**]—To an action upon a decree obtained against a party in the Court of Session, in Scotland, a plea that he was not, at the time of the commencement of the suit in that court, or at any time during the proceedings therein, in Scotland, or at any place within the jurisdiction of that court; nor was he at any time before the pronouncing of the decree, in any manner, according to the course and practice of the court, notified, nor did he know, of the proceedings, so that he might by himself, his proctor, attorney or agent, appear or plead, or in any way defend himself in the action; nor did he appear in or to any of the proceedings, whereby the decree was contrary to natural justice, and wholly inoperative and void against the defendant, is ill. *Cowan* v. *Braidwood*, 1 Man. & G. 288; 2 Scott (N.R.) 138; 9 D. P. C. 27; 10 L. J., C. P. 42.

Held, that the statement in the plea, that the decree was contrary to natural justice, was to be regarded as a mere conclusion of law from the facts previously alleged, and, consequently, not traversible. *Ib.*

—— **Sufficiency of Pleading.**]—Action on a policy of insurance, by assignees of a bankrupt. A plea as to 78*l.*, that the policy was made in Scotland, and that that sum was duly fenced and arrested, according to the law of Scotland, at the suit of G., for a debt due to him, until sufficient caution should be found in the books and session, that the same should be forthcoming to G.; that thereupon the sum became and was, according to the law of Scotland, in custody of the law, and subject to the order of the Court of Session; that such proceedings were afterwards had, that G. obtained final judgment; that the proceedings were regularly conducted, and that the judgment was final and conclusive against the assignees; and that, according to the law of Scotland, they are precluded from suing for that sum, and are, by reason of the premises, wholly barred,—is sufficient, without setting out the Scotch law. *M'Leod* v. *Schultze*, 1 D. & L. 614; 13 L. J., Ex. 321.

—— **Decree of Divorce—Conclusive upon the Merits.**]—The English courts will recognise as valid the decision of a competent foreign Christian tribunal dissolving the marriage between a domiciled native in the country where such tribunal has jurisdiction and an English woman when the decree of divorce is not impeached by collusion or fraud. And this, although the marriage may have been solemnised in England, and may have been dissolved for a cause which would not have been sufficient to obtain a divorce in England. *Harvey* v. *Farnie*, 52 L. J., P. 33; 8 App. Cas. 43; 48 L. T. 273; 31 W. R. 433; 47 J. P. 308—H. L. (E.)

Other Matters.]—In 1886 a company registered in Queensland issued debentures to the Union Bank of Australia conferring a charge on its uncalled capital. No notice of these debentures was given to the shareholders. Later in 1886 the capital was called up and made payable by instalments in 1887. In February, 1887, a Scotch company sued the Queensland company for negligence, and served upon the Scotch shareholders of the Queensland company a process called "arrestment on the dependence of the action," which by Scotch law operated as a complete assignment of the calls to the Scotch company, in the event of their making good their claim, as from the date of service. Orders having been made both in Queensland and England for the winding-up of the Queensland company, an order was made in the English winding-up to restrain the Scotch company from proceeding with their action, but without prejudice to any security obtained by the arrestment; and the Scotch court, having regard to the terms of the English order, recalled the arrestment. Both the Scotch company and the bank established claims against the Queensland company in the winding-up. It was proved on the appeal that by Scotch law and international law as administered by the Scotch courts, the Scotch company were entitled to priority over the bank:—Held, that inasmuch as the Scotch court in recalling the arrestment intended that the claim of the Scotch company should be decided in the same way as if the Scotch proceedings had gone on, the Scotch company were entitled to priority. *Queensland Mercantile Co., In re, Australasian Investment Co., Ex parte*, 61 L. J., Ch. 145; [1892] 1 Ch. 219; 66 L. T. 433—C. A.

b. IRISH JUDGMENTS.

Action on.]—An action lies upon a judgment recovered in Ireland, as such judgment is not a record in England. *Harris* v. *Saunders*, 6 D. & R. 471 ; 4 B. & C. 411 ; 3 L. J. (O.S.) K. B. 239 ; 28 R. R. 310.

How far Conclusive.]—The 13 Vict. c. 18, s. 9, applies to incorporated companies registered and carrying on business in England and also in Ireland by means of an agent there. *Sheehy* v. *Professional Life Insurance Co.*, 3 C. B. (N.S.) 597 ; 27 L. J., C. P. 233 ; 4 Jur. (N.S.) 27 ; 6 W. R. 103—Ex. Ch.

Therefore, where in an action against such a company, the Queen's Bench in Ireland made an order authorising substitution of service by delivering a copy of the writ and a copy of the order to the agent in Dublin, and by sending through the post like copies to the London agent, and the plaintiff had an appearance entered for the company, and obtained judgment, and afterwards brought an action upon the judgment in England :—Held, that the court in Ireland had authority to make the order, and that the judgment obtained by the plaintiff was irregular. *Ib.*

Held, also, that even if the order was irregular, the court would not interfere. *Ib.*

A plea of nul tiel record, pleaded to an action of debt on an Irish judgment, tenders an issue of fact, even since the Act of Union. *Collins* v. *Mathew* (*Viscount*), 5 East, 473 ; 2 Sm. 25.

Plea to Jurisdiction.]—In an action on a judgment of one of the superior courts in Ireland, the defendant, though he cannot contest the merits of the action, or the propriety of the decision, may shew that the court had not properly jurisdiction as to the defendant under the circumstances. *Ferguson* v. *Mahon*, 11 A. & E. 179 ; 3 P. & D. 143 ; 9 L. J., Q. B. 146.

Therefore, where a defendant pleaded to such action, that he was never arrested upon or served with, nor at any time had notice of any process at the suit of the plaintiff for the cause of action on which the judgment was obtained, nor ever appeared in the action :—Held, that the plea was a good defence. *Ib.*

Declaration on an Irish judgment. Plea, that the defendant was never served with any writ of summons, nor had he any notice of the action. Replication, that the court, under the provisions of an act of parliament in that behalf, and upon an affidavit of the plaintiff's attorney, made an order directing that personal service of the writ of summons in the action on the defendant's attorney, and the transmission of copies thereof, and of the order in a registered letter to the defendant, addressed to his place of business in London, should be deemed good service of the writ upon him, unless cause was shewn to the contrary in six days after service of the rule making the order on his attorney and such transmission by post as aforesaid, and that such service and transmission were effected as directed by the court, and that the rule of court making the order was made absolute :—Rejoinder, that the order of the court was obtained on the strength of the affidavit of the plaintiff's attorney, which affidavit was untrue, and that the plaintiff never had any right of action against the defendant in respect of the cause of action in respect of which the judgment was obtained :—Held, that the rejoinder was bad, and that the replication was good. *Crawley* v. *Isaacs*, 16 L. T. 529.

To an action of debt on an Irish judgment the defendant pleaded that the judgment was entered up on a warrant of attorney given to the plaintiff to secure payment on a bond ; that after the bond and warrant of attorney were given, and before judgment was entered up, the plaintiff became bankrupt, and the debt in question was vested in his assignee, who had brought an action on the judgment before that commenced by the plaintiff, and that the same was still depending :—Held, that the plaintiff was the person by whom the judgment ought to have been entered up, though after his bankruptcy ; that in so doing, and in bringing the action, he must be considered as a trustee for the creditors ; and the pendency of the other action, as here pleaded, was no defence. *Guinness* v. *Carroll*, 1 B. & Ad. 459 ; 9 L. J. (O.S.) K. B. 11.

—— **English Judgment—Action in Ireland.**]—The creditors of a person resident in Ireland filed a bill in the English Court of Chancery, and obtained a decree for an account, &c., and afterwards (the property of the debtor lying chiefly in Ireland) filed a bill in the Court of Chancery there, praying to have the full benefit of the proceedings in the English suit. The Court of Chancery in Ireland dismissed such second bill as for want of jurisdiction :—Held, that the judgment of the Court of Chancery in Ireland was erroneous ; that the proceedings in the English Court of Chancery were in the nature of a foreign judgment, and were to be treated as such in Ireland, namely, as primâ facie evidence of the right in the party who had obtained the judgment. *Houlditch* v. *Donegall* (*Marquis*), 2 Cl. & F. 470 ; 8 Bli. (N.S.) 301.

English Judgment entered in Ireland.]—When a certificate of an English judgment had been entered in the Common Pleas in Ireland, pursuant to 31 & 32 Vict. c. 54, on motion to set aside the judgment entered in the Common Pleas, on the ground that the English judgment, on which the certificate was founded, was irregularly entered up as a final judgment, while demurrers to some of the pleas were still undecided :—Held, that there was no judgment of the Irish court, but merely an entry of record of the certificate of an English judgment. *Bailey* v. *Welply*, Ir. R. 4 C. L. 243.

Held, also, that the certificate of the proper officer in England was conclusive on such a motion that there was such a final judgment. *Ib.*

Held, also, that a subsequent order of the officer in England, staying all proceedings on the English judgment while the demurrers remained undisposed of, had no application to the registry of the certificate in Ireland, which had been regularly done at the date of the order. *Ib.*

A judgment obtained in an inferior court of record in England was removed into the Court of Queen's Bench, and a certificate purporting to be under the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), but omitting the material allegation that the judgment was obtained "after appearance" or "after service," was signed by the Master of the Queen's Bench at Westminster, and was registered by the Master of the Common Pleas at Dublin ; the court, acting under s. 4, set aside the registration, and all subsequent proceedings founded upon it. *Part* v. *Scannell*, Ir. R. 9 C. L. 426.

XIII. COLONIAL JUDGMENT.

In General.]—The same rules are applicable respecting the enforcement of colonial judgments as are applicable respecting the enforcement of foreign judgments. *Simpson* v. *Fogo*, 1 H. & M. 195; 32 L. J., Ch. 249; 9 Jur. (N.S.) 403; 8 L. T. 61; 11 W. R. 418; 1 N. R. 422.

Defendant must have been Served with Process.]—An action is not maintainable on a colonial judgment, unless it appears that the defendant was regularly served with process, and had an opportunity of defending the suit, even although it appears to be the practice of that court not to give personal notice. *Buchanan* v. *Rucker*, 9 East, 192; 1 Camp. 65; 9 R. R. 531. Cp. *Schibsby* v. *Westenholz*, and other cases, ante, col. 332.

For, the law will not raise an assumpsit upon such a judgment obtained by default against a party who, upon the face of the proceedings, appeared only to have been summoned by nailing up a copy of the declaration at the court-house door; it not appearing that he had ever been present in the colony, or subject to the jurisdiction of the colonial court at the time the suit commenced and afterwards, although by a law of the colony, if a defendant is absent from the island, and without an attorney, manager, or overseer there, such mode of summoning him shall be deemed a good service. *Ib.*

A judgment of a colonial court against a party absent from the place, and not represented by any agent upon whom the process of the court could be served, is primâ facie void. *Smith* v. *Nicolls*, 7 Scott, 147; 5 Bing. (N.C.) 208; 7 D. P. C. 282; 1 Arn. 474; 8 L. J., C. P. 92.

Declaration on a decree of the Supreme Court of Newfoundland. Plea, that the decree was made in respect of an amended bill; and that, before the filing thereof, the defendant was out of the jurisdiction of the court, and has so continued; that he was not served with a copy of such bill, and had no notice of any process therein, and that the proceedings were taken in his absence and ex parte. Replication, that, at the commencement of the suit, the defendant was within the jurisdiction, and was duly served with process in respect of the original bill in the suit, and appeared and appointed H. E. to be attorney for him, the defendant, in the suit: and H. E. accordingly became the attorney of the defendant, and authorised to conduct his defence; and that he had notice of the amended bill. Rejoinder traversed that H. E. had notice of the amended bill:—Held, after verdict for the plaintiff, that the defendant, by merely traversing the notice, admitted that H. E. had authority from the defendant to act as attorney for him, as well in respect of the amended as of the original bill; and that such authority, given by the defendant about to leave the jurisdiction, would support the decree. *Henderson* v. *Henderson*, 11 Q. B. 1015; 17 L. J., Q. B. 209; 12 Jur. 773.

—— **Service on Person as Agent for absent Party.**]—To render a colonial judgment void, on the ground that it is contrary to the law of the country where it was given, it must be shewn clearly and unequivocally to be so. *Becquet* v. *MacCarthy*, 2 B. & Ad. 951. Cp. *Copin* v. *Adamson*, 1 Ex. D. 17; 45 L. J., Ex. 15; 33 L. T. 560; 24 W. R. 85—C. A.

Where the law of a British colony required that, in a suit instituted against an absent party, the process should be served upon the king's attorney-general in the colony; but it was not expressly provided that the attorney-general should communicate with the absent party:—Held, that such law was not so contrary to natural justice as to render void a judgment obtained against a party who had resided within the jurisdiction of the court at the time when the cause of action accrued, but had withdrawn himself before the proceedings were commenced. *Ib.*

—— **Company—Colonial Act enabling Chairman to Sue and be Sued.**]—An act of the legislature of New South Wales enabled the chairman of a company to sue and be sued on behalf of the company, and provided that execution upon any judgment in such an action against the chairman might be issued against the goods and lands of any member of the company in like manner as if such judgment had been obtained against him personally:—Held, first, that the colonial legislature had authority to make such an act, and that it contained nothing repugnant to the law of England or to natural justice. *Bank of Australasia* v. *Nias*, 16 Q. B. 717; 20 L. J., Q. B. 284; 15 Jur. 967. S. P., *Bank of Australasia* v. *Harding*, 9 C. B. 661; 19 L. J., C. P. 345; 14 Jur. 1094.

Held, secondly, that the specific mode provided for enforcing the judgment by execution against a member of the company could not be obtained against a shareholder out of the colony. *Ib.*

Held, thirdly, that the judgment against the chairman might be made the foundation of an action against a member beyond the territory of the colony in the same manner as if he had been personally served in the colony, and the judgment had been against him as a party to the record. *Ib.*

—— **Indian Act enabling Secretary to Sue and be Sued.**]—By an act of the council of India, to enable a banking company to sue and be sued in the name of their secretary, it was enacted that all actions against the company should be brought against the secretary for the time being as the nominal defendant; that a memorial of the names of the directors and secretary, and proprietors of the bank, should be inrolled; and that every judgment in any action in India against the secretary should (subject to the express provisions of the act) "have the like effect and operation upon and against the property and funds of the bank, as if such judgment had been made or pronounced against all its members, and as if all the members had been parties to such action, and as if the act had not passed." The act provided that, in case execution upon any judgment in such action, obtained against the secretary, should be ineffectual for obtaining satisfaction against the funds of the bank, execution might issue; first, against proprietors for the time being, and, that proving ineffectual, against persons who were proprietors at the time of the contract; provided that no such execution should issue against any other person than the actual party to the suit, without leave of the court in which the action was brought:—Held, that there was nothing in the act to prevent a

creditor, having obtained a judgment against the secretary of the bank in India, from enforcing it by action against a shareholder in this country; the provisions as to execution merely regulating the mode of procedure in India, and that the non-inrolment of a memorial was no answer to an action upon the judgment here. *Kelsall* v. *Marshall*, 1 C. B. (N.S.) 241; 26 L. J., C. P. 19; 2 Jur. (N.S.) 1142; 5 W. R. 114.

How far Examinable.]—A judgment of a colonial court is not open to examination, as to the merits of it, in an action brought upon it in the courts of this country. *Henderson* v. *Henderson*, 6 Q. B. 288; 13 L. J., Q. B. 274; 9 Jur. 755. Cp. *Castrique* v. *Imrie*, and other cases, ante, col. 327.

Nul tiel Record.]—A plea of nul tiel record to an action upon a judgment of a colonial court is bad. *Philpott* v. *Adams*, 7 H. & N. 888; 31 L. J., Ex. 421.

A plea of nul tiel record cannot be pleaded to an action on a colonial judgment. *Chapman* v. *Sherrie*, Ir. R. 5 C. L. 36.

Merger.]—A colonial judgment obtained against a co-contractor cannot be insisted on by way of merger in an action on such judgment. *Bank of Australasia* v. *Nias*, 16 Q. B. 717; 20 L. J., Q. B. 284; 15 Jur. 967.

Insolvent Person — Sequestration.]—To an action on a judgment at the Cape of Good Hope, the defendant pleaded that by an ordinance in that colony relating to insolvents, it was enacted that the court might, on the petition of an insolvent, place his estate under sequestration, and that further execution of any judgment against him or his estate for any debt should, after lodging the order for sequestration, be stayed during the pendency of such sequestration; and that all actions pending against any insolvent for any debt provable against his estate should, upon any order being made for sequestration, be stayed. The plea stated the petition of the defendant, the surrender of his estate, it being placed under sequestration, and that the estate was distributed, and upon such distribution the plaintiff received a dividend of 1*s.* 6*d.* in the pound on the amount of the judgment debt in the action:—Held, that the plea was bad, as it merely shewed a temporary suspension of the execution during the pendency of the sequestration, but not a discharge of the person or estate of the insolvent. *Frith* v. *Wollaston*, 7 Ex. 194; 21 L. J., Ex. 108.

Action on—Allegation of Jurisdiction.]—A declaration on a judgment of a colonial court need not state that the court had jurisdiction over the parties or the cause. *Robertson* v. *Struth*, 5 Q. B. 941; D. & M. 773; 8 Jur. 404.

—— **In Assumpsit.**]—A declaration on a colonial judgment framed in assumpsit did not aver the plaintiff's readiness to perform his part of the contract, but it disclosed a good cause of action for malfeasance:—Held, that a court of equity would not treat the judgment as void, though the objection to the declaration might have been good on general demurrer. *Jack* v. *Tease*, 12 Ir. Ch. Rep. 279.

—— **Appeal.**]—Where the time for appealng from the judgment had elapsed, the court gave time to the parties to apply to the judicial committee of the privy council in England for liberty to appeal, or to apply to a court of law for liberty to plead to an action which had been commenced on the judgment. *Ib.*

The question upon the construction of a contract for a security, by way of mortgage, over land in a colony, having been before a court of competent jurisdiction in the colony, and a foreclosure and judicial sale directed, the allegation of fraud merely general and denied, an injunction was refused. *White* v. *Hall*, 12 Ves. 321; 8 R. R. 326.

A mortgage deed was established by a decree of the privy council, which reversed the decree of the court of Grenada in a suit to which the mortgagor and the first and second mortgagees were parties. The mortgagor was not a party to the appeal to the privy council, but was held to have been so far represented in interest by the second mortgagee, as not to be entitled to file a bill in England impeaching the deed so upheld. *Furquharson* v. *Seton*, 5 Russ. 45.

The next of kin of an intestate filed their bill in equity in the supreme court of Newfoundland against A., the brother and deceased partner of the intestate, for an account of the estate of the father of A., and of the intestate possessed by A., and an account of the partnership transactions and the dealings of A. with the estate since the death of the intestate; the bill was taken pro confesso against A. in the colonial court; and, on a reference, the master reported that certain sums were due to the several next of kin on the account of the estate of the intestate's father possessed by A., but that no account between A. and the intestate had been laid before him. The supreme court decreed that the sums found by the master to be due to the next of kin, and the costs, should be paid to them by A. The next of kin brought their actions in this country against A. upon the decree. A. then filed his bill in this court against the next of kin and personal representative of the intestate, stating that the intestate's estate was indebted to him on the partnership accounts and on private transactions; alleging various errors and irregularities in the proceedings in the supreme court; and that A. intended to appeal therefrom to the privy council; and praying that the estate of the intestate might be administered, the partnership accounts taken, the amount of the debt due to A. ascertained and paid, and the next of kin restrained by injunction from proceeding in their actions. Demurrer, for want of equity, allowed on the ground that the whole of the matters were in question between the parties, and might properly have been the subject of adjudication in the suit before the supreme court of Newfoundland; that inasmuch as the privy council is the court of appeal from the colonial court, and has jurisdiction to stay the execution of the decree pending the appeal, the court will not interfere by injunction on the ground of error or irregularity in the decree of the colonial court. Quære, whether, in a case of error shewn in the judgment of the court of a foreign country, from which there was no appeal to any of her Majesty's courts, the decision would be the same. *Henderson* v. *Henderson*, 3 Hare, 100. *S. C.*, 6 Q. B. 288; 13 L. J., Q. B. 274; 9 Jur. 755, post.

—— **Defence in Foreign Court.**]—Any pleas which might have been pleaded to the original

action cannot be pleaded here to an action on a colonial judgment. *Kelsall* v. *Marshall*, 1 C. B. (N.S.) 241; 26 L. J., C. P. 19; 2 Jur. (N.S.) 1142; 5 W. R. 114. Cp. *Vanquelin* v. *Bouard*, 15 C. B. (N.S.) 341; 3 N. R. 122; 33 L. J., C. P. 78; 10 Jur. (N.S.) 566; 9 L. T. 582; 12 W. R. 128.

No Estoppel to Action brought in England.]—A judgment obtained by a defendant in a colonial court cannot be pleaded by way of estoppel to a declaration in this country for the same cause of action, unless it is shewn that the judgment so obtained would be final and conclusive in the colony. *Plummer* v. *Woodburne* 7 D. & R. 25; 4 B. & C. 625; 4 L. J. (O.S.) K. B. 6.

A judgment obtained in a colonial court is no estoppel, nor is it pleadable in bar to an action brought in England for the same cause. *Bank of Australasia* v. *Harding*, 9 C. B. 661; 19 L. J., C. P. 345; 14 Jur. 1094.

A plea of a judgment recovered in the vice-admiralty court at Sierra Leone, is no bar to an action brought for the same cause in this country. *Smith* v. *Nicolls*, 7 Scott, 147; 5 Bing. (N.C.) 208; 7 D. P. C. 282; 1 Arn. 474; 8 L. J., C. P. 92.

Administration — Judgment — Creditor.]—A colonial judgment having been obtained against the personal representatives (called executors dative) of an intestate, who died in a British colony, leaving assets in the colony and in Ireland:—Held, in a suit instituted in Ireland for the administration of the personal estate of the deceased, that—assuming the executors dative to have been duly appointed and the judgment to have been regularly obtained, according to the law of the colony—no privity existed between the executors dative and the administrator in Ireland of the personal estate of the intestate, and that consequently the colonial judgment was not, against the Irish administrator, evidence of the debt claimed by the judgment creditor, on the foot of which the judgment had been recovered. *Tighe* v. *Tighe*, Ir. R. 11 Eq. 203.

As to Balance of Account.]—An action lies upon the decree of a colonial court of equity for the balance of an account between partners. *Henley* v. *Soper*, 2 Man. & Ry. 153; 8 B. & C. 16; 6 L. J. (O.S.) K. B. 210.

An action is maintainable upon a decree of a colonial court of equity, in a suit which has terminated in ascertaining a clear balance, whereby one party is ordered to pay a sum certain to the other. *Henderson* v. *Henderson*, 6 Q. B. 288; 13 L. J., Q. B. 274; 9 Jur. 755. *S. C.*, 3 Hare, 100, supra.

A. E. R.

INTERPLEADER.

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A. By Sheriff.
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A. BY SHERIFF.

1. When Entitled to Relief.

Infant Claimant.]—The court has power to give a sheriff relief, though the claimant is an infant. *Claridge* v. *Collins*, 7 D. P. C. 698; 3 Jur. 894.

Not when Interested.]—Where the sheriff is placed in circumstances which give him an interest in either side, the court will not relieve him. *Duddin* v. *Long*, 1 Scott, 281; 1 Bing. (N.C.) 299; 3 D. P. C. 139.

The court refused to interfere in favour of the sheriff, where the under-sheriff's partner appeared to be concerned for some of the parties. *Ib.*

If the under-sheriff is the execution creditor, or partner in business of the execution creditor, the sheriff is not entitled to relief. *Ostler* v. *Bower*, 4 D. P. C. 605; 1 H. & W. 653.

Conduct of.]—A sheriff is entitled to call upon an execution creditor and claimants to interplead, unless he has acted dishonestly, or his conduct has prejudiced either of the parties. *Holt* v. *Frost*, 3 H. & N. 821; 28 L. J., Ex. 55.

The fact, therefore, that the sheriff had, down to the seizure of the execution debtor's goods, acted as the attorney of a claimant, and had given him notice of the execution, is not alone sufficient to prevent his calling on the parties to interplead. *Ib.*

Where an under-sheriff, who was acting as attorney for certain creditors of the defendant, informed them of a fieri facias at the suit of the plaintiff having been placed in his hands to execute, by which means the issuing of a fiat in bankruptcy against the defendant was accelerated, and the plaintiff's execution thereby defeated, the court refused to grant the sheriff relief. *Cox* v. *Balne*, 2 D. & L. 718; 14 L. J., Q. B. 95; 9 Jur. 182.

Possession of Goods or Proceeds—Intention to Seize.]—A sheriff can only interplead while he is in possession of goods seized under a fi. fa., or intends to seize goods or holds the proceeds of an execution. Ord. LVII. rr. 1 (*b*) 16-17, does not alter the practice in this respect under the Interpleader Act (1 & 2 Will. 4, c. 58), s. 6, and the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126). *Moore* v. *Hawkins*, 15 R. 166; 43 W. R. 235.

An actual seizure of goods by the sheriff under an execution is not required to give the court jurisdiction—an intended seizure of them by him is sufficient. *Lea* v. *Rossi*, 11 Ex. 13; 24 L. J., Ex. 280; 1 Jur. (N.S.) 384. S. P., *Day* v. *Carr*, 7 Ex. 883.

Where the sheriff, after having gone to the premises of the defendant to take the goods under a fi. fa., has withdrawn without seizing them, on notice of an adverse claim, and has not the goods in his possession when he applies to the court, he is not entitled to relief. *Holton* v. *Guntrip*, 3 M. & W. 145; 6 D. P. C. 130; M. & H. 324.

The sheriff cannot apply, unless the goods or money in dispute be actually in his hands. *Scott* v. *Lewis*, 2 C. M. & R. 289; 4 D. P. C. 259; 1 Gale, 204; 5 Tyr. 1083; 4 L. J., Ex. 321.

Goods having been seized and sold under an execution, and the proceeds paid over to the execution creditor, the sheriff cannot apply for relief, though he had no notice of the claim until after the sale. *Inland* v. *Bushell*, 2 H. & W. 118; 5 D. P. C. 147.

If a sheriff has paid over the produce of an execution to a judgment creditor, after notice of a claim, he is too late to move for relief. *Anderson* v. *Calloway*, 1 C. & M. 182; 1 D. P. C. 636; 3 Tyr. 237; 2 L. J., Ex. 32.

If, having seized goods in execution, which are claimed by another party, the sheriff delivers up part of the goods to the claimant, he thereby precludes himself from relief. *Braine* v. *Hunt*, 2 D. P. C. 391; 2 C. & M. 418; 3 L. J., Ex. 85. S. P., *Kirk* v. *Almond*, 2 L. J., Ex. 13.

—— **Seizure of Equity of Redemption.**]—Where goods seized in execution by a sheriff under a fi. fa. have been previously assigned by the execution debtor to a third person as security for a debt, the sheriff is not bound to interplead and thereby enable proceedings to be taken for an order to sell being made by a judge under s. 13 of the Common Law Procedure Act, 1860, but is at liberty to withdraw, though the value of the goods seized exceed the sum secured by the bill of sale, and the execution debtor, therefore, has an equity of redemption which is valuable. *Scarlett* v. *Hanson*, 53 L. J., Q. B. 62; 12 Q. B. D. 213; 50 L. T. 75; 32 W. R. 310—C. A.

—— **Withdrawing.**] — The sheriff is not entitled to call upon parties to interplead where he has already exercised a discretion in the matter, as by withdrawing from the goods. *Crump* v. *Day*, 4 C. B. 760.

Where, after the making of an interpleader order, the sheriff, with the consent of the execution creditor and the claimant, temporarily withdrew from possession:—Held, that the goods were no longer in custodiâ legis, and that the landlord was entitled to distrain upon them, although he knew that the interpleader proceedings were pending. *Cropper* v. *Warner*, 1 Cab. & E. 152.

Notice to Sheriff—Sufficiency.]—Notice from some person whose name is not mentioned, that a fiat has been issued against the defendant, does not amount to a sufficient claim to entitle the sheriff to protection under the Interpleader Act. *Bentley* v. *Hook*, 2 C. & M. 426; 4 Tyr. 229; 3 L. J., Ex. 87.

Not Party against whom Process issued.]—Where a seizure by a sheriff under a fi. fa. is disputed, on the ground that the goods on which the levy was made were held by the defendant, not in his own right, but merely as an executor in trust for others, the defendant is to be considered as "not being the party against whom the process issued," and the sheriff may apply for an interpleader rule. *Fenwick* v. *Laycock*, 1 G. & D. 532; 2 Q. B. 108; 11 L. J., Q. B. 146; 6 Jur. 341.

The circumstance of the goods seized being in the possession of a stranger, and not of the defendant against whom the execution issued, does not prevent the sheriff from applying for relief. *Allen* v. *Gibbon*, 2 D. P. C. 292.

On the 20th August the sheriff, under a fi. fa. against A., took possession of B.'s furniture in A.'s house. Both before and after seizure B. gave formal notice to the sheriff that the furniture was his, and on the 23rd issued the writ in this action against the sheriff for an injunction and damages. On the 25th August the sheriff issued an interpleader summons, under which an issue was directed and an order made for the sheriff withdrawing from possession on payment of 100*l.* into court. The sheriff accordingly withdrew from possession on the 1st September. B.'s title was afterwards admitted by the judgment creditor, and the 100*l.* paid out of court to B. B. now brought this action to trial against the sheriff for damages and costs:—Held, that the sheriff had not exceeded the scope of his duty in retaining possession till ordered to withdraw under the interpleader order, and that the action must be dismissed, but without costs, on the ground that the sheriff might have applied to the judge, under the interpleader order, to dispose of the matters in question between him and the plaintiff. *Aylwin* v. *Evans*, 52 L. J., Ch. 105; 47 L. T. 568.

Where a sheriff's officer had notice, at the time of the seizure under a fi. fa., that the goods seized were not the goods of the person against whom the writ issued, the court will not interfere to protect the sheriff. *Tufton* v. *Harding*, 29 L. J., Ch. 225; 6 Jur. (N.S.) 116; 1 L. T. 264; 8 W. R. 122.

Money Paid without Levy.]—Where the sheriff seized goods under a fi. fa., and a person other than the person against whom the process issued claimed the goods and paid out the sheriff under protest:—Held, that the money so paid to the sheriff under protest was the proceeds of goods taken in execution within the meaning of Ord. LVII. r. 1 (b.), and that therefore the sheriff was entitled to interplead in respect thereof. *Smith* v. *Critchfield*, 54 L. J., Q. B. 366; 14 Q. B. D. 873; 54 L. T. 122; 33 W. R. 920—C. A.

Execution against Tenant—Landlord.]—Where an execution has been levied, and a landlord makes a claim upon the sheriff for rent, which the execution creditor has not expressly disputed, although the claim may be disputable, whether as regards the amount of rent due, or as regards the liability of the property which has been seized to distress, the sheriff is not entitled to an interpleader, at all events unless the landlord claims any part of the property. *Bateman* v. *Farnsworth*, 29 L. J., Ex. 365; 2 L. T. 390.

Indemnity.]—Where a sheriff has seized goods under a fi. fa., and a claim to them is put in by another person, he is not bound to accept an indemnity from the execution creditor, but may obtain relief. *Levy* v. *Champneys*, 2 D. P. C. 454.

Where the sheriff seized goods in execution which were under distress for rent due to the

landlord, the court refused to grant him relief, though he had applied for indemnity to the execution creditor, which had been refused. *Haythorn* v. *Bush*, 2 C. & M. 689; 2 D. P. C. 641; 3 L. J., Ex. 210.

Time for Application.]—The sheriff need not wait for proceedings to be taken against him before he applies for relief. *Green* v. *Brown*, 3 D. P. C. 337.

But he must not apply before claim made. *Isaac* v. *Spilsbury*, 10 Bing. 3; 3 M. & Scott, 341; 2 D. P. C. 211.

—— **Where Delay.**]—A sheriff will not be entitled to relief, unless he comes "immediately" on receiving notice of an adverse claim. *Devereux* v. *John*, 1 D. P. C. 548.

He must come as soon as possible. *Cook* v. *Allen*, 2 D. P. C. 11; 3 Tyr. 586; 1 C. & M. 542; 2 L. J., Ex. 199. S. P., *Tufton* v. *Harding*, 29 L. J., Ch. 225; 6 Jur. (N.S.) 116; 1 L. T. 264; 8 W. R. 122.

Where there was great delay on the part of the sheriff in applying to the court, in consequence of negotiations between the parties, and the execution creditor afterwards abandoned his claim, the court refused to make the latter pay costs. *Dixon* v. *Ensell*, 2 D. P. C. 621.

Where a sheriff took possession under a fi. fa. in November, and, a few days afterwards, had notice that the goods belonged to a trustee, and kept possession until the 28th January, and did not apply to the court till Easter term:—Held, that an issue, at the instance of the sheriff, could be granted only upon paying the costs of both the other parties, as the sheriff ought to have applied in the term next after the claim was made. *Beale* v. *Overton*, 5 D. P. C. 599; 2 M. & W. 534; M. & H. 172; 6 L. J., Ex. 118; 1 Jur. 544.

On the 16th January, 1847, the sheriff seized the goods and moneys of the defendant under a fi. fa., the net proceeds of which he handed over to the plaintiffs in part satisfaction of their judgment. He at the same time seized bills of exchange and a promissory note, which, not being due, he retained. On the 3rd February he received a notice that a fiat in bankruptcy had issued against the defendant. On the 4th he was ruled to return the writ; and on the 11th he returned what he had done under the writ. On the 18th he received notice that assignees had been appointed; and the bills and note were claimed on their behalf. After some negotiation with the solicitor to the fiat, the sheriff took out an interpleader summons on the 29th April:—Held, that he had by his laches disentitled himself to relief. *Mutton* v. *Young*, 4 C. B. 371; 16 L. J., C. P. 165; 11 Jur. 414.

Where it appeared that the sheriff had been guilty of neglect, the court refused to relieve him from any liability occasioned thereby. *Brackenbury* v. *Laurie*, 3 D. P. C. 180.

Nature of Claim.]—The court will not interfere, for the sheriff, quia timet, unless a claim to property is actually made. *Isaac* v. *Spilsbury*, 10 Bing. 3; 3 M. & Scott, 341; 2 D. P. C. 211.

Giving notice of a fiat in bankruptcy having issued is not equivalent to a claim by the assignees to the goods sold. *Bently* or *Bartley* v. *Hook*, 2 D. P. C. 339; 2 C. & M. 426; 4 Tyr. 229; 3 L. J., Ex. 87.

Where goods were taken in execution, and a claim was set up under a bill of sale which bore date after the levy, the court discharged the sheriff's application for relief, and made him pay the costs of the execution creditor. *Oxfordshire (Sheriff), In re*, 6 D. P. C. 136.

A plaintiff having obtained a judgment against the defendant for a sum less than 50*l.*, including costs, was ordered to pay to the defendant the costs of abortive bankruptcy proceedings commenced under a debtor's summons for that debt. The amount was ordered to be paid to the sheriff, and the plaintiff claiming to set off that sum against his judgment debt, the defendant commenced an action against the sheriff to have the amount paid over to him. An interpleader order was thereupon made to decide whether the plaintiff or the defendant was entitled to the funds in the sheriff's hands:—Held, that this was not a case for interpleader at all, there being no claim by the plaintiff to the goods and chattels taken in execution, so as to bring the case within 1 & 2 Will. 4, c. 58, c. 6. *Smith* v. *Saunders*, 37 L. T. 359.

—— **Equitable Claims.**]—*See* infra, col. 357.

—— **Lien.**]—The court will relieve the sheriff in the case of conflicting claims on property seized by him, though that claim is only of a lien, and not of the whole property. *Ford* v. *Baynton*, 1 D. P. C. 357.

—— **Next of Kin.**]—The court will not grant an interpleader rule on behalf of a sheriff who has been served with notice of a claim to goods taken in execution, made by a party who claims a share in them as one of the next of kin to a person deceased, to whom the defendant has taken out administration, and who had previously obtained an injunction in equity against the defendant's disposing of the property taken in execution. *Roach* v. *Wright*, 8 M. & W. 155; 1 D. (N.S.) 56; 10 L. J., Ex. 267; 5 Jur. 755.

—— **Interest as Partner.**]—A sheriff is not entitled to apply for relief, on the ground of claim set up in respect of an interest as a partner, in goods seized under a writ of execution. *Holmes* v. *Mentze*, 5 N. & M. 563; 4 D. P. C. 300; 4 A. & E. 127; 1 H. & W. 608; 5 L. J., K. B. 62.

So, although the claim states that the balance of accounts is so much in favour of the claimant, as to give him the sole beneficial interest in the property seized. *Ib.*

But where the execution creditor refuses either to admit or to deny the alleged partnership, the court will enlarge the time for the sheriff's return to the writ until he is indemnified. *Ib.*

—— **Various Writs.**]—Where the sheriff has levied under a fi. fa., and while in possession he receives notice that other writs of execution have been issued against the defendant's goods, and that the first execution creditor is not entitled to the whole proceeds of the levy, the sheriff is not entitled to relief. *Salmon* v. *James*, 1 D. P. C. 369.

Where a sheriff seizes under one fi. fa., and the question is whether that writ ought to have precedence of another, the court will not grant the sheriff relief. *Day* v. *Wildock*, 1 D. P. C. 523.

An order was made under the statute, where goods had been taken by the sheriff under a fi. fa. and sold by him, another fi. fa. having issued in the meantime against the same goods, and where a party claimed title to the property

against both the plaintiffs, the defendant and the sheriff, and complained that the goods had been sold improvidently, and in spite of notice from the owner. *Slowman* v. *Back*, 3 B. & Ad. 103.

Inquiry by Sheriff.]—Before the sheriff applies he is bound to inquire into the nature of the claims set up; and, therefore, if he brings parties before the court in consequence of a claim which is clearly bad in point of law, the court will compel him to pay the costs. *Bishop* v. *Hinxman*, 2 D. P. C. 166.

Notice of Adverse Claim.]—A sheriff, who has seized goods, cannot file a bill of interpleader, without first acquainting the creditor with the adverse claim, in order to give him an opporunity of withdrawing his claim. *Dutton* v. *Furniss*, 35 Beav. 461; 35 L. J., Ch. 463; 12 Jur. (N.S.) 386; 14 L. T. 319; 14 W. R. 600.

Protection of Sheriff.]—The sheriff, having seized goods under a fi. fa. which were claimed by a third person, gave notice of the claim to the execution creditor, who five days afterwards gave him notice to admit the claim and to withdraw from possession. The sheriff did not withdraw, but took out an interpleader summons, upon the hearing of which the judge made no order, and refused to order that no action should be brought against the sheriff:—Held, that the judge had properly refused to make an order protecting the sheriff from any action. *Sodeau* v. *Shorey*, 74 L. T. 240—C. A.

Where an interpleader order provided that no action should be brought against the sheriff, and the order was subsequently rescinded, owing to the default of the execution creditor to return the issue:—Held, that the claimant had no cause of action against the sheriff for the original seizure. *Martin* v. *Tritton*, 1 Cab. & E. 226.

Where the sheriff in the execution of a fi. fa. enters the premises of a person other than the execution debtor, and there seizes goods, believing erroneously that such goods belong to the execution debtor, the sheriff may, upon interpleader proceedings, be protected against an action for trespass to the land as well as against an action for seizure of the goods, if no substantial grievance has been done to the person whose premises are wrongfully entered. *Hollier* v. *Laurie* (3 C. B. 334) discussed, and *Winter* v. *Bartholomew* (11 Ex. 704) approved. *Smith* v. *Critchfield*, 54 L. J., Q. B. 366; 14 Q. B. D. 873; 33 W. R. 920—C. A.

—— **On Bankruptcy.**]—Where there are conflicting claimants to property seized under a fi. fa., the defendant having become bankrupt, the court will interfere and protect the sheriff. *Parker* v. *Booth*, 1 M. & Scott, 156. S. P., *Northcote* v. *Beauchamp*, 1 M. & Scott, 158.

—— **Trespass — Striking out Claim.**]—A judge's order directed goods seized under a fi. fa. to be sold, and the money to be paid into court, to abide the event of an issue between the claimant and the execution creditor. A verdict was found for the claimant, who thereupon brought an action against the sheriff for breaking and entering his dwelling-house, and seizing and converting his goods. The court made absolute a rule to strike out of the declaration so much as charged the defendant with seizing and converting the plaintiff's goods. *Abbott* v. *Richards*, 15 M. & W. 194; 3 D. & L. 487; 15 L. J., Ex. 330.

Where, under 9 & 10 Vict. c. 95, s. 118, a judge of a county court adjudicated in favour of a claimant whose house had been broken and entered, and his goods seized and taken away, as the goods of an execution creditor in the county court:—Held, that the claimant was afterwards entitled to proceed in an action for the special damage occasioned by the wrongful breaking and entry, but not for the trespass in taking away his goods. *Chater* v. *Chignell*, 15 Q. B. 217; 19 L. J., Q. B. 520; 14 Jur. 697.

—— **Stay of Proceedings.**]—A judge on an interpleader order has authority to restrain an action against the execution creditor, as well as against the sheriff. *Carpenter* v. *Pearce*, 27 L. J., Ex. 143.

A sheriff entered the house of A. and seized therein his goods, and also goods belonging to the execution debtor. A. brought an action against the sheriff, who thereupon obtained an interpleader summons, and the judge ordered that the execution creditor be barred as to the goods of A., and that all further proceedings be stayed:—Held, that the judge had power to stay proceedings, and the power was properly exercised, it not appearing that the sheriff had committed any excess. *Winter* v. *Bartholomew*, 11 Ex. 704; 25 L. J., Ex. 62; 4 W. R. 264.

Where goods are seized under an execution issued on a judgment in a county court and sold, and an interpleader summons is taken out at the instance of the high bailiff, under the County Courts Act, 1867, s. 31, the county court judge has power to adjudicate upon the damages, to which the claimant of the goods may be entitled, arising out of the execution, although the goods have been sold, and therefore are no longer in the control of the county court; and any action against the officers of the court for wrongfully depriving the plaintiff of his goods will be stayed; but an action against the purchasers of the goods from the officers of the county court will not be stayed. *Hills* v. *Renny*, 49 L. J., Ex. 710; 5 Ex. D. 313; 42 L. T. 610—C. A.

The court will not stay proceedings in an action for damage arising out of a seizure under a county court execution, merely because there has been an interpleader order in the county court in favour of the plaintiff; the plaint containing no claim for damages, and there having been no adjudication except as to the right to the goods so taken. *Jones* v. *Williams*, 4 H. & N. 706; 28 L. J., Ex. 324.

Goods seized by a sheriff under a fi. fa. against A. out of the Exchequer, were claimed by B., to whom they were restored upon the establishment of her right upon an issue directed at the sheriff's instance. B. afterwards brought an action against the sheriff for breaking and entering her house on the occasion of the seizure. The court refused to stay the proceedings, holding the relief and protection afforded to the sheriff by 1 & 2 Will. 4, c. 58, s. 6, to be confined to disputed claims to the goods seized, or to their proceeds. *Holler* v. *Laurie*, 3 C. B. 334; 4 D. & L. 205; 15 L. J., C. P. 294; 10 Jur. 860.

2. Sale of Goods Seized.

Jurisdiction—Bill of Sale—Order for Application of Proceeds.]—Goods having been taken in execution under a judgment of the high court, and a claim made to them under a bill of sale, by which less than one month before the date of the execution the execution debtor had

assigned them by way of security for the repayment of 130*l.* and interest thereon at 60 per cent. per annum, agreeing to pay the principal sum with interest by monthly instalments of 6*l.* each for seventeen months, and the balance a month later, a judge made an order under Ord. LVII. r. 12 that the sheriff should sell the goods, and out of the proceeds pay to the claimant the amount of his claim with interest up to the date of payment, and to the execution creditor the amount of his execution, and the residue to the defendant:—Held, that on the true construction of the words of the rule, "and direct the application of the proceeds of sale in such manner, and upon such terms, as may be just," the judge had jurisdiction to make the order, and that his jurisdiction was not limited by the practice of the courts of equity as to the repayment of an unwilling mortgagee. *Forster* v. *Clowser*, 66 L. J., Q. B. 693; [1897] 2 Q. B. 362; 76 L. T. 825—C. A.

Where goods subject to a bill of sale have been seized by the sheriff at the instance of an execution creditor, and it is doubtful whether the security is sufficient, the court will not interfere with the rights of the bill of sale holder, and will not order a sale under Ord. LVII. r. 12, unless the execution creditor guarantees him against loss. *Forster* v. *Clowser* (supra) explained. *Stern* v. *Tegner*, 66 L. J., Q. B. 859; [1898] 1 Q. B. 37; 77 L. T. 347; 46 W. R. 82—C. A.

Where a trustee in bankruptcy has not called upon the sheriff under s. 11 (1) of the Bankruptcy Act, 1890, to deliver to him goods taken in execution which are subject to a bill of sale, the execution is not at an end, and the jurisdiction given by Ord. LVII. r. 12 to order a sale still continues. *Ib.*

Order for.]—An order was not made for the sale of goods under 23 & 24 Vict. c. 126, s. 13, except under special circumstances. *Pearce* v. *Watkins*, 2 F. & F. 377.

Where, after an interpleader order directing a sheriff to sell goods, the execution debtor was adjudicated a bankrupt, on his own petition, before the time limited by the order for the sale, and, upon the messenger entering, the sheriff withdrew, leaving him in possession, the court refused to issue an attachment against the sheriff at the suit of the execution creditor, for contempt in not proceeding to a sale pursuant to the interpleader order. *Collins* v. *Cliff*, 8 L. T. 466; 11 W. R. 786.

Receiver and Manager instead of Sale.]—An interpleader issue being ordered to try the right to goods seized in execution, the court or a judge may, under the Judicature Act, 1873, s. 25, sub-s. 8, and Ord. LVII. r. 15, order that, instead of a sale by the sheriff, a receiver and manager of the property be appointed. *Howell* v. *Dawson*, 13 Q. B. D. 67.

Particulars of Claim.]—Where, upon an interpleader summons by the sheriff, a claimant alleges that he is entitled, under a bill of sale, or otherwise by way of security for a debt, to the goods seized in execution, and an order is made for the sale of the goods and the satisfaction of the claim out of the proceeds of the sale, the claimant is not entitled to demand from the sheriff any sum not included in the particulars of claim on which the order was made. *Hockey* v. *Evans*, 56 L. J., Q. B. 253; 18 Q. B. D. 390; 56 L. T. 179; 35 W. R. 265—C. A.

Liability of Execution Creditor.]—An execution creditor is not liable to the person whose goods have been wrongfully taken in execution for any damage sustained by him in consequence of their sale under an interpleader order. *Walker* v. *Olding*, 1 H. & C. 621; 32 L. J., Ex. 142; 9 Jur. (N.S.) 53; 7 L. T. 633; 11 W. R. 186.

The plaintiff's goods having been wrongfully seized by the defendants under a fi. fa. directed against the goods of the execution debtor, and in default of payment of their value or security for the amount by the plaintiff (the claimant) having been sold by the sheriff under an interpleader order, and the proceeds paid into court to await the result of an interpleader issue, which was subsequently determined in the plaintiff's favour:—Held, that he was entitled to recover from the execution creditors damages only up to the time of the interpleader order, and that they were not liable for any loss or damage resulting from the sale, or any proceedings subsequent to such order. *Ib.*

If a sheriff's officer, without any direction from an execution creditor, or any interference by him, in executing a fi. fa. seizes a stranger's goods, who makes a claim, and the officer takes out an interpleader summons, and the execution creditor appears and accepts an issue to try the ownership of the goods, the execution creditor does not thereby become liable to an action for the wrongful act of the sheriff's officer in taking the goods. *Woollen* v. *Wright*, 1 H. & C. 554; 31 L. J., Ex. 513; 7 L. T. 73; 10 W. R. 715—Ex. Ch.

3. Expenses of Possession.

Rule not Enlarged.]—A sheriff, having taken goods in execution which were claimed by a third party, obtained an interpleader rule. The parties appeared; and a rule was made that the parties should appear in the next term, and maintain or relinquish their claims, and that, in the meantime, the sheriff should continue in possession till further order of the court, and proceedings against him be stayed; and that a feigned issue should be tried between the claimants at the next assizes. The issue was tried and the third party obtained a verdict against the execution creditor. The latter obtained a rule for a new trial, which rule, after the lapse of five terms, was discharged. The sheriff had, by direction of the execution creditor, quitted possession before the rule for a new trial was discharged. The interpleader rule had never been enlarged, or in any manner formally continued:—Held, that the court might nevertheless act upon the interpleader rule, for the purpose of awarding to the successful party his costs of appearing to the sheriff's rule, and costs of keeping possession of property incurred by such party. *Levy* v. *Champneys*, 4 A. & E. 365.

What Expenses.]—The sheriff will be allowed his costs of keeping possession, after applying to the court, where it is for the benefit of the parties, and not in furtherance of his duty. *Underton* v. *Burgess*, 4 D. P. C. 104.

The term "possession money" does not include the expense of the keep of cattle seized by the sheriff. *Gaskell* v. *Sefton*, 14 M. & W. 802; 3 D. & L. 267; 15 L. J., Ex. 107; 9 Jur. 996.

When a judge has ordered that the claimant as a condition of a relief shall pay possession money, the claim of an overcharge is not an

extortion, but a ground for relief on taxation of costs. *Long* v. *Bray*, 10 W. R. 841.

Non-appearance of Parties.]—Where neither the plaintiff nor claimant appears, the court will discharge the sheriff from actions by either of those parties, and permit him to levy his poundage and expenses, and abandon the remainder of the levy. *Eveleigh* v. *Salisbury*, 5 D. P. C. 369 ; 3 Bing. (N.C.) 298 ; 3 Scott, 674.

If the execution creditor does not appear upon a rule to relieve the sheriff, the court will order the sheriff to withdraw from possession, but will not direct the execution creditor to pay the sheriff the costs of keeping possession. *Field* v. *Cope*, 2 C. & J. 480 ; 1 D. P. C. 567 ; 2 Tyr. 548 ; 1 L. J., Ex. 175.

Where Seizure Wrongful.]—The court will allow a sheriff to deduct the expenses of a sale effected by the authority of the court, although it appears on the trial of an issue that the seizure was wrongful. *Bland* v. *Delaus*, 6 D. P. C. 293 ; 1 W. W. & H. 75.

Unsuccessful Execution Creditor—Repayment to Claimant.]—The execution creditor who is unsuccessful in an interpleader issue is liable to repay to the claimant the charges of the sheriff which he has deducted from the amount of the levy. *Blaker* v. *Seager*, 76 L. T. 392.

4. Interfering with Sheriff.

Contempt of Court.]—Sheriff's officers went to the house of a party to execute a fieri facias, and took possession of his goods. An auctioneer and others claimed them under a bill of sale, and proceeded to sell them, notwithstanding the resistance of the officers, whom they treated with considerable violence ; whereupon the sheriff took out an interpleader summons, and served it. They disregarded this, and completed the sale and removed the goods :—Held, a contempt of court, both at common law and under 1 & 2 Will. 4, c. 58. *Cooper* v. *Asprey*, 3 B. & S. 932 ; 32 L. J., Q. B. 209 ; 9 Jur. (N.S.) 1198 ; 8 L. T. 355 ; 11 W. R. 641.

B. IN OTHER CASES.

Unliquidated Damages.]—Actions for unliquidated damages are not within s. 1 of 1 & 2 Will. 4, c. 58. *Walter* v. *Nicholson*, 6 D. P. C. 517.

Equitable Claims.]—An equitable claim is not the subject of an interpleader summons. *Hurst* v. *Sheldon*, 13 C. B. (N.S.) 750. S. P., *Sturgess* v. *Claude*, 1 D. P. C. 505. *Rouch* v. *Wright*, 8 M. & W. 155 ; 1 D. (N.S.) 56 ; 10 L. J., Ex. 267. *Putney* v. *Tring*, 5 M. & W. 425 ; 7 D. P. C. 81 ; 8 L. J., Ex. 271.

On an interpleader issue, a common law court can take notice of equitable rights, and determine which party is to be preferred to the other according to such rights. *Englebach* v. *Nixon*, 44 L. J., C. P. 396 ; L. R. 10 C. P. 645 ; 32 L. T. 831. S. P., *Duncan* v. *Cashin*, 44 L. J., C. P. 225 ; L. R. 10 C. P. 554 ; 32 L. T. 497 ; 23 W. R. 561. *See now* Judicature Act, 1873, s. 24, sub-s. 3, and s. 25, sub-s. 11.

The Interpleader Act applies only to those cases where the opposite claims depend on legal rights, and not on matters peculiarly of equitable jurisdiction. *Langton* v. *Horton*, 3 Beav. 464.

A bill of interpleader cannot be sustained upon equities ; the claims must be founded on legal rights, and must refer to precisely the same subject-matter, and not to collateral demands arising out of the right immediately in dispute. *Barclay* v. *Curtis*, 9 Price, 661.

Chose in Action.]—Semble, that a chose in action may be the subject of interpleader. *Robinson* v. *Jenkins*, 59 L. J., Q. B. 147 ; 24 Q. B. D. 275 ; 62 L. T. 439 ; 38 W. R. 360—C. A.

Conflicting Claims.]—It is no objection to a bill of interpleader that one party's right is legal, and the other's equitable ; but they must both claim the same subject adversely, not under each other. *Glynn* v. *Locke*, 3 Dr. & War. 11 ; 2 Con. & L. 21 : 5 Ir. Eq. R. 61.

Where a bill of interpleader stated a case for relief as between two of the defendants, but also set up the claim of a third, which was paramount and adverse to the claims of the two others :—Held, that although this last claim might be one which could not support the bill, the introduction of it did not expose the bill to a successful demurrer on the part of one of the first-named defendants. *Farebrother* v. *Beale*, 3 De G. & Sm. 637 ; 19 L. J., Ch. 149 ; 14 Jur. 215.

Where a fund in the hands of a stakeholder was contested by three parties, one of whom claimed the whole of it, and the other two claimed it in certain proportions, and the stakeholder filed a bill of interpleader against the three claimants, the court at the hearing dismissed the bill with costs as against one of the parties claiming a part of the fund, and decreed that the other two parties should interplead as to the other part. *Hoggart* v. *Cutts*, Cr. & Ph. 197 ; 10 L. J., Ch. 314.

A mere pretext of a conflicting claim will not support a bill of interpleader ; the court is bound to see that there is a question to be tried. *Cochrane* v. *O'Brien*, 2 Jo. & Lat. 380 ; 8 Ir. Eq. R. 241.

It is not necessary that the right claimed by the third party should be an absolute right of property. *Harwood* v. *Betham*, 1 L. J., Ex. 180.

A plaintiff in an interpleader is not bound to shew the existence of an apparent title in each of the defendants claiming the property. *East and West India Dock Co.* v. *Littledale*, 7 Hare, 57.

Different Debts.]—Debts that are different in their original nature and constitution, could not be made the subject of interpleader. *Glyn* v. *Duesbury*, 11 Sim. 139 ; 9 L. J., Ch. 365 ; 4 Jur. 1080.

B. undertook to pay A. the sum of 365*l.* at a particular time, and afterwards paid him 40*l.* on account. A. then assigned the sum of 365*l.* alleged to be due to him from B. both to C. and D., and C. and D. claimed to be paid this sum from B. B. filed a bill of interpleader against C. and D., stating the payment of 40*l.*, and requiring them to interplead as to the 325*l.* :—Held, that on account of the difference of the two sums of 365*l.* and 325*l.*, interpleader did not lie. *Diplock* v. *Hammond*, 23 L. J., Ch. 550 ; 2 W. R. 500—L.JJ.

To give the court jurisdiction under the act there must be cross claims on one and the same subject-matter, and the party applying must shew that he cannot in any case be liable to both the claims. *Farr* v. *Ward*, 2 M. & W. 844 ; 6 L. J., Ex. 213.

Applicant not to be harassed.]—It is sufficient to support a bill of interpleader, that each of the defendants has a claim to the matter in question, although one only can maintain an action at law; the principle being, to prevent a plaintiff from being doubly vexed. It is therefore not necessary that he should have been actually sued. *Morgan* v. *Marsack*, 2 Mer. 107.

Interpleader upon notice of a variety of claims by persons, amongst whom an entire charge upon an estate was split, though no suit instituted, and but one legal right of entry; the principle being, not merely that the payment cannot be safely made, but that the party entitled to be discharged by a single payment should not be harassed by a number of suits. *Angell* v. *Hadden*, 15 Ves. 244.

No Possession.]—Plaintiff having parted with the property, cannot sustain an interpleading bill against different claimants, upon an undertaking to pay over the value to the party entitled. *Burnett* v. *Anderson*, 1 Mer. 405.

Claim of Lien.]—A lien attaching upon the goods in dispute does not prevent the party who holds them from applying for relief. *Cotter* v. *Bank of England*, 3 M. & Scott, 180; 2 D. P. C. 728; 2 L. J., C. P. 158. See *Attenborough* v. *St. Katharine's Docks*, post, col. 369.

A wharfinger, who claims a lien on goods for wharfage cannot interplead if the lien only attaches upon one of the parties by whom the goods are claimed. *Braddick* v. *Smith*, 9 Bing. 84; 2 M. & Scott, 131; 1 L. J., C. P. 154.

In an action against an auctioneer by his employer, for the proceeds of goods intrusted to him for sale, he having sold after notice of a claim by a third party, and claiming a lien on a certain sum only as portion of the proceeds for his commission and expenses:—Held, entitled to an interpleader as to the residue. *Best* v. *Heys*, 3 F. & F. 113.

Stakeholder.]—When there are two or more claimants of goods in the hands of a stakeholder, the only way in which he can protect himself is by filing a bill of interpleader. If, instead of doing so, he litigates with the claimants separately, he must pay the costs of the successful claimant. *Laing* v. *Zeden*, 43 L. J., Ch. 626; L. R. 9 Ch. 736; 31 L. T. 284.

A mere stakeholder is justified, if there is the slightest doubt or risk arising from conflicting claims, in calling upon the person really interested on either side to indemnify him against such risk, and, if he refuses or neglects to do so, in filing a bill of interpleader in equity. *Nelson* v. *Barter*, 2 H. & M. 334; 33 L. J., Ch. 705; 10 Jur. (N.S.) 832; 12 W. R. 999.

—— **After Action brought.**]—The court cannot give relief to stakeholders, who are only threatened with proceedings; an action must be brought, and the plaintiff declare, before the court will interfere. *Parker* v. *Linnett*, 2 D. P. C. 562.

—— **Illegal Race.**]—The court will not grant an interpleader where an action has been brought against the holder of a stake deposited with him to abide the event of an illegal race. *Applegarth* v. *Colley*, 2 D. (N.S.) 223; 10 M. & W. 723; 11 L. J., Ex. 350.

—— **Title Deeds.**]—The holder of title deeds cannot apply for protection against opposing claims. But trover for title deeds is within the act. *Smith* v. *Wheeler*, 3 D. P. C. 431; 1 Gale, 15, 163.

Bankers—Interest.]—A. being in possession of a house, deposited the title deeds with a bank, as a security for a loan. Amongst them was what purported to be a grant to B., deceased, in fee. A. died; B.'s heir demanded the grant from the bank, claiming it as his property. A.'s heir, who was in possession of the house, paid off the advance, and demanded the deeds deposited. The bank gave up all but the grant claimed by B.'s heir, which the bank refused to give to either party. B.'s heir brought trover against the bank. A.'s heir threatened to sue the bank. The court relieved the bank, though in the relation of bailee to the person represented by the claimant. *Roberts* v. *Bell*, 7 El. & Bl. 323; 3 Jur. (N.S.) 662.

A bill of exchange was drawn by the Melbourne branch of the Bank of Australasia, upon their house in London, in favour of a married woman, and remitted to her by her husband, and duly accepted by the London house. After the bill had been so accepted, and had been indorsed by the wife for value, but before its maturity, the husband (who had in the meantime arrived in this country) gave notice to the bank not to pay it, his wife having eloped. The bill becoming due, and the bank being sued by the indorsee:—Held, not a case for an interpleader, the bank having an interest in the subject-matter of the suit, and the question whether or not the bank was estopped from contesting the payee's right to indorse not being one which could be tried in an issue between the plaintiff and the claimant. *Baker* v. *Bank of Australasia*, 1 C. B. (N.S.) 515; 26 L. J., C. P. 93; 3 Jur. (N.S.) 187; 5 W. R. 253.

A sum of money had been deposited by the plaintiff while sole with the defendants, who were bankers; they were afterwards served with a notice by M., that the plaintiff was married to him, and that they should not pay over the money to her. The plaintiff disputed the marriage:—Held, that the case was within 1 & 2 Will. 4, c. 58, s. 1. *Crellin* v. *Leland*, 6 Jur. 733.

Interests of Husband and Wife.]—A defendant who is sued on a promissory note given to the plaintiff for money due to a married woman, to enable her to have the benefit of it, and not her husband, cannot obtain relief on the ground that he expects the husband to sue for the money. *Newton* v. *Moody*, 1 W. W. & H. 554; 7 D. P. C. 582; 3 Jur. 42.

A married woman lodged several sums of money in a bank in her own name upon deposit receipts representing herself to be a widow. Her husband and a transferee from her both afterwards claimed and brought actions for the recovery of the deposits:—Held, a proper case for interpleader. *Costello* v. *Martin*, 15 W. R. 548.

Estate Agents—Commission.]—Two claims by different estate agents against the same person for different sums in respect of commission, on the sale of the same house to a purchaser, are not such opposing or conflicting claims to the same debt as entitle the defendant to an interpleader order under Ord. XVII. r. 13 of the County Court Rules, 1889. *Greatorex* v. *Shackle*, 64 L. J., Q. B. 634; [1895] 2 Q. B. 249; 15 R. 501; 72 L. T. 897; 44 W. R. 47.

Charge on Lands.]—The owner of lands subject to a charge is entitled to file a bill against persons setting up conflicting claims to the benefit of the charge to have their rights declared and the estate discharged on payment of the money charged. *Vyvyan* v. *Vyvyan*, 4 De G. F. & J. 183; 31 L. J., Ch. 158; 8 Jur. (N.S.) 3; 5 L. T. 511; 10 W. R. 179.

Conduct of Party.]—A party, who, by his own act, is placed in a situation to be sued, cannot call on the court to substitute another defendant. *Belcher* v. *Smith*, 1 L. J., C. P. 167; 9 Bing. 82; 2 M. & Scott, 184.

Semble, on the doctrine of interpleader, that where the double claim has been occasioned by the act of the stakeholder, he has no right to file a bill of interpleader. *Desborough* v. *Harris*, 5 De G. M. & G. 439; 1 Jur. (N.S.) 986; 3 Eq. R. 1058; 4 W. R. 2.

A party cannot obtain relief where he has incurred a personal liability to either of the contending parties. *Patorni* v. *Campbell*, 12 M. & W. 277; 1 D. & L. 397; 13 L. J., Ex. 85; 7 Jur. 1139.

Purchaser from Factor.]—A. consigned goods to B., a factor, who sold them to C. B. having become bankrupt, his assignees sued C. for the price of the goods, which were also claimed by A.:—Held, that C. was entitled to the benefit of the 1 & 2 Will. 4, c. 58, s. 1. *Johnson* v. *Shaw*, 4 Man. & G. 916; 12 L. J., C. P. 112.

Ownership of Shares.]—An action having been brought by A. against a railway company to recover dividends due upon certain consolidated stock of the company, and B. claiming to be the registered proprietor of the stock in respect of which the dividends were sought to be recovered by A.:—Held, that the company was not entitled to relief. *Dalton* v. *Midland Ry.*, 12 C. B. 459.

The plaintiff was registered proprietor of shares in a public company, and held a certificate that he was registered as owner of the shares. He executed a transfer to the defendants, who were brokers, to enable them to sell the shares, and handed to them the certificate and transfer for that purpose. The claimant gave the defendants notice that he claimed the shares, and the plaintiff demanded back the certificate and transfer. The defendants applied for an interpleader order:—Held, that, as the claimant was in effect claiming the documents, the defendants were entitled to interplead. *Robinson* v. *Jenkins*, 59 L. J., Q. B. 147; 24 Q. B. D. 275; 62 L. T. 439; 38 W. R. 360—C. A.

Title to Reward.]—Where two parties claim to be entitled to a reward, the defendant, when sued by one of them to recover it, is not entitled to relief under the act. *Collis* v. *Lee*, 1 Hodges, 204; 5 L. J., C. P. 83. S. P., *Grant* v. *Fry*, 4 D. P. C. 135.

A reward was offered by a parish to any party who should give information which should lead to the conviction of the party who had murdered a female. A party claimed to have given the information and brought an action against the vestry clerk of the parish (who was liable to be sued under a local act). Other parties also claimed to have given the information. The court, at the instance of the defendant, granted a rule under 1 & 2 Will. 4, c. 58, s. 1. *Guy* v. *Pittman*, 5 Scott, 795; 1 Jur. 775.

Title to Bill of Exchange.]—Actions were commenced by two persons, claiming to be lawful owners of a bill of exchange, against the acceptor. The court directed an issue to try who was lawfully entitled to recover on the bill, and relieved the acceptor from all claim in respect of costs. *Regan* v. *Serle*, 9 D. P. C. 193; 1 W. P. C. 31.

A defendant, having purchased cattle from the plantiff, accepted a bill in payment, with a blank for the name of the drawer, and remitted it by post to the plaintiff. The bill subsequently came into the hands of B. & S. for a valuable consideration. The plaintiff, denying that he had ever authorised payment by an acceptance, or that he had ever received the bill or indorsed it, brought an action against the defendant for the price of the cattle. B. & S. also threatened to commence an action against him on the bill:—Held, that the defendant was not entitled to relief. *Furr* v. *Ward*, 2 M. & W. 844; M. & H. 244; 6 L. J., Ex. 213.

When two parties claim a right to a vessel which has been sold, and part of the proceeds is in the hands of a third party, in the form of a bill of exchange, that is a case for interpleader. *Gibbs* v. *Gibbs*, 6 W. R. 415.

M. & Co. were sued by G. as acceptors on a bill of exchange. M. & Co. had handed the bill to L. & Co. for full value received. L. & Co. had really obtained the bill for one H. in consideration of the value of a cargo sent by G. to England from Russia, which H. instructed L. & Co. to sell on commission. H. obtained possession of the cargo on handing over the bill to G.'s agents in England. The bill was then forwarded to G. in Russia, and being duly presented, was dishonoured, whereupon G. sued M. & Co. as acceptors. L. & Co. meantime give M. & Co. notice not to pay the bill, on the ground that they, L. & Co., had parted with the bill through the fraud of H., and that, the cargo being deteriorated, they had not received full value for the bill, and claimed to be recouped for their loss on its sale from the moneys handed to M. & Co. for the bill. M. & Co. applied for an interpleader issue to be ordered, which the Master granted, and on which he substituted L. & Co. as defendants in lieu of M. & Co.:—Held, that M. & Co., being "persons seeking relief who were under liability for a debt in which they were, or expected to be, sued by two or more parties making adverse claims" within the terms of Or. LVII. r. 1 (*a*), there was jurisdiction for the court or judge to exercise a discretion in ordering an interpleader issue, and that such discretion had been rightly exercised. *Gerhard* v. *Montagu*, 61 L. T. 564; 38 W. R. 76.

Claims under Life Policy.]—A life insurance company received notice of an assignment by an insurer of a policy which the company had granted, and the insurer afterwards became bankrupt. Soon after the death of the person whose life was assured, the party to whom the assignment had been made applied for the payment of the sum due upon the policy, and the company inquired of the assignees of the bankrupt whether there was any objection to payment being made to the claimant. The assignees did not assent to the payment, but made no positive claim to the policy. In the meantime an action was brought upon the policy by the claimant, in the name of the bankrupt, against the company:—Held, that it was a case in which the company were entitled to file their bill of interpleader against the plaintiff in the action, the bankrupt, and his assignees, and that the assignees, who had

in the suit shewn no title to the policy, must pay the costs. *Fenn* v. *Edmonds*, 5 Hare, 314.

In 1825 H. effected a policy upon the life of G., and subsequently assigned it, and real estate, by way of mortgage, to Messrs. S. to secure a sum of money. Due notice of the assignment was given by Messrs. S. to the assurance office. In 1830 Messrs. S. took possession of the real estate, and have ever since remained in possession of it. In 1834 H. became insolvent. In 1853 G., the life assured, died. The assurance office refuse to pay Messrs. S. the sum assured, alleging that both H. and his assignee in insolvency claimed the fund; and they filed a bill of interpleader against all the parties. It appeared that H., the insolvent, did not deny the validity of Messrs. S.'s security, but only alleged that after payment of all his debts there would be a surplus; and that the insolvent assignee did not actually claim the fund or object to the payment of it to Messrs. S., but declined to consent to the payment:—Held, that this was not a case for interpleader. *Desborough* v. *Harris*, 5 De G. M. & G. 439; 1 Jur. (N.S.) 986.

Claim by Uncertificated Bankrupt.]—Where an uncertificated bankrupt brought an action for work done by him, and on a reference a certain sum was found to be due to him, which his assignees thereupon claimed from the defendant:—Held, that on a fresh action being brought by the bankrupt, the defendant might call upon the assignees, by an interpleader rule, to support the claim. *Jones* v. *Turnbull*, 2 M. & W. 601; 5 D. P. C. 591; M. & H. 106; 6 L. J., Ex. 166.

When Indemnity given.]—Where a defendant has been idemnified by a third party for not delivering up property in his possession, he has no right to relief. *Tucker* v. *Morris*, 1 C. & M. 73; 1 D. P. C. 639; 2 L. J., Ex. 1.

The plaintiff in interpleader is not bound to show the existence of an apparent title in each of the defendants claiming the property, and a stakeholder is entitled to relief by suit of interpleader, and is not bound to accept an indemnity from either of the claimants, though the claimant offering it shows an apparent title. *East and West India Dock Co.* v. *Littledale*, 7 Hare, 57.

"Collusion."]—The objection that a stakeholder has, by merely taking an indemnity from one of two rival claimants to property in his hands, disentitled himself to relief under the Interpleader Acts because he had identified himself with and must be taken to "collude" with the claimant who gave the indemnity, cannot be raised by that claimant himself, and the decisions in *Tucker* v. *Morris* (1 Cr. & M. 73), and *Belcher* v. *Smith* (9 Bing. 82), do not apply. *Thompson* v. *Wright*, 54 L. J., Q. B. 32; 13 Q. B. D. 632; 51 L. T. 634; 33 W. R. 96.

Where an applicant for relief by way of interpleader has made an agreement with one of two contending parties to assist him in his endeavour to defeat the claim of the other, he so far identifies himself with the first party as to be guilty of "collusion" within the meaning of r. 2, sub-s. (*b*) of Ord. LVII. Collusion under this order does not necessarily imply any moral wrong. *Murietta* v. *South American Co.*, 62 L. J., Q. B. 396; 5 R. 380.

Disclaimer—Interest in Part.]—In an action for an obstruction in collecting tolls of a mine, with a count in trover for the ore against the adventurers who claimed an interest in the ore, but disclaimed as to the tolls:—Held, that the court could not entertain an application by them under the act. *Lawrence* v. *Mathews*, 2 H. & W. 123; 5 D. P. C. 149.

—— **By one of two.**]—In a joint action of trover against two, one of them who claims no title to the goods is entitled to relief. *Gladstone* v. *White*, 1 Hodges, 386.

Claiming Interest in Subject-matter.]—A claim for warehouse rent is not such an interest in the subject-matter of a suit as will exclude a defendant from the protection of the Interpleader Act. *Harwood* v. *Betham*, 1 L. J., Ex. 180.

Where the depositary of a fund has a personal interest in contesting a question relating to part of the fund with one of the claimants of it, he cannot properly file a bill of interpleader respecting it. *Moore* v. *Usher*, 7 Sim. 384; 4 L. J., Ch. 205.

Defendant, the proprietor of a horse repository, sold there by public auction a horse to the plaintiff, warranted quiet to ride and in harness, but subject to a condition, by which, if considered by the buyer incapable of working from any infirmity or disease, it might be returned on the second day after the sale, and the matter determined by veterinary surgeons according to the terms provided for in such condition. The horse was returned accordingly by plaintiff, who demanded to have back the money he had paid for the purchase, and this being refused, he brought an action against defendant for damages for breach of the warranty. A. B., who had placed the horse at the repository for sale, claimed of defendant the proceeds of the sale, stating that the horse had left the repository perfectly sound:—Held, that defendant was not entitled to an interpleader order. *Wright* v. *Freeman*, 48 L. J., C. P. 276; 40 L. T. 134; *Id.* 358—C. A.

An auctioneer sold for the plaintiff some furniture, and paid him a part of the proceeds; but whilst the balance was in his hands, G. gave him notice that the furniture belonged to her. The plaintiff having brought an action against the auctioneer for the balance, he sought to deduct his charges for commission, and applied for an interpleader order between the plaintiff and G., as to the residue, G. being willing to allow him his charges:—Held, that a judge had power to make the interpleader order, if not under 1 & 2 Will. 4, c. 58, under the 23 & 24 Vict, c. 126, s. 12. *Best* v. *Hayes*, 1 H. & C. 718; 32 L. J., Ex. 129; 11 W. R. 71.

An auctioneer sold, by the instructions of the plaintiff, some furniture, after he had received notice of a claim to it under a bill of sale; and disposed of a portion of the proceeds according to the plaintiff's direction; subsequently a claim was made to the balance by the holder of the bill of sale, and the auctioneer obtained a summoning order:—Held, that the state of facts did not entitle him to an interpleader order; and that the rival claimants were not entitled to the costs of affidavits which went solely into the merits of the case as between themselves. *Poland* v. *Coall*, Ir. R. 7 C. L. 108.

Stakeholder, seeking to retain part of stake, cannot file interpleader. If an action is brought against an auctioneer for a deposit, he cannot file a bill of interpleader if he insists upon retaining either his commission or the duty. *Mitchell* v. *Hayne*, 2 Sim. & S. 63; 25 R. R. 151.

Auctioneer, being a mere stakeholder, ordered to pay deposit money into court, on retaining his own claims on it, without prejudice. *Yates* v. *Farebrother*, 4 Madd. 239.

Part only of a single Claim.]—A debtor against whom an action has been brought, and who has had notice of assignment of the debt, may interplead as to part only of the claim, and may dispute the residue. His application for relief may either be made in the action under Ord. LVII. rr. 1, 4, or by a separate proceeding under s. 25, sub-s. 6, of the Judicature Act, 1873. If an interpleader order be made on a separate proceeding under s. 25, sub-s. 6, of the Judicature Act, 1873, the judge making the order has no power to stay the proceedings in an action already commenced against the debtor. *Reading* v. *London School Board*, 16 Q. B. D. 686; 54 L. T. 678; 34 W. R. 609.

Claims not Identical.]—A court of law was not bound by the principles which governed courts of equity upon a bill of interpleader, and might give relief although one of the parties had incurred to another a personal obligation independently of the questions of property, and the claims were not identical. *Best* v. *Hayes*, 1 H. & C. 718; 32 L. J., Ex. 129; 11 W. R. 71.

Deposit—Pledge.]—A. sued the defendant, to whom he had intrusted a policy for certain purposes, and declared in trover and detinue, and specially on the contract. B., who had pledged the policy with A., then brought an action against the defendant for the recovery of the policy. An interpleader order was made, directing that the proceedings in the first action should be stayed till further order, that A. should be at liberty to defend the second action, indemnifying the defendant, and that B. should give the defendant security for costs:—Held, that the order was rightly made. *Tanner* v. *European Bank*, 35 L. J., Ex. 151; L. R. 1 Ex. 261; 12 Jur. (N.S.) 414; 14 L. T. 414; 14 W. R. 675.

Work and Labour.]—A plaintiff in his own name contracted with the defendant to do works, for which he was to be paid by instalments. The works proceeded, and some instalments were paid, when the defendant received notice from C. that the plaintiff was but his agent in making the contract and doing the work, and that further payments to the plaintiff would be at the defendant's peril. The work was completed by the plaintiff, who brought an action for the balance admitted by the defendant to be due to some one:—Held, that the defendant was entitled to relief by way of interpleader. *Meynell* v. *Angell*, 32 L. J., Q. B. 14; 8 Jur. (N.S.) 1211; 11 W. R. 122.

Contract, with whom.]—Where work is done under a contract, and an action is brought for the amount of it by one party, but another claims to be entitled to be paid for it, and gives notice thereof to the defendant:—Semble, that such a case is not within the 1 & 2 Will. 4, c. 58, s. 1; and it is the fault of the defendant, who made the contract, that he does not know with whom he contracted. *Turner* v. *Kendal Corporation*, 13 M. & W. 171.

A. being in possession of iron lying on the premises of the defendants, who were wharfingers, transferred it to the plaintiff; whereupon they, at the plaintiff's request, placed it to his account in their books, and informed him that they had done so. A claim to the iron having been made by other parties, suggesting that it had been fraudulently transferred by A. to the plaintiff, the defendants refused to deliver the iron to the plaintiff, who brought an action against them:—Held, that they having agreed to hold the iron for the plaintiff, were not entitled to an interpleader order. *Horton* v. *Devon (Earl)*, 7 D. & L. 206; 4 Ex. 497; 19 L. J., Ex. 52.

The plaintiff sold to the defendant a rick of hay, belonging to a deceased person. S. afterwards took out administration to the effects of the deceased, and claimed the price of the hay:—Held, that the defendant could not be relieved. *James* v. *Pritchard*, 7 M. & W. 216; 8 D. P. C. 890; 10 L. J., Ex. 92; 4 Jur. 1188. See *Meynell* v. *Angell*, supra.

Landlord and Tenant.]—E. hired a farm, and his son resided on and managed it, paying rent, and taking receipts in his own name. The defendant gave the son notice to quit, and a valuation of tenant-right was made by valuers appointed by the defendant and the son. The father gave the defendant notice not to pay the amount of the valuation to any one but himself, and the son having commenced an action to recover the amount of the valuation, the defendant applied for an interpleader order:—Held, that this was a case for interpleader, and that if the father was dissatisfied with the valuation, he might apply to the court for relief. *Evans* v. *Wright*, 12 L. T. 77; 13 W. R. 468.

Upon the death of a landlord, the tenant, in ignorance of the rights of the parties, attorned to and paid rent to A., who claimed as devisee. The right of A. to the property was afterwards disputed by B., the heir:—Held, that the tenant might maintain a bill of interpleader against A. and B. *Jew* v. *Wood*, Cr. & Ph. 185; 3 Beav. 579; 10 L. J., Ch. 261; 5 Jur. 954. S. P., *Rickard* v. *Hyde*, 2 Ir. Eq. R. 299.

A tenant cannot file an interpleading bill against his landlord. Where one claimant seeks a certain rent from the tenant in possession, and the other unliquidated damages for use and occupation, he cannot make them interplead. *Johnson* v. *Atkinson*, 3 Anstr. 798.

The rule that a tenant cannot compel the landlord to interplead, does not prevail where the claim of a third person arises by the act of the landlord, subsequent to the commencement of the relation of landlord and tenant. *Clarke* v. *Byrne*, 13 Ves. 383.

Tenant cannot file a bill of interpleader against his landlord on notice of ejectment by a stranger, under a title adverse to that of the landlord. *Dungey* v. *Angove*, 2 Ves. J. 304; 2 R. R. 217.

To support a bill of interpleader by a tenant, two persons must claim the same rent in privity of tenure and contract, as in the case of mortgagor and mortgagee, trustee and cestui que trust, &c. *S. C.*, 2 Ves. J. 312.

Two parties claiming adversely an estate under the limitations of a settlement which contained a power of leasing, brought actions against a tenant for rent, reserved by a lease made under the power:—Held, that the case was a proper one for an interpleader. *Bermingham* v. *Tuite*, Ir. R. 7 Eq. 221.

A tenant cannot sustain a bill of interpleader against his landlord, unless the title is affected by some act done by the landlord subsequently to the lease. *Cook* v. *Rosslyn (Earl)*, 1 Giff. 167; 28 L. J., Ch. 833; 5 Jur. (N.S.) 973; 7 W. R. 537.

It is no objection to a bill of interpleader by tenant, that it appears by his bill that the rent was adversely demanded by two persons, one of whom had a primâ facie legal right to receive it, as devisee and executrix of the lessor, and the other a mere equitable claim as heir-at-law, where the adverse claimants were litigating, and the tenant threatened with distress. *Doran* v. *Everitt*, 2 Ir. Eq. R. 28.

Two parties claimed a real estate under different wills, the validity of which was in controversy. An action being brought against the tenant by one of the claimants, he filed a bill of interpleader against both claimants, and obtained an injunction, on bringing his rent into court. The court directed an issue to determine the rights of the defendants, and continued the injunction on the tenant continuing to pay his rent into court. *Townley* v. *Deare*, 3 Beav. 213. S. P., *Glover* v. *Reynolds*, 16 L. T. 113.

Ship—Captain—Claim to Goods.]—Where a suit has been instituted in the Court of Admiralty by arrest of a ship, on behalf of a person claiming to be the owner of goods, on the ground of breach of duty on the part of the master in not delivering the goods to him, and a like proceeding has been instituted in the same court by another claimant in respect of the same goods :—Semble, that a bill of interpleader by the captain of the ship will not lie, on the ground that the proceedings are not against him, but against the ship, and that the Court of Admiralty has jurisdiction to decide the whole question. *Sablicich* v. *Russell*, L. R. 2 Eq. 441 ; 14 W. R. 913.

Captain of the ship may file interpleader where parties claim adversely under bill of lading ; but otherwise where paramount to it. *Lowe* v. *Richardson*, 3 Madd. 277.

Agents and Bailees.]—Agent to receive particular moneys, is bound to pay same over to principal, notwithstanding claims of third persons ; therefore, he cannot file bill of interpleader. *Nicholson* v. *Knowles*, 5 Madd. 47 ; 21 R. R. 276.

Where goods in the hands of a bailee have been subsequently so treated and dealt with by the bailor, as to constitute or acknowledge an apparent title to them, in two distinct parties, the rule which prevents an agent from filing a bill of interpleader against his principal does not apply. *Pearson* v. *Cardon*, 2 Russ. & M. 606.

Interpleader allowed by a factor against both defendants residing abroad, and one not appearing. The subject, a policy on a cargo lost, for effecting which the plaintiffs claimed to be reimbursed their expenses. *Martinius* v. *Helmuth*, Coop. 245 ; 2 Ves. & B. 412, n.

One of several part owners of a ship, acting as ship's husband, directs a broker to effect an insurance upon the entirety of the ship ; a loss happens, and the insurance money being paid to the broker, who knew what other persons were part owners of the ship, one of the other part owners demands payment of his proportion of the insurance money, and commences an action against the broker to recover it ; and the part owner who directed the insurance demands payment of the whole, and commences an action to enforce such demand :—Held, that the broker could sustain a bill of interpleader against the two claimants. *Stuart* v. *Welch*, 4 Myl. & C. 305 ; 3 Jur. 237. And see *Brack* v. *Douglas*, 4 Myl. & C. 320, n.

A. delivered goods to B., a wharfinger, to be kept for him, and afterwards directed B. to transfer them to C., which was done. D. then gave notice to B. not to deliver the goods to anyone but him, and thereupon B. refused to deliver the goods to C., upon which C. brought trover against B., and B. filed a bill of interpleader. Afterwards D. abandoned all claim to the goods, and withdrew his notice :—Held, that the case was a proper case of interpleader, and that D., who had occasioned the suit, must pay to the plaintiff and the other defendants their costs at law and in equity. *Mason* v. *Hamilton*, 5 Sim. 19.

A. deposited certain iron with B. & Co., who were wharfingers, and afterwards directed them to deliver it to C. C. applied to B. & Co. to know the particulars of the iron held by them on his account ; and B. & Co. then wrote a letter to C., saying, that in compliance with his request, they annexed a note of the landing weights of the iron transferred into his name by A., and now held by them (B. & Co.) at his (C.'s) disposal. B. & Co. subsequently received notice from D. that the iron belonged to him, and that it had been deposited with A. as an agent for sale, and that he had without authority pledged it to C. B. & Co. then filed a bill of interpleader against C. and D. :—Held, on demurrer, that after B. & Co.'s letter to C., they could not maintain a bill of interpleader against him. *Crawshay* v. *Thornton*, 2 Myl. & C. 1 ; 6 L. J., Ch. 179 ; 1 Jur. 19.

500*l.* was placed in the hands of a party to be applied by him in carrying a divorce bill through parliament ; part was paid to the solicitor employed in carrying the bill through parliament, but before the remainder had been applied, the depositor died : the executrix of the depositor claimed from the depositary the whole deposit ; the solicitor claimed the sum remaining in the hands of the depositary :—Held, that, under the circumstances, a bill of interpleader could not be sustained. *Moore* v. *Usher*, 7 Sim. 384 ; 4 L. J., Ch. 205.

A. having a claim to certain property in India, agreed with B. that B. should undertake the trouble and expense of recovering it, and that if successful he should receive half the value of the property recovered. Afterwards, A.'s title having been established, A., with B.'s concurrence, sent a power of attorney to C. to receive the money, with instructions to remit it to England. C. accordingly received the money and transmitted a bill of exchange for the amount to his agent in England. A. having refused to perform the agreement, B. filed a bill against him, and A. brought an action at law against C. for the amount of the bill. C. thereupon filed a bill of interpleader against A. and B. :—Held, that C. having become possessed of the property solely as A.'s agent, it was not a proper case for interpleader, and the court refused to allow C. a lien for his costs on the fund. *Watts* v. *Hammond*, 3 Eq. R. 641 ; 3 W. R. 312.

Warehousemen being private agents, and not holding goods as the possessors of a public bonded warehouse, cannot maintain a bill of interpleader ; but where goods are deposited in a public bonded warehouse, a bill of interpleader may be maintained against contending claimants. *Cooper* v. *De Tastet*, Taml. 177.

Where a principal has created a lien in favour of another person, on funds in the hands of an agent, the agent may file a bill of interpleader against his principal and the other claimant. *Smith* v. *Hammond*, 6 Sim. 10.

Issue as to Right to Goods, although one Claimant also claims Damages.]—S. was the agent of L., a wine merchant in Spain, and was induced by the fraudulent representations of three persons acting in collusion to enter into separate contracts with them for the sale of wine. S. transmitted the orders for the wine to L., who shipped the wines, and sent the bills of lading to S.; the bills of lading were handed by S. to the three persons respectively on account of the contracts entered into with them. The wine so obtained was deposited with a dock company, who issued warrants for the same: some of the wine therein mentioned was made deliverable to the order of one of the three persons, and the rest to the order of another of them. The warrants were then pledged with the plaintiff to secure advances. L. afterwards served notice upon the dock company not to part with the wine; thereupon the company refused to give up the wine when it was demanded of them by the plaintiff, who commenced actions claiming damages in addition to the value of the wines:—Held, that the dock company was entitled to an interpleader order under 1 & 2 Will. 4 c. 58. s. 1, and the C. L. P. Act, 1860, s. 12, for the right to the wine might be determined as between the plaintiff and L., and the actions might be stayed as to that, and might be continued as to the claims for damages, and by issuing the dock warrants the dock company had not debarred itself from obtaining relief under those statutes. *Attenborough* v. *London and St. Katharine Dock Co.*, 47 L. J., C. P. 763; 3 C. P. D. 450; 38 L. T. 404; 26 W. R. 583—C. A.

Discretion of Judge.]—The plaintiff sued an auctioneer for breach of warranty of a horse sold by auction, and also for personal damages caused through the horse's vice. B., the owner of the horse, gave the defendant notice not to return or part with the purchase-money of the horse, the plaintiff having sent it back to the defendant. The defendant took out a summons under Ord. I. r. 2, that the plaintiff and B. should interplead. A judge in chambers refused to make the order:—Held, that the judge's discretion was properly exercised. *Wright* v. *Freeman*, 48 L. J., C. P. 276; 40 L. T. 134; Id. 358—C. A.

Before 23 & 24 Vict. c. 126, s. 12.]—The 1 & 2 Will. 4, c. 58, s. 1, did not apply to the case of a party sued by one person for the price of goods, and by another for the goods themselves. *Slaney* v. *Sidney*, 3 D. & L. 250; 14 M. & W. 800; 15 L. J., Ex. 72; 9 Jur. 995.

Before the above statute, the court would not grant to a defendant an interpleader rule, on the ground that the claimant set up a right of action against him in respect of the same subject-matter, where it appeared that the plaintiff's claim against the defendant rested not merely upon the right of property, but also on the personal contract of the defendant. *Lindsey* v. *Barron*, 6 C. B. 291.

A., professing to act as agent of B., obtained from C. an advance of money, upon the security of plate in A.'s possession belonging to B.; after A.'s death, C. brought detinue for the plate against his executors; B. also demanded it of the executors:—Held, not a case for an interpleader. *Ib.*

The Crown.]—The court refused a rule applied for by a defendant, upon affidavit, stating that the debt sought to be recovered in the action had been, under a writ of extent, issued against the plaintiff, returned by the jury as seized for the Crown. *Candy* v. *Maugham*, 6 Man. & G. 710; 1 D. & L. 745; 7 Scott (N.R.) 401; 13 L. J., C. P. 17; 7 Jur. 1040.

The provisions of the Interpleader Act do not apply where the Crown is a party interested. *Ib.*

There being considerable doubts as to the title to certain money, believed to be the proceeds of a robbery, the court made a decree that the Crown and the other claimants should interplead, and gave directions for inquiries as to the title to the money. *Reid* v. *Stearn*, 6 Jur. (N.S.) 267.

Foreigners.]—Semble, that a foreigner, residing abroad, cannot be compelled to come in under the act. *Patorni* v. *Campbell*, 12 M. & W. 277; 1 D. & L. 397; 13 L. J., Ex. 85; 7 Jur. 1139. S. P., *Lindsey* v. *Barron*, 6 C. B. 291. But see *Belmonte* v. *Aynard*, 4 C. P. D. 352; 27 W. R. 789—C. A. Affirming 40 L. T. 627.

Colonists.]—Semble, per Parke, B., that the act does not extend to the colonies. *Colonial Bank* v. *Warden*, 5 Moore, P. C. 340; 10 Jur. 745.

Married Women.]—A married woman may maintain a claim on an interpleader issue, in which the issue is, whether the goods are hers, as against the execution creditor. *Shingler* v. *Holt*, 7 H. & N. 65, n.; 2 F. & F. 487; 30 L. J., Ex. 322; 7 Jur. (N.S.) 866; 4 L. T. 76; 9 W. R. 871.

W., by will, gave real and personal chattels to his daughter, L. B., a married woman (the plaintiff), for life, for her sole and separate use, appointing her executrix. L. B. carried on the business (a colliery), the whole of which came into her possession (part under the will and part under a conveyance from a third person), as she alleged, for her own benefit, assisted by her husband. Some of these chattels, which were used in the colliery, having been seized by C., the now defendant, and execution creditor of her husband, under a judgment revived against him, the present issue was directed to try whether the chattels so seized were the property of the now plaintiff as against the now defendant. At the trial the judge left it to the jury to say whether the plaintiff really carried on the business on her own account, or whether it was her husband's. The jury having found a verdict for the plaintiff, the court discharged a rule obtained to set it aside. *Bird* v. *Crabb*, 30 L. J., Ex. 318; 7 Jur. (N.S.) 866; 5 L. T. 76.

C. PRACTICE ON.

1. PARTIES.

Cestui que trust.]—A cestui que trust who is in possession of settled goods, by virtue of an authority from the trustees, is entitled to the same as against the sheriff seizing them for the execution creditor of a debtor living in the houses wherein such goods are, and it is not necessary for the trustees to be parties to an interpleader issue directed in order to determine the right of possession. *Schroeder* v. *Hanrott*, 28 L. T. 704.

Married Woman.]—A married woman may be a claimant in an interpleader issue. *Shingler* v. *Holt*, 7 H. & N. 65; 30 L. J., Ex. 322; 7 Jur. (N.S.) 866; 4 L. T. 76; 9 W. R. 871. S. P., *Bird*

v. *Crabb*, 30 L. J., Ex. 318; 7 Jur. (N.S.) 866; 5 L. T. 76.

Claimants.]—Counsel for the purchaser from the claimant will not be heard. *Gayton* v. *Espin*, 1 F. & F. 722.

Semble, that in an issue the claimant should be the plaintiff, and the execution creditor the defendant. *Bartley* v. *Hook*, 4 Tyr. 229.

Where a new claim is raised, after a rule nisi has been obtained, the sheriff may make the new claimant a party to the rule. *Kirk* v. *Clarke*, 4 D. P. C. 363.

Where the sheriff applies to the court for protection, no one has a right to be heard against the rule, unless he is called upon by the rule, though he is in fact a claimant; and if he is called on in one character he cannot appear in another. *Clarke* v. *Lord*, 2 D. P. C. 55.

—— **Trustee in Bankruptcy.**]—If, after an interpleader issue has been settled, the execution debtor files a petition for liquidation, and the trustee under the liquidation claims the goods in respect of which the issue has been directed, the trustee will, upon his application, be added as a claimant in the trial of the issue. *Bird* v. *Mathews*, 46 L. T. 512—C. A.

A sheriff having levied on the goods of the defendant, received notice of his bankruptcy, and of a claim by the provisional assignee, "or of any other persons who might be appointed assignees." After the assignees were appointed, the sheriff obtained an interpleader rule, calling on the provisional assignee only to appear:—Held, that the assignees were entitled to appear on that rule. *Ibbetson* v. *Chandler*, 9 D. P. C. 250.

Where an interpleader rule was obtained, and afterwards a claim was made by a curator appointed by the Scotch law to the property of a deceased person, the court enlarged the rule to enable the defendant to make such claimant a party thereto. *Walker* v. *Ker*, 12 L. J., Ex. 204; 7 Jur. 156.

Substituting Names.]—Where a plaintiff does not proceed to the trial of an interpleader issue, the court will not permit another person's name to be substituted without making the originally appointed plaintiff a party to the rule. *Lydal* v. *Biddle*, 5 D. P. C. 244; 2 H. & W. 302.

A horse, pointed out by A., an execution creditor, as the property of B., the execution debtor, having been seized under a fi. fa., C. claiming property, brought trespass against the sheriff, who applied for relief. The court, instead of directing an issue, ordered that the action should proceed, and that A.'s name should be substituted for that of the sheriff, subject to the terms usually imposed where an issue is directed. *Brown* v. *Ludham*, 6 Man. & G. 169; 6 Scott (N.R.) 934.

—— **Limiting Defences.**]—There is no jurisdiction under Ord. LVII. r. 7, to limit the defences of the claimant, who is substituted as defendant, to such defences as the original defendant could raise, since the words of Ord. LVII. r. 7, empowering the court or judge to substitute any claimant as defendant "in lieu of" the applicant, the original defendant, do not mean that such claimant should stand "in the actual place of," but instead of, such defendant. *Gerhard* v. *Montagu*, 61 L. T. 564; 38 W. R. 76.

Execution Creditor.]—An execution creditor, served with a sheriff's rule, is not bound to appear when there are no goods liable to his execution. *Glazier* v. *Cooke*, 5 N. & M. 680.

If the execution creditor does not appear upon a rule to relieve the sheriff, the court will order the sheriff to withdraw from possession, but will not direct the execution creditor to pay the sheriff the costs of keeping possession. *Field* v. *Cope*, 2 C. & J. 480; 1 D. P. C. 567; 2 Tyr. 458; 1 L. J., Ex. 175. See also *Eveleigh* v. *Salisbury*. 5 D. P. C. 369; 3 Bing. (N.C.) 268; 3 Scott, 674,

2. Application.

Jurisdiction—District Registry.]—The Judicature Rules confer no jurisdiction upon a district registrar of the High Court to make an interpleader order. *Hood* v. *Yates*, 63 L. J., Q. B. 218; [1894] 1 Q. B. 240; 70 L. T. 557; 42 W. R. 412.

—— **Liverpool Court of Passage.**]—The rules of the Court of Passage do not give that court the jurisdiction in interpleader contained in Ord. LVII. r. 8, of the Rules of the Supreme Court, 1883, and that even if rules had been framed to that effect they could not give such a jurisdiction, as they would be in that respect ultra vires. The power to decide summarily without consent questions in interpleader is not a "rule of law" within the meaning of s. 91 of the Judicature Act, 1873. *Speers* v. *Daggers*, 1 Cab. & E. 503.

Service of Summons out of the Jurisdiction.]—Where the plaintiffs sued for goods in the possession of the defendant, and it appeared that a foreigner residing out of the jurisdiction claimed the right to the same goods, and would probably sue the defendant in respect of them, the court gave the defendant leave to serve an interpleader summons out of the jurisdiction upon the foreigner. The effect of service out of the jurisdiction in such a case is to give the foreigner notice of the proceedings within the jurisdiction, so that he may appear and prosecute his claim, or, if he does not appear, so that any future claim prosecuted by him against the defendant in respect of the subject-matter of the action within the jurisdiction may be barred. *Credits Gerundense* v. *Van Weede*, 53 L. J., Q. B. 142; 12 Q. B. D. 171; 32 W. R. 414; 48 J. P. 184.

Affidavits—Form.]—An affidavit to ground an interpleader rule should shew that the application is made before plea; but the objection may be waived, or the affidavits amended. *Frost* v. *Hayward*, 2 D. (N.S.) 801; 12 L. J., Ex. 242; 7 Jur. 179.

A claimant called upon by a rule under the Interpleader Act to come in and state his claim, must give the particulars upon his affidavit, to enable the court to decide even whether he is to be made a party to an issue. *Powell* v. *Lock*, 3 A. & E. 315; 1 H. & W. 281; 4 N. & M. 852.

Upon a motion in an interpleader rule, the affidavits should be entitled in the original cause. *Pariente* v. *Pennell*, 7 Scott (N.R.) 834. S. P., *Levi* v. *Coyle*, 2 D. (N.S.) 932; 7 Jur. 725.

A party seeking the benefit of the act must state in his affidavit the specific sum or goods in his hands that are claimed by a third person. *Butler* v. ——, 3 L. J., C. P. 62.

—— **Application by Sheriff.**]—In applying for an interpleader summons a sheriff need not, as a general rule, file an affidavit in support of his application, such affidavit being wholly unnecessary, and if he does so file an affidavit he will not be entitled to the costs of the same. His proper course is to wait and see if an affidavit is necessary, in which case he can ask for and obtain an adjournment for an affidavit to be filed. *Stocker* v. *Heggerty*, 67 L. T. 27.

The sheriff or other officer need not, in the affidavit in support of the application, deny collusion with the claimants. *Donniger* v. *Hinxman*, 2 D. P. C. 424. S. P., *Dobbins* v. *Green*, 2 D. P. C. 509; *Bond* v. *Woodhall*, 2 C. M. & R. 601; 4 D. P. C. 351; 1 Tyr. & G. 11; 5 L. J., Ex. 9.

—— **Claimant or Execution Creditor.**]—An affidavit from a claimant himself is not necessary to entitle him to call upon the judge to make an order for a feigned issue. *Webster* v. *Delafield*, 7 C. B. 187; 6 D. & L. 597; 18 L. J., C. P. 186; 13 Jur. 635.

It is not necessary for an execution creditor, appearing upon a motion, to produce an affidavit. *Angus* v. *Wootton*, 3 M. & W. 310; 1 H. & H. 46; 7 L. J., Ex. 82.

—— **No Collusion.**]—Where a bill of interpleader is filed by the officer of a company on behalf of the company, the affidavit annexed ought to state, not that the plaintiff does not collude, but that, to the best of his knowledge and belief, the company do not collude with the defendants. *Bignold* v. *Audland*, 11 Sim. 23; 9 L. J., Ch. 266; 5 Jur. 51. *See also* 10 L. J., Ch. 91.

The plaintiff in an interpleader suit being abroad, leave was given, valeat quantum, to file the bill without his affidavit of no collusion, but with an affidavit by his solicitor of his belief that there was no collusion. *Larabrie* v. *Brown*, 1 De G. & J. 204; 26 L. J., Ch. 416; 5 W. R. 538; Affirming 23 Beav. 607.

Where in an interpleader suit there are several plaintiffs residing in different parts of the country, and there is evidence that they all conducted their business through the same agent in London, and solicitor, the court will allow the bill to be filed upon an affidavit of no collusion by such agent and solicitor only, but will not thereupon grant the ordinary injunction till the hearing, but merely an interim order for a reasonable time upon an understanding that the plaintiffs will themselves in the meantime make the requisite affidavit. *Nelson* v. *Barter*, 2 Hem. & M. 334; 33 L. J., Ch. 705; 10 Jur. (N.S.) 611; 10 L. T. 491; 12 W. R. 857.

Where it appeared that there was not sufficient time subsequently to settling the bill, for all of the plaintiffs to make the usual affidavit as to collusion between themselves and the defendants. The court permitted the bill to be filed upon the affidavit of some of the plaintiffs only. *Glover* v. *Reynolds*, 16 L. T. 84.

An interpleader bill cannot be filed without an affidavit by all the plaintiffs as to no collusion, unless a satisfactory reason can be given why some of the plaintiffs have not joined in such affidavit. *Gibbs* v. *Gibbs*, 5 W. R. 243.

—— **Trial by.**]—Where an application is made to the court by the sheriff, the court cannot try the rights of the different claimants upon affidavit but must direct an issue. *Allen* v. *Gibbon*, 2 D. P. C. 292; *Bramadge* v. *Adshead*, 2 D. P. C. 59; 3 L. J., Ex. 54.

Time for.]—An action of trover was commenced on the 29th of December, and the delaration was delivered on the 12th of January, after which the defendant twice obtained time to plead:—Held, that a rule obtained by the defendant on the 23rd was not too late. *Barnes* v. *Bank of England*, 1 W. W. & H. 50.

A bill of interpleader ought to be filed immediately after or before the commencement of proceedings at law, and not to be delayed till after a judgment or verdict has been obtained. *Cornish* v. *Tanner*, 1 Y. & J. 333. S. P., *Larabrie* v. *Brown* 1 De G. & J. 204; 26 L. J., Ch. 605; 5 W. R. 538.

The institution of a suit in equity, by one of two claimants of a fund, without making the other claimant a party, for the purpose of enforcing payment from a stakeholder, is no bar to the subsequent institution by the stakeholder of an interpleader suit, or to the obtaining by him in the interpleader suit of an injunction extending as well to the prior proceedings in equity as to proceedings at law. *Prudential Assurance Co.* v. *Thomas*, 37 L. J., Ch. 202; L. R. 3 Ch. 74; 16 W. R. 470.

It is no objection to a bill of interpleader that it is filed after verdict at law, where the effect of the action at law was to ascertain the quantum of damages due on the claim of the plaintiff at law (a defendant in equity). *Hamilton* v. *Marks*, 5 De G. & Sm. 638.

Where a plaintiff in an interpleader suit had previously set up a claim of lien, and had pleaded it in defence to an action:—Held, that this was no bar to an interpleader order being made on the terms of the plaintiff withdrawing his plea and paying the costs at law and in equity up to the time of such withdrawal. *Jacobson* v. *Blackhurst*, 2 John. & H. 486.

Particulars of Goods Seized by Plaintiff.]—A sheriff seized certain goods as the property of the defendant, which were claimed by the defendant's wife as her separate property. The wife applied for an order that the sheriff should deliver particulars of the goods seized:—Held, that the application must be refused. *Bauly* v. *Krook*, 65 L. T. 377.

Varying Order—Reference.]—On an application to a judge an order was made, by consent of all parties, to refer the cause on certain terms to a barrister, instead of an issue being directed. The court refused to grant a rule nisi for varying the order, by introducing a fresh term into the reference, in consequence of information which one of the parties (an administratrix) had obtained since the hearing at chambers. *Drake* v. *Brown*, 2 C. M. & R. 270; 5 Tyr. 1067; 4 L. J., Ex. 313.

Order to Withdraw.]—A judge at chambers has power to order a sheriff to withdraw without directing an issue. *Englebach* v. *Nixon*, 44 L. J., C. P. 396; L. R. 10 C. P. 645; 32 L. T. 831.

Issue of Writ Pending Hearing.]—Pending the hearing of an interpleader summons by a judge in chambers, a plaintiff issued a writ of summons, and the defendant gave an undertaking to appear to it:—Held, that the writ was properly issued. *Hooke* v. *Ind, Coope & Co.*, 36 L. T. 467.

Ruling Sheriff to return Writ pending Issue.]—Pending an interpleader issue as to the property in goods seized by a sheriff under a fi. fa., the execution creditor has not an absolute right to an immediate return of the writ. *Angell* v. *Baddeley*, 47 L. J., Ex. 86; 3 Ex. D. 86; 37 L. T. 653; 26 W. R. 137—C. A.

A sheriff having seized goods under a fi. fa., three different persons put in claims to separate portions of the goods. The sheriff interpleaded, and three separate interpleader orders were made. One of the claimants, in pursuance of the order, paid into court the value of the goods claimed by him, to an amount sufficient to answer the debt. The other two claimants disobeyed the order; but the sheriff, instead of selling the goods claimed by them, abandoned possession of the whole. The execution creditor, thereupon, obtained a side-bar rule calling on the sheriff to return the writ:—Held, that he had no right to such return, and that the side-bar rule ought to be set aside. *Ib.*

3. Barring Claims.

Claimant not Appearing.]—Claimants neglecting to appear are precluded by the terms of the rule from enforcing their claims. *Ford* v. *Dillon*, 2 N. & M. 662; 5 B. & Ad. 885.

Goods consigned to A., and warehoused at the London docks, were claimed by B. The dock company required an indemnity from A., the original consignee, before they delivered them to him. A. refused, and brought an action of trover, with counts for special damage, for the detention. On motion by the company for relief, B., upon due notice, not appearing, the court held, that the claim of B. against the company was barred, but that A. ought not to be precluded from recovering for his special damage, if any. The rule was made that, on the defendant's undertaking to deliver up the goods, then if A. should accept the same, the action should be discontinued on payment of costs by the defendant; but if A. should go on with the action, the count in trover should be struck out, and A. proceed for the special damage only. *Lucas* v. *London Dock Co.*, 4 B. & Ad. 378.

—— **Costs.**]—When an adverse claim is set up to goods seized by the sheriff, and the latter applies to the court for relief, and the adverse party does not appear to support his claim, the court will bar his claim as to the sheriff, and make him pay the judgment creditor his costs of appearing on the sheriff's rule, but will not allow the sheriff his costs. *Bowdler* v. *Smith*, 1 D. P. C. 417. *See also cases* post, col. 390.

Execution Creditor.]—When an execution creditor does not appear on being served with the sheriff's rule, the court cannot bar his claim. *Danniger* v. *Hinxman*, 2 D. P. C. 424.

Goods being seized by the sheriff under a fi. fa. were claimed adversely to the execution creditor. On an interpleader rule, obtained by the sheriff, the claimant and the sheriff appeared, but not the execution creditor. The claimant supported his title by affidavit. The court refused to order generally that the execution creditor should be barred of his demand; but made a rule that the sheriff should withdraw from possession, and the execution creditor take no proceedings against him in respect of the goods non-claimed. *Doble* v. *Cummins*, 7 A. & E. 580; 2 N. & P. 575; W. W. & D. 682; 7 L. J., Q. B. 12.

—— **Misconduct.**]—Where the execution creditor did not appear, and it was doubtful whether the sheriff, who had acted under his express direction, had not misconducted himself subsequently to the seizure, the court made an order that the execution creditor should be barred against the claimant, and the goods restored to the latter; the claimant to be at liberty to bring an action against the sheriff for misconduct, provided it should turn out that he had been guilty of any; and also if there had been any misconduct in the execution creditor in giving directions to the sheriff, to bring an action against him. *Lewis* v. *Jones*, 2 M. & W. 203; 2 Gale, 211; 6 L. J., Ex. 51.

Estoppel.]—A sheriff levied upon goods in the possession of the defendants, who were agents for their sale, and who proceeded with the sale which had then been advertised. The defendants, by inadvertence, failed to appear upon an interpleader summons taken out by the sheriff in the action concerning which he was obeying the writ of fi. fa., and the defendants were barred. They subsequently attempted to rescind the order, but failed, and their appeal to the court was also dismissed. This action was brought to recover the proceeds of the sale:—Held, that the defendants could not set up as a defence to the action the facts by which they claimed to be entitled to the goods upon which the sheriff had levied. *Williams* v. *Richardson*, 36 L. T. 505.

4. Issue.

Mistake in.]—A mistake appearing on the face of an interpleader issue, as to the statute under which it is directed, does not invalidate the issue. *Saunderson* v. *Perrin*, 22 L. T. 419.

Particulars, Order for.]—When an interpleader issue is settled in the common form to try whether the goods seized "or any part thereof" were at the time of the seizure the property of the claimant, and it appears that the claimant claims a part only, the goods seized being more than sufficient to satisfy the judgment of the execution creditor, the claimant will be ordered to specify the goods claimed by him. *Price* v. *Plummer*, 25 W. R. 45.

When a claimant in an interpleader issue did not claim all the goods seized, and he had been ordered to specify which of the goods he claimed, but had neglected to do so, and gone to trial claiming all:—Held, a verdict having been found for the claimant as to a portion only of the goods, that he and not the execution creditor was entitled to the amount paid into court under the interpleader order. *Plummer* v. *Price*, 39 L. T. 657—C. A. Reversing 26 W. R. 682.

Interrogatories.]—Interrogatories may be delivered in an interpleader issue. *White* v. *Watts*, 12 C. B. (N.S.) 267; 31 L. J., C. P. 381; 6 L. T. 387.

Form of Issue.]—A feigned issue, in the form of a wager, directed under the Interpleader Act, is not illegal by the prohibition of actions upon wagers by virtue of the above statute. *Luard* v. *Butcher*, 2 C. B. 858; 3 D. & L. 815; 15 L. J., C. P. 187.

The form of issue given in the schedule to the act is not compulsory. *Ib.*

—— **Title of Parties.**]—An issue is for the purpose of informing the conscience of the court as

to whether the plaintiff or the defendant is entitled to the goods in dispute; therefore, the court will not allow either party to give evidence of a jus tertii. *Carne* v. *Brice*, 7 M. & W. 183; 8 D. P. C. 884; 1 H. & W. 23; 10 L. J., Ex. 28; 4 Jur. 1115.

Under a feigned issue brought to try the right of property in goods which had been seized under an execution against A.:—Held, that the question for the jury was not, whether the goods were the property of the plaintiff in a feigned issue, or of A., but merely, whether they were or were not the property of the former. *Green* v. *Rogers*, 2 Car. & K. 148.

In an issue directed between the partners of a banking company and certain defendants, to try whether the defendants, as partners in a joint-stock company, were indebted to the banking company:—Held, that it was no defence to shew that some of the defendants were also partners in the banking company, as the issue was directed to ascertain the fact of the defendants being indebted and was not to be determined, like an action, by the legal rights of the parties. *Bosanquet* v. *Woodford*, D. & M. 419; 5 Q. B. 310; 13 L. J., Q. B. 93.

—— **Fact of Bankruptcy.**]—On a feigned issue between execution creditor and assignees, the declaration reciting an execution and fiat in bankruptcy, and a wager on the question "whether the execution was valid against the fiat," the plaintiff is not entitled by the terms of the issue to dispute the bankruptcy. *Linnet* v. *Chaffers*, 4 Q. B. 762; D. & M. 14.

Goods of S. having been taken under a fi. fa., the assignees of S. (who has been declared a bankrupt) preferred a claim; whereupon an issue was directed, in which the assignees were the plaintiffs, and the execution creditors the defendants, to try whether, "at the time of the seizure, the plaintiffs were entitled to the goods, as against and free from the execution, or whether the goods were subject and liable to be so seized and levied under the writ or not as against the plaintiffs":—Held, that this put in issue all the requisites of the bankruptcy. *Lott* v. *Melville*, 3 Scott (N.R.) 346; 3 Man. & G. 40; 9 D. P. C. 882; 10 L. J., C. P. 279; 5 Jur. 436.

Where goods had been purchased by a married woman out of the produce of her separate estate, which goods had been seized by the sheriff under an execution against her husband, and an issue had been directed between the execution creditor and the trustees of the marriage settlement, for the purpose of trying their respective rights; but the form of the issue was, whether the goods in question were the goods of the husband—the court would not allow the trustees to give in evidence that the husband had become a bankrupt a second time, and had not paid 15*s.* in the pound, for the purpose of shewing that the property in the goods was not in him, but in his assignees. *Carne* v. *Brice*, 7 M. & W. 183; 1 H. & W. 23; 8 D. P. C. 884; 10 L. J., Ex. 28; 4 Jur. 1115.

Goods seized under a fi. fa., issued by A. against B., were claimed by C. In a feigned issue between C. and A., to try whether the goods were, at the time of the seizure, the goods of C., it is competent to A. to negative the title of C., by shewing that the goods, though seized by A., and claimed by C., passed to the assignees of B. by relation to an act of bankruptcy committed by B. before the seizure, and before the conveyance under which C. claims. *Chase* v. *Goble*, 2 Man. & G. 930; 3 Scott (N.R.) 245; 10 L. J., C. P. 216.

—— **Validity of Execution—Prior Claims.**]—On the 4th of March the sheriffs of London entered upon premises of A. under a fi. fa., at the suit of B., A.'s goods being then already under seizure, upon an execution of the suit of C., by an officer of the Lord Mayor's Court, and the landlord of the premises being also in for rent. On the 9th a fiat in bankruptcy was awarded against A. On 6th April the landlord sold all the goods, and after paying C.'s execution, and retaining the amount due to himself for rent, paid the residue into court, to abide the event of an issue between A.'s assignees and B., as to whether at the date and issuing of the fiat, the assignees were entitled to the goods as against B.:—Held, that it was not competent to the assignees, under this issue, to set up either the prior execution or the distress to defeat the claim of B. *Belcher* v. *Patten*, 6 C. B. 608; 6 D. & L. 370; 18 L. J., C. P. 69.

Onus of Proof—Issue between Trustee for Creditors and Execution Creditor—Irrevocability of Deed.]—When a debtor has made an assignment of his property to a trustee for the benefit of his creditors generally, and when the trustee sets up this deed of assignment against an execution creditor, the onus of proving that the deed is irrevocable and binding, as against such execution creditor, lies on the trustee; that is, the trustee has to prove that the deed has gone beyond the stage of being revocable, by shewing that it has been communicated to a creditor, and assented to, or at least not dissented from, by him. The burden of giving such affirmative evidence lies on the person setting up the deed against the execution creditor. *Adnitt* v. *Hands*, 57 L. T. 370.

Jus tertii.]—Upon the trial of an issue under a sheriff's interpleader between a claimant and the execution creditor, in the absence of any evidence of title on the part of the claimant, or if the claimant's interest be shewn to have passed to a third person, the execution creditor is entitled to succeed. *Richards* v. *Jenkins*, 56 L. J., Q. B. 293; 18 Q. B. D. 451; 56 L. T. 591; 35 W. R. 355—C. A.

A mortgagor of a house with the trade fixtures subsequently granted to the claimant a bill of sale of the chattels, including the trade fixtures upon the premises. The trade fixtures and other chattels were taken in execution under a judgment against the mortgagor. In an interpleader issue between the claimant and the execution creditor:—Held, that the claimant having become possessed of the equity of redemption in the goods under the bill of sale was entitled to them as against the execution creditor. *Richards* v. *Jenkins* (18 Q. B. D. 451), distinguished. *Usher* v. *Martin*, 59 L. J., Q. B. 11; 24 Q. B. D. 272; 61 L. T. 778.

—— **Prior Bills of Sale.**]—Upon an interpleader issue, whether goods and chattels seized in execution were "at the time of the seizure the goods and chattels of the plaintiff," the plaintiff proved a bill of sale of the goods to himself:—Held that the defendant by way of answer, might set up a prior bill of sale to a third party. *Gadsden* v. *Barrow*, 9 Ex. 514; 2 C. L. R. 1063; 23 L. J., Ex. 134; 2 W. R. 241.

An interpleader issue between an assignee of goods and execution creditors, stated the question to be "whether, at the time of the delivery

of the writ to the sheriff, the goods seized by him and claimed respectively by the claimants, were the property of the respective claimants": —Held, that the meaning of the issue was whether the assignor had any goods which the plaintiff had a right to take in execution; and that it was not competent to the defendant to defeat the plaintiff's title by shewing a prior bill of sale to a third party, which was void on account of non-compliance with 17 & 18 Vict. c. 36, s. 1. *Edwards* v. *English*, 7 El. & Bl. 564; 26 L. J., Q. B. 193; 3 Jur. (N.S.) 934; 5 W. R. 507.

A. conveyed goods by bill of sale to B. By a second bill of sale A. conveyed the same goods to C. A. having become bankrupt, and the first bill of sale not having been duly registered, A.'s assignees brought trover for the goods:—Held, that B. could not set up the bill of sale to C. against the assignees. *Nicholson* v. *Cooper*, 3 H. & N. 384.

Validity of Assignment—Ultra vires.] — A railway company being sued by the assignee of a Lloyd's bond given by them, compromise the action before judgment by assigning their rolling stock to secure the money advanced by the assignee. Some of the rolling stock was afterwards taken in execution by another creditor of the company:—Held, in an interpleader issue between the two creditors, that evidence ought not to be admitted which tended to shew that the bond was illegal, the assignee having taken it without notice of any illegality; and that whether the assignment of the rolling stock was ultra vires and illegal or not, still, as it was made in lieu of judgment, its legality was not in question on this issue, and the assignee was entitled to the rolling stock as against the execution creditor. *Blackmore* v. *Yates*, 36 L. J., Ex. 121; L. R. 2 Ex. 225; 16 L. T. 288; 15 W. R. 750.

Married Woman Living apart.]—On an interpleader at the instance of a sheriff, an issue was tried, whether certain goods seized were the property of the claimant as against the execution creditor, when it appeared that the claimant was a married woman living apart from her husband in adultery with the execution debtor, and the goods were seized in a house in which they were living together. The judge told the jury that the question was whether, looking at the subject as if the claimant had been a single woman as between her and the execution debtor, the goods belonged to him. The jury having found a verdict for the claimant:—Held, that the verdict was right, notwithstanding that the claimant was a married woman. *Shingler* v. *Holt*, 7 H. & N. 65; 30 L. J., Ex. 322; 7 Jur. (N.S.) 866; 4 L. T. 76; 9 W. R. 871.

Goods Lent.]—In an interpleader issue, to try whether goods were the property of the plaintiff, as against the execution creditor, it was proved that the goods were at the time of the seizure, in the possession of the execution debtor, to whom they had been let by the plaintiff. The goods were, in fact, the property of W., who had lent them to the plaintiff, who was his agent, allowing her to let them, as owner, to whom she would:—Held that the plaintiff had sustained her claim. *Green* v. *Stevens*, 2 H. & N. 146; 5 W. R. 497.

Title to Deeds — Duress.] — The defendants issued a commission of lunacy against the plaintiff, and at the hearing before the commissioner, an agreement was entered into, that the proceedings should be dropped in consideration of the plaintiff assigning her property to trustees. This agreement was signed by her counsel, and in order to carry it out, her title-deeds were placed in the defendants' hands. On the trial of an issue, as to whether the plaintiff was entitled to the deeds notwithstanding the agreement:—Held, first, that it was not open to the defendants to dispute the title of the plaintiff to the deeds independently of the agreement. *Cummings* v. *Ince*, 11 Q. B. 112; 17 L. J., Q. B. 105; 12 Jur. 331.

Held, secondly, that the agreement was entered into under duress, and was not binding on the plaintiff, notwithstanding the consent of her legal advisers. *Ib.*

Evidence of Title.] — The question being between a claimant under a bill of sale from the sheriff and an execution creditor, the bill of sale, though it may not, per se, be sufficient primâ facie evidence of the title of the claimant, is so coupled with some evidence of a prior seizure by the sheriff. *Hornidge* v. *Cooper*, 27 L. J., Ex. 314.

On an interpleader issue between the plaintiff, the claimant of goods and the execution creditor, the plaintiff claiming the goods under an assignment made to him by the debtor, as a security for previous advances, an admission of the debt made by the debtor before the assignment, in the absence of the defendant, is not receivable for the plaintiff. *Coole* v. *Braham*, 3 Ex. 183; 18 L. J., Ex. 105.

Where goods are claimed under an agreement, the terms of which are contained in a written instrument, which is inadmissible by reason of its not being stamped, parol evidence cannot be received of the claimant's title to such goods. *Yorke* v. *Smith*, 21 L. J., Q. B. 53; 16 Jur. 63.

In an action by A. against B., the court, upon a motion made by B., directed that an action for money had and received should be brought by C. against A., to try the right to certain money:—Held, that in an action brought in pursuance of such order, a special agreement might be given in evidence, which in ordinary cases would be admissible only under a special count. *Pooley* v. *Goodwin*, 5 N. & M. 466; 1 H. & W. 567.

Proceedings transferred to County Court — Jurisdiction—Order on Sheriff to pay Costs.]—Where interpleader proceedings are transferred, by an order in the ordinary form, to the county court, the sheriff is not a party to the interpleader issue, and the county court judge has no jurisdiction to order him to pay costs. On the making of such an order the sheriff should apply for a prohibition, and is not entitled to appeal. *Temple* v. *Temple*, 63 L. J., Q. B. 556; 10 R. 251.

Estoppel by.] — Where on an interpleader issue to try the question whether the beneficial interest in certain goods bequeathed to plaintiff for her separate use had been transferred by her to her husband, a verdict was found for the plaintiff:—Held, that this did not decide the question whether the goods which the wife had in her separate right, and to which the husband was entitled merely in his marital right, were subject to an execution against him. *Bird* v. *Crabb*, 4 L. T. 368.

Where goods of a less value than the judgment

debt have been seized by an execution creditor, and the claimant in an interpleader proceeding in the county court has deposited their value to avoid a sale, and the execution creditor being successful in the interpleader, has received the money so deposited by the claimant, upon a second seizure of the same goods in execution of the same judgment and a second issue between the same creditor and the same claimant, the execution creditor is estopped from denying that the goods are the goods of the claimant. *Haddow* v. *Morton*, 63 L. J., Q. B. 431; [1894] 1 Q. B. 565; 9 R. 275; 70 L. T. 470—C. A.

An assignee of book debts sued a debtor for the debt assigned and the assignor's trustee claimed the money; an interpleader issue was ordered, and at the trial the trustee disputed the assignment on the ground of notice of an act of bankruptcy:—Held, that after the issue was decided against the trustee, he could not set up any other ground upon which the assignment could be impeached. *March, Ex parte, Hilton, In re*, 67 L. T. 594; 9 Morrell, 286.

Trial—Agreement to withdraw Juror.]—A bond given to the plaintiff under an interpleader order by two defendants, as security for a claimant of goods seized at the suit of the plaintiff, contained a condition, that if at the trial of the issue the goods should be found to have been the property of the claimant, or if he should "proceed to try," according to the order, or any further order, or should pay the value of the goods, the bond should be void. A declaration in an action on the bond after setting out the condition, stated, that when the issue came on to be tried, the parties agreed to withdraw a juror; that afterwards an order was made, directing the claimant to proceed to trial at a certain sittings, and that he did not proceed to trial, or try:—Held, that the declaration was good; that the condition meant that the claimant should try, and was not satisfied by the first proceeding to trial, and that there was a sufficient breach. *Williams* v. *Gray*, 9 C. B. 730; 19 L. J., C. P. 382.

—— **Right to Begin.**]—Where the question was, whether goods which had been seized by the sheriff under a fi. fa., issued upon a judgment, were the property of the plaintiffs as assignees of a bankrupt, or of the defendant, the execution creditor, the defendant pleaded that by virtue of the fi. fa., and as against the plaintiffs, he was entitled to the proceeds of the goods:—Held, that the plaintiffs were entitled to begin at the trial. *Edwards* v. *Matthews*, 4 D. & L. 721; 16 L. J., Ex. 291; 11 Jur. 398.

Mode of Trial—Jury.]—An interpleader issue having been directed, the issue was drawn up for trial with a jury, and the trial took place before a judge and jury. A new trial having been ordered, the plaintiff gave notice of trial before a judge alone. The defendant did not give a counter-notice, but objected at the trial to the jurisdiction of the judge to try the case without a jury:—Held, that it was not competent for the plaintiff to give such notice, and that the issue could not be tried by a judge without a jury. *Hamlyn* v. *Betteley*, 50 L. J., Q. B. 1; 6 Q. B. D. 63; 43 L. T. 790; 29 W. R. 275—C. A.

Issue Not an "Action."]—An interpleader issue is not an action within the meaning of s. 100 of the Judicature Act, 1873, and the rules of court made under that act. *Ib.*

5. Summary Adjudication.

Consent of Parties.]—The court had no power, under 1 & 2 Will. 4, c. 58, to dispose summarily of the matter in dispute between the parties who appeared on the sheriff's rule, without the consent of both plaintiff and claimant. *Curlewis* v. *Pocock*, 5 D. P. C. 381.

Goods of a debtor seized by a sheriff under an execution having been claimed by a third party, the sheriff brought the plaintiff and the claimant before a judge, who decided that the property belonged to the claimant, and ordered the plaintiff to pay the costs of the claimant and of the sheriff, and the goods to be delivered up to the claimant. The order was not stated on the face of it to have been made by consent, but was, in fact, so made; and the plaintiff paid the costs accordingly; but having discovered that there was other property in the debtor's possession not belonging to the claimant, he ruled the sheriff to return the writ, and, on his returning nulla bona, brought an action for a false return:—Held, first, that the judge had no power under 1 & 2 Will. 4, c. 58, s. 6, to make such an order without the consent of the parties. *Harrison* v. *Wright*, 13 M. & W. 816; 2 D. & L. 695; 14 L. J., Ex. 196.

Held, secondly, that although the order was bad, as no consent appeared upon the face of it, still that it was binding upon the parties as a decision of the judge in the nature of an award, and made by consent. *Ib.*

Reference by Judge to Court.]—A judge at chambers referred an interpleader summons to a divisional court. The court barred the claimant and decided the case without ordering an interpleader issue:—Held, that such decision was given in exercise of the summary jurisdiction of a court or judge under the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 14, and was therefore final and without appeal. *Turner* v. *Bridgett*, 51 L. J., Q. B. 377; 9 Q. B. D. 55; 46 L. T. 517; 30 W. R. 586—C. A.

Reviewing Decision on Appeal.]—Where a judge disposes summarily of an interpleader order, by consent of the parties, under the 1 & 2 Will. 4, c. 58, s. 6, and 1 & 2 Vict. c. 45, s. 2, the court has no jurisdiction to review his decision. *Shortridge* v. *Young*, 12 M. & W. 5; 1 D. & L. 416; 13 L. J., Ex. 30; 7 Jur. 996. *Burgh* v. *Schofield*, 2 D. (N.S.) 261; 9 M. & W. 478; 11 L. J., Ex. 382. S. P., *Dodds* v. *Shepherd*, and *Tarn, In re*, post, col. 385. Contra, *Teggin* v. *Langford*, 2 D. (N.S.) 467; 10 M. & W. 556; 12 L. J., Ex. 76.

6. Payment into and out of Court.

Payment out—At what Time.]—Where money has been paid into court by a stakeholder to abide the event of a feigned issue, the party succeeding cannot take the money out before judgment is signed. *Cooper* v. *Lead Smelting Co.*, 1 D. P. C. 728; 9 Bing. 634; 2 M. & Scott, 810.

—— **When Title clear.**]—An interpleader order having been made for payment into court of a sum of money, the freight of a ship, in a dispute between shipowners and charterers, the court, on its appearing that the larger portion was plainly due to the former, ordered it to be paid out of court to them, and directed an action to try the question between the parties (instead

of an issue), in order that a commission might issue to examine the master, who was about to sail on a voyage. *Mersey Dock Board, In re*, 11 W. R. 283.

Where a judge's order has been obtained, ordering the payment of a sum of money out of court to a person claiming under an interpleader rule, the court will not refuse to enforce the order of the judge, though a suit of a creditor, against the claimant, is pending in chancery; for the right of the receiver cannot be recognised where no injunction has been served upon the officers of the court. *Smith* v. *Clinch*, 2 D. (N.S.) 48; 7 Jur. 129.

—— **Application, to whom.**]—Where a judge has directed money to be paid into court to abide the event of an issue, and has reserved the question of costs, an application for payment of the money out of court must be made to the same judge, and not to the court. *Marks* v. *Ridgway*, 1 Ex. 8; 16 L. J., Ex. 241.

Order on Claimant to pay Sum to Sheriff to abide Order—No Order made—Right of Sheriff to hold Money.]—In interpleader proceedings at the instance of a sheriff the claimant and the execution creditor were ordered to proceed to the trial of an issue in the county court, and the claimant was ordered to pay a sum of money to the sheriff to abide the order of the county court judge. The execution creditor having withdrawn his claim, the claimant applied to the sheriff for repayment of the money:—Held, that the sheriff was justified in refusing to pay until the county court judge made an order for payment. *Discount Banking Co.* v. *Lambarde*, 63 L. J., Q. B. 21; [1893] 2 Q. B. 329; 4 R. 537; 69 L. T. 223; 42 W. R. 50; 58 J. P. 39.—C. A.

Payment in.]—If a part of a sum claimed by the parties has been paid to one of them before adverse claim made, the adverse claimant has a right to have the whole sum he claims paid into court, on the holder applying for relief under the act. *Allen* v. *Gilby*, 2 D. P. C. 143.

Where a rule is obtained, calling on a party in a certain cause to pay money into court, the affidavits should be entitled in the original action, and not in the names of the parties to the interpleader rule. *Levi* v. *Coyle*, 2 D. (N.S.) 932; 7 Jur. 725. S. P., *Pariente* v. *Pennell*, 7 Scott (N.R.) 834.

Costs.]—Upon a motion to obtain out of court money paid in under an interpleader rule, the successful party is entitled to the costs of the application, though cause is shewn in the first instance. *Cusel* or *Cusal* v. *Pariente*, 8 Scott (N.R.) 240; 7 Man. & G. 527.

Where a party succeeds on an issue, he has a right to his costs of applying to take the proceeds of the sale out of court, although he has not applied to the opposite side for a consent to take the money out. *Meredith* v. *Rogers*, 7 D. P. C. 596; 2 W. W. & H. 69; 3 Jur. 1191.

So the successful party as against the unsuccessful is entitled to the costs of applying to the court in order to obtain the property in dispute from the stakeholder: an application having been made to the latter, and he having properly awaited the decision of the court before he gave it up. *Barnes* v. *Bank of England*, 7 D. P. C. 319; 1 W. W. & H. 291.

7. Appeal.

From Judgment at Trial.]—An appeal will lie to the Court of Appeal from a judgment on the trial of an interpleader issue tried in the ordinary way. *Witt* v. *Parker*, 46 L. J., Q. B. 450; 36 L. T. 538; 25 W. R. 518—C. A.

The 17 & 18 Vict. c. 125, s. 32, authorises error to be brought upon a judgment upon a special case, stated by consent, upon the trial of an interpleader issue. *Gumm* v. *Tyrie*, 6 B. & S. 298; 34 L. J., Q. B. 124; 13 W. R. 436—Ex. Ch.

The right of appeal given by 17 & 18 Vict. c. 125, s. 34, applies to an interpleader issue. *Withers* v. *Parker*, 4 H. & N. 810; 28 L. J., Ex. 383; 6 Jur. (N.S.) 22; 2 L. T. 601—Ex. Ch.

No writ of error lay on a judgment signed in a feigned issue, directed under 1 & 2 Will. 4, c. 58, and the exchequer chamber quashed such a writ for a variance between the writ and the record brought up in pursuance of it, the judgment signed in pursuance of s. 7 not being a judgment in an action. *King* v. *Simmonds*, 7 Q. B. 289; 14 L. J., Q. B. 248; 9 Jur. 761—Ex. Ch. *S. C.*, and S. P., in Dom. Proc., 1 H. L. Cas. 755; 12 Jur. 903. S. P., *Thorpe* v. *Plowden*, 2 Ex. 387.

—— **To what Court.**]—Where it is sought to impeach the judgment of a judge on the trial of an interpleader issue with respect only to the finding of the facts or the ruling of the law, and not with respect to the final disposal of the whole matter of the interpleader proceedings, an appeal will lie from such judgment under s. 19 of the Judicature Act, 1873, as it will from any other judgment or order of a judge. *Dawson* v. *Fox*, 54 L. J., Q. B. 299; 14 Q. B. D. 377; 33 W. R. 514—C. A. *See now* 53 & 54 Vict. c. 44, s. 1.

When an interpleader issue has been tried by a judge and jury and upon the finding of the jury the judge has, under Ord. LVII. r. 13, pronounced judgment disposing of the whole matter of the interpleader proceedings, but has given leave to appeal, a party to the issue who is dissatisfied with both the finding of the jury and the judgment of the judge may appeal under Ord. XL. r. 5, to a divisional court of the Queen's Bench Division, and under the Supreme Court of Judicature Act, 1873, s. 19, from that court to the Court of Appeal:—Semble, that *Burstall* v. *Bryant* (12 Q. B. D. 103) was wrongly decided. *Robinson* v. *Tucker*, 53 L. J., Q. B. 317; 14 Q. B. D. 371; 50 L. T. 380; 32 W. R. 697—C. A.

The appeal from a judgment of the court or a judge in any action or any issue ordered to be tried or stated in an interpleader proceeding, or from the decision of the court or a judge in a summary way in an interpleader proceeding, lies direct to the Court of Appeal, and in no case to the divisional court; and it is immaterial whether the judge whose judgment is appealed against gives or refuses special leave to appeal. *Burstall* v. *Bryant*, 12 Q. B. D. 103; 49 L. T. 712; 32 W. R. 495; 48 J. P. 119.

Proceedings transferred to County Court—Jurisdiction of Court of Appeal.]—Interpleader proceedings were transferred under the Judicature Act, 1884, s. 17, from the Queen's Bench Division to a county court. On appeal from the judgment of the county court the Queen's Bench Division affirmed that judgment but gave leave

to appeal to the Court of Appeal:—Held, that the Court of Appeal had jurisdiction under the Judicature Act, 1873, s. 45, to hear the appeal, that jurisdiction not having been taken away by the Appellate Jurisdiction Act, 1876, s. 20. *Crush* v. *Turner* (3 Ex. D. 303) approved. *Thomas* v. *Kelly*, 58 L. J., Q. B. 66; 13 App. Cas. 506; 60 L. T. 114; 37 W. R. 353—H. L. (E.)

County Court—Amount not exceeding £20.]—In an interpleader proceeding under s. 157 of the County Courts Act, 1888, the value of the goods claimed was less than 20*l.*, and the claimant claimed damages, exceeding 20*l.*, against the high bailiff and the execution creditor. At the hearing the judge gave judgment for 15*l.* for the claimant against the execution creditor, and did not grant leave to appeal:—Held, that the execution creditor had no right of appeal under s. 120, which provides that there shall be no right to appeal in proceedings in interpleader where the money claimed, or the value of the goods and chattels claimed, or of the proceeds thereof, does not exceed 20*l.*, unless the judge shall grant leave to appeal. *Lumb* v. *Teal*, 58 L. J., Q. B. 298; 22 Q. B. D. 675; 60 L. T. 451.

An appeal does not lie, even by leave of the judge, from the decision of a county court in proceedings in interpleader, where neither the money claimed, nor the value of the goods and chattels claimed, or of the proceeds thereof, exceeds 20*l.* *Collis* v. *Lewis*, 57 L. J., Q. B. 167; 20 Q. B. D. 202; 57 L. T. 716; 36 W. R. 472.

Where in an interpleader proceeding in a county court the claimant deposits the amount of the value of the goods claimed as fixed by appraisement under s. 72 of the County Courts Act, 1856, he cannot, if the amount so deposited be less than 20*l.*, claim to appeal under s. 68 of the act on the ground that the value of the goods was over 20*l.*, and that a less amount was deposited because it was sufficient to satisfy the execution creditor's judgment. *White* v. *Milne*, 58 L. T. 225.

Summary Decision.]—Where upon an interpleader summons, the question is one of law, and the judge decides it under Ord. LVII. r. 9, without directing an issue or a special case, his decision is final and conclusive, and no appeal lies therefrom. *Tarn, In re*, 62 L. J., Ch. 564; [1893] 2 Ch. 280; 2 R. 407; 68 L. T. 311; 41 W. R. 397—C. A.

When a judge at chambers disposes of the merits of an interpleader in a summary manner under the Common Law Procedure Act, 1860, s. 14, his decision is, by s. 17, final, and he cannot, even with consent of parties, give a right of appeal to the court; and no alteration in this respect is made by the Judicature Act, 1873, ss. 19 and 50, taken together with Ord. I. r. 2. *Dodds* v. *Shepherd*, 45 L. J., Ex. 457; 1 Ex. D. 75; 34 L. T. 358; 24 W. R. 322.

A summary decision under Ord. LVII. r. 8, by a judge at chambers, on an interpleader summons, is final and conclusive, and no appeal lies from such decision, and there is no power to give leave to appeal. *Lyon* v. *Morris*, 56 L. J., Q. B. 378; 19 Q. B. D. 139; 57 L. T. 324; 35 W. R. 707—C. A.

—— **At Chambers—From Divisional Court to Court of Appeal.**]—By the combined operation of the Common Law Procedure Act, 1860, s. 17, and of the Appellate Jurisdiction Act, 1876, s. 20, no appeal lies to the Court of Appeal from a decision of the Queen's Bench Division upon an appeal from the summary decision at chambers of an interpleader summons, and r. 11 of the Rules of the Supreme Court, 1883, Ord. LVII., does not confer any power to give leave to appeal. *Waterhouse* v. *Gilbert*, 54 L. J., Q. B. 440; 15 Q. B. D. 569; 52 L. T. 784—C. A.

On an interpleader summons at chambers the master decided, at the request of one of the parties, and having regard to the value of the subject-matter in dispute, to dispose of the claims in a summary manner, and he adjourned the summons for the production of evidence. The claimant objected that it was a case for an issue, and appealed to a judge at chambers, who dismissed the appeal on the ground that the decision of the master was final. An appeal from the judge at chambers to the divisional court was dismissed. On appeal to the Court of Appeal:—Held, that the decision of the master was a summary decision within Ord. LVII. r. 8, and that therefore *Waterhouse* v. *Gilbert* (15 Q. B. D. 569) applied, and the Court of Appeal could not entertain the appeal. Quære, whether under Ord. LIV. r. 21, all decisions of a master, including a decision in a summary way in interpleader, are not the subject of appeal to a judge at chambers. *Bryant* v. *Reading*, 55 L. J., Q. B. 253; 17 Q. B. D. 128; 54 L. T. 524; 34 W. R. 496—C. A. *S. C.*, 54 L. T. 300.

—— **Reference by Judge to Court.**]—A judge at chambers referred an interpleader summons to a divisional court. The court barred the claimant and decided the case without ordering an interpleader issue:—Held, that such decision was given in exercise of the summary jurisdiction of a court or judge under the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 14, and was therefore final and without appeal. *Turner* v. *Bridgett*, 51 L. J., Q. B. 377; 9 Q. B. D. 55; 46 L. T. 517; 30 W. R. 586—C. A.

—— **Appeal by Sheriff.**]—The 23 & 24 Vict. c. 126, s. 17, makes a summary decision under the act final and conclusive "against the parties," but this does not apply to the sheriff; therefore a sheriff can appeal from an order made in a summary way. *Smith* v. *Darlow*, 53 L. J., Ch. 696; 26 Ch. D. 605; 50 L. T. 571; 32 W. R. 665—C. A.

—— **Master to Judge.**]—Where a master summarily decides an interpleader matter under Ord. LVII. r. 8, and gives leave to appeal, a judge at chambers has jurisdiction to entertain such appeal by virtue of the provisions of Ord. LVII. r. 11. *Webb* v. *Shaw*, 55 L. J., Q. B. 249; 16 Q. B. D. 658; 54 L. T. 216; 34 W. R. 415.

Upon the true construction of Ord. LIV. rr. 12 and 21, and Ord. LVII. rr. 8 and 11, an appeal lies from a summary decision of a master in an interpleader proceeding to a judge at chambers. *Clench* v. *Dooley*, 56 L. T. 122. See also *Bryant* v. *Reading*, supra.

Within what Time.]—An order made on an interpleader issue, though it substantially decides the dispute between the parties, is an interlocutory order, an appeal against which cannot, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days. *McAndrew* v. *Barker*, 47 L. J., Ch. 340; 7 Ch. D. 701; 37 L. T. 810; 26 W. R. 317—C. A.

An appeal from the decision of a judge on an interpleader issue tried by him without a jury must, under Ord. LVIII. r. 15, be brought within twenty-one days. *McNair* v. *Audenshaw Paint Co.*, 60 L. J., Q. B. 770; [1891] 2 Q. B. 502; 65 L. T. 292; 40 W. R. 26—C. A.

The judgment of a divisional court affirming the judgment of the county court in an interpleader issue transferred to the county court under s. 17 of the Judicature Act, 1884, is a "final order" within Ord. LVIII. r. 3. *Hughes* v. *Little*, 56 L. J., Q. B. 96; 18 Q. B. D. 32; 55 L. T. 476; 35 W. R. 36—C. A.

Power to order Judgment to be entered.]—The Court of Appeal has power under Ord. XL. r. 10, to order judgment in an interpleader action to be entered for the execution creditor without directing a new trial. *Williams* v. *Mercier*, 51 L. J., Q. B. 594; 9 Q. B. D. 337; 47 L. T. 140; 30 W. R. 720—C. A.

No Order to Pay pending Appeal.]—Property taken in execution, being claimed by the assignees of the debtor who had become bankrupt, the sheriff obtained an interpleader rule, and an issue was directed, the assignees to be the plaintiffs, and the execution creditor the defendant, the money levied being in the meantime paid into court. On trial of the issues the assignees recovered, but the defendant having tendered a bill of exceptions, error was brought in the Exchequer Chamber. The court gave judgment quashing the writ of error. The assignees then moved the Queen's Bench to make an order for payment of money to them; but before cause shewn the defendant brought error in the House of Lords. There being no proof that the last writ of error was frivolous, the court refused to make such order pending the writ. *King* v. *Birch*, 7 Q. B. 669.

As to Costs.]—*See* infra.

8. New Trial.

There is no difference between interpleader issues and other actions, as regards the terms upon which rules for a new trial will be granted where the verdict is against the evidence. *Janes* v. *Whitbread*, 2 L. M. & P. 407; 11 C. B. 406; 20 L. J., C. P. 217; 15 Jur. 612.

9. Security for Costs.

General Rules.]—The rules in regard to security for costs on interpleader issues follow the analogy of the rules on the same subject in actions, and no special jurisdiction to require security for costs in interpleader is given by Ord. LVII. r. 15. *Rhodes* v. *Dawson*, 55 L. J., Q. B. 134; 16 Q. B. D. 548; 34 W. R. 240—C. A.

In an interpleader issue directed upon an application by a sheriff, who has received a notice of a claim to goods seized by him under a writ of fieri facias in execution of a judgment, both the plaintiff and the defendant in the issue are really in the position of the plaintiffs in an ordinary action, and, therefore, the defendant in the interpleader issue may be ordered to give security for costs in any case in which a plaintiff may be so ordered, and the rule, that a defendant cannot be compelled to give security for costs, does not apply. *Tomlinson* v. *Land and Finance Corporation*, 53 L. J., Q. B. 561; 14 Q. B. D. 539—C. A.

Foreigner Abroad.]—Where one of the defendants in an interpleader issue is really interested in the result thereof as if he were a plaintiff in an action, he is not entitled to call upon the plaintiff in the issue to give security for costs upon the ground that the latter is a foreigner residing abroad. *Belmonte* v. *Aynard*, 4 C. P. D. 352; 27 W. R. 789—C. A. Affirming 40 L. T. 627. See *Workmeister* v. *Healy*, Ir. R. 10 C. L. 451.

In an interpleader issue, the sheriff having paid money into court, and the defendant not having obeyed an order of the court to give security for costs, the defendant, who was residing abroad, was, after a lapse of six months, ordered to give security for costs within fourteen days, otherwise the claimant to be allowed to take the money paid in, out of court. *Melin* v. *Dumont*, 20 L. T. 366; 17 W. R. 673.

A sheriff being in possession of the goods of B., under a fi. fa. at the suit of A., who was resident in Scotland, a fiat in bankruptcy issued against B., and his assignees claimed the goods. Upon an application by the sheriff, a judge made an order directing an issue, in which the assignees were to be the plaintiffs, and A., the execution creditor, the defendant, and ordering that security for costs should not be required:—The court amended the order by striking out the latter words, and directed that A. should give security for costs. *Williams* v. *Crosling*, 3 C. B. 957; 4 D. & L. 660; 16 L. J., C. P. 112.

Application by Auctioneer—Insolvent Vendor.]—Where an auctioneer, against whom an action was brought to recover the deposit on a sale by auction of real estate, upon the ground that the vendor's title was defective, applied for an interpleader rule, and it appeared that the vendor had no other property except that of which the title was disputed, the court refused the application, unless the defendant gave security for costs; and refused to allow him his costs of the application out of the deposit. *Deller* v. *Prickett*, 15 Q. B. 1081; 20 L. J., Q. B. 151; 15 Jur. 168.

Insolvent Debtor.]—The assignee of an insolvent debtor sued the defendant for the proceeds of goods intrusted to him by the insolvent before his insolvency, for sale. The insolvent claimed them as executor, and the assignee and the insolvent were ordered to interplead, on the defendant bringing the money into court. The court refused to make it a condition of the order, that the insolvent or the defendant should give security for costs. *Ridgway* v. *Jones*, 29 L. J., Q. B. 97; 6 Jur. (N.S.) 223; 1 L. T. 368; 8 W. R. 185.

In an action by the assignees of a bankrupt against a banker, to recover money deposited with him as being part of the bankrupt's estate, a claim having been made to this money by a third party, as part of a trust fund, of which the bankrupt was trustee; the court on an interpleader rule ordered an action to be brought in the name of the bankrupt against the assignees, the cestui que trust to find security for the defendant's costs. *Frost* v. *Hayward*, 2 D. (N.S.) 801; 12 L. J., Ex. 242; 7 Jur. 179.

Withdrawal of Sheriff—Sufficiency.]—By an interpleader order, the sheriff was ordered to

withdraw from possession of goods seized under a fi. fa. upon payment into court by the claimant of 50*l.*, or upon his giving security for that amount, to the satisfaction of the master. On the last day for giving security, the claimant's attorney, without giving notice to the execution creditor, tendered to the master a bond with two sureties, at the same time untruly informing him that the sureties were approved by the execution creditor. The master accepted the security; and the claimant's attorney, on the same day, gave the sheriff notice to withdraw, as security had been given pursuant to the interpleader order. The sheriff immediately withdrew from possession. It was afterwards on the same day discovered that the bond was unstamped, and notice of that fact was at once given to the claimant's attorney, and he on the following morning accompanied a messenger from the master's office to Somerset House with the bond, and got it stamped:—Held, that, as between the sheriff and the execution creditor, the sheriff was justified in withdrawing from possession. *Darby* v. *Waterlow*, 37 L. J., C. P. 203; L. R. 3 C. P. 453; 18 L. T. 525; 16 W. R. 864.

10. Costs.

Applicants.]—The costs of an applicant, where he has acted bonâ fide, will, in the first instance, be directed to be paid out of the fund or the produce of the thing in dispute, to be repaid by the party ultimately unsuccessful. *Ducar* v. *Macintosh*, 3 M. & Scott, 174; 2 D. P. C. 730. S. P., *Cotter* v. *Bank of England*, 3 M. & Scott, 180; 2 D. P. C. 728; 2 L. J., C. P. 158.

A stakeholder, who bonâ fide applies for relief, is entitled to his costs out of the funds or the produce of the subject-matter in dispute, to be repaid by the party ultimately unsuccessful. *Reeves* v. *Barraud*, 7 Scott, 281. S. P., *Parker* v. *Sinnett*, 2 D. P. C. 562.

A stakeholder interpleading, who acts with good faith, is entitled, although not a defendant in an action, to deduct from the fund in dispute the costs occasioned by the interpleader proceedings. *Clench* v. *Dooley*, 56 L. T. 122.

An auctioneer who has acted bonâ fide, but who is sued for deposit-money received on a purchase, and who pays it into court under an order for the vendor and purchaser to interplead, is entitled, upon the termination of proceedings between the vendor and purchaser, to receive his costs out of the deposit-money. *Pitchers* v. *Edney*, 4 Bing. (N.C.) 721; 6 Scott, 582; 1 Arn. 267; 7 L. J., C. P. 276.

A defendant being sued for rent in arrear, and having received notice from a mortgagee not to pay the rent to the plaintiff, obtained a rule for the mortgagee to interplead; the mortgagee having declined to appear to the rule, the court ordered that each party should pay his costs of the rule. *Murdock* v. *Taylor*, 6 Bing. (N.C.) 293; 8 Scott, 604; 9 L. J., C. P. 188.

Payment to Applicant for "Charges."]—The court or a judge has power under Ord. LVII. r. 15, to make an order for payment of the charges of a wharfinger who has interpleaded. *De Rothschild* v. *Morrison*, 59 L. J., Q. B. 557; 24 Q. B. D. 750; 63 L. T. 46; 38 W. R. 635—C. A.

Claimant not Appearing.]—If a claimant does not appear, the court will not order him to pay the costs of applying to the court, or such costs to be paid out of the fund in dispute. *Lambert* v. *Cooper*, 5 D. P. C. 547; W. W. & D. 204.

Where the claimant does not appear, the judgment creditor is entitled to have his costs from the claimant, but the sheriff has no costs. *Perkins* v. *Burton*, 2 D. P. C. 108; 3 Tyr. 51. See also *Bowdler* v. *Smith*, 1 D. P. C. 417; *Oram* v. *Sheldon*, post, col. 392.

What is an Appearance.]—Upon the hearing of an interpleader summons, the claimant's attorney appeared without an affidavit, and after the statement of the defendant's case, he said that he would consent to an order, barring the claim, but asked that the order might provide that no action should be brought by or against either party concerning the goods in question. The claim had been persisted in until the moment of the hearing. The judge made an order barring the claimant, and directing him to pay all costs:—Held, that although a judge has jurisdiction upon an interpleader summons to order a claimant to pay costs only when he appears to litigate his claim, these facts raised a question for his discretion as to whether this was such an appearance. *Rooda* v. *Gun and Shot Wharves Co.*, 28 L. T. 635.

Where an application has been made to a judge, and the parties do not go before the judge at the instance of the execution creditor, and he having made inquiries abandons his execution, the court will not grant summarily to the claimant the costs of attending at the judge's chambers, but will leave him to his action. *Swaine* v. *Spencer*, 9 D. P. C. 347; 5 Jur. 319.

When an issue is directed to be tried between an execution creditor and a claimant, but the latter refuses to try, and abandons his claim, he will be liable to pay the execution creditor's costs down to the time of the claim being abandoned, and of applying to take the money paid in by the sheriff out of court. *Wills* v. *Hopkins*, 3 D. P. C. 346.

Execution Creditor Abandoning Execution.]—Where upon execution of a fi. fa., a claim is made to the goods seized, and upon the return to a summoning order the claimant appears and the execution creditor abandons the execution, the execution creditor must pay the costs of the interpleader summons to the claimant and the expenses of execution to the sheriff. *Hyland* v. *Lennox*, 28 L. R., Ir. 286.

Sheriff's Charges—Successful Claimant.]—A successful claimant on an interpleader issue is entitled as against an unsuccessful execution creditor to the amount of the sheriff's charges incurred in the matter of a levy and sale. *Goodman* v. *Blake*, 56 L. J., Q. B. 441; 19 Q. B. D. 77; 57 L. T. 494; 35 W. R. 812.

—— **Claimant Failing—Form of Order.**]—Where an interpleader has been directed on the application of the sheriff, and the claim of the third party fails, the strict form of order, upon which the sheriff is entitled to insist, is to direct the execution creditor to pay the sheriff's charges of the interpleader, with a remedy over to the execution creditor against the third party, though it is a common form of order simply to order the third party to pay them to the sheriff. *Smith* v. *Darlow*, 53 L. J., Ch. 696; 26 Ch. D. 605; 50 L. T. 571; 32 W. R. 665—C. A.

Where a sheriff obtains an interpleader order, and the claim by the third party fails, the sheriff is entitled to have his costs of the order against the execution creditor, and the execution creditor has his remedy for them over against the unsuccessful claimant. *Todd* v. *M'Keevir*, [1895] 2 Ir. R. 400—C. A.

A claim having been made to goods of an execution debtor in the possession of the sheriff under a writ of fieri facias taken out by the execution creditor, the sheriff applied for and obtained an order for an interpleader issue to be tried. Subsequent to this order the landlord of the debtor claimed the goods for rent. The execution creditor declined to pay the rent, and, the goods being distrained by the landlord, the trial of the issue was not proceeded with. The sheriff applied for a discharge of the order and for his costs to be paid by the execution creditor. The execution creditor applied for an order to bar the claimant's claim and for payment of his costs by the claimant:—Held, that the execution creditor should first pay the sheriff's costs, and that the claimant should then pay to the execution creditor half the sheriff's costs from the date of the claim. *Lawson* v. *Carter*, 63 L. J., Q. B. 159.

—— **Receiving Order, Notice of.**]—Notwithstanding the pendency of an interpleader order, a sheriff is not entitled to any costs of execution under s. 11, sub-s. 1, of the Bankruptcy Act, 1890, after he is served with a notice that a receiving order has been made against the judgment debtor. *Essex (Sheriff), Ex parte, Harrison, In re*, 62 L. J., Q. B. 266; [1893] 2 Q. B. 111; 5 R. 367; 68 L. T. 590; 41 W. R. 512; 10 Morrell, 106.

—— **Right to.**]—The sheriff is not entitled to his costs on an application under the 1 & 2 Will. 4, c. 58, s. 6; and his claim to poundage depends on the legality of the seizure. *Barker* v. *Dynes*, 1 D. P. C. 169.

Where the sheriff applies for relief, and no blame appears to attach either to the execution creditor, the claimant, or the sheriff, each party will pay his own costs. *Morland* v. *Chitty*, 1 D. P. C. 520.

Although the sheriff is not actually allowed costs, yet, where he has retained possession of the goods seized at the request of the execution creditor, and has sold them with consent of all the parties, and the execution creditor afterwards abandons his claim, the sheriff is entitled to receive from him his costs of such possession and sale. *Dabbs* v. *Humphries*, 1 Scott, 325; 1 Bing. (N.C.) 412; 3 D. P. C. 377; 1 Hodges, 4; 4 L. J., C. P. 101. *See further cases*, ante, cols. 356, 357.

—— **Ordered to Pay Costs.**]—The court will, on proper grounds shewn, order the sheriff, or the execution creditor, to pay a third party appearing and successfully prosecuting his claim, his costs of such appearance. *Ford* v. *Dilly*, 5 B. & Ad. 885; 2 N. & M. 662.

The sheriff having taken goods in execution while there was rent due to the landlord, which he claimed from the sheriff, the latter brought the landlord, with other claimants, into court: the court ordered the sheriff to pay the rent, upon the landlord's giving security, and also to pay his costs:—Held, that the sheriff was liable to pay the expense of the security. *Clark* v. *Lord*, 2 D. P. C. 227; 3 L. J., Ex. 20.

—— **Where Claimants do not Appear.**]—The court will not allow the sheriff applying to be relieved his costs, where the claimant does not appear. *Oram* v. *Sheldon*, 1 Scott, 697; 3 D. P. C. 640; 1 Hodges, 92. S. P., *Beswick* v. *Thomas*, 5 D. P. C. 458.

Nor will the plaintiff be allowed his costs, except in the event of extremely improper conduct in the parties. *Ib.*

If the claimant does not appear, and is therefore barred, the sheriff is not entitled to costs against the claimant. *Jones* v. *Lewis*, 8 M. & W. 264; 10 L. J., Ex. 320; 5 Jur. 873.

—— **Claimant Abandoning.**]—Where a claimant abandons his claim after an issue directed, the sheriff is entitled to his costs from the time of directing the issue and of the application for those costs. *Scales* v. *Sargeson*, 4 D. P. C. 231.

—— **Claimant neglecting to give Security.**]—Where, in consequence of a claim made to goods seized by a sheriff in execution, the court ordered the claimant to proceed to trial upon paying a sum of money into court, which he neglected to do, and a rule was then obtained to compel him to pay the costs occasioned by his false claim:—Held, that he was liable to pay those costs as well as the costs of that rule, though no previous application had been made to him. *Scales* v. *Sargeson*, 3 D. P. C. 707.

—— **Non-appearance of Execution Creditor.**]—Where a fi. fa. has been issued, and goods seized under it, and, an adverse claim being set up, the sheriff has applied for relief, and the execution creditor does not appear to support his fi. fa., the court will order the costs of the adverse claimant's appearing to support his claim to be paid by the execution creditor, but not those of the sheriff; yet, if the execution creditor afterwards appears and opens the rule, the court will grant the sheriff the costs of his second appearance. *Bryant* v. *Ikey*, 1 D. P. C. 428.

—— **Arrangement between Parties.**]—If a sheriff, having levied under a fi. fa., makes an application, and an order of a judge is obtained to pay a certain portion of the money levied into court, to abide the event, and certain other proceedings are directed, but, in consequence of an arrangement between the parties, not carried into effect, the sheriff is not entitled to his costs, unless it can be shewn that the demand made by the first claimant was altogether groundless and fraudulent. *Cox* v. *Fenn*, 7 D. P. C. 50; 8 L. J., Ex. 25; 2 Jur. 945.

—— **Claim by Agent.**]—If a claim to goods seized by a sheriff is made by the defendant on behalf of another, which does not appear to be well founded, the court will make him pay the costs of the sheriff's application. *Lewis* v. *Eicke*, 2 D. P. C. 337; 2 C. & M. 321; 4 Tyr. 157; 3 L. J., Ex. 23.

Where a claim is made by one on behalf of another to goods seized by the sheriff in execution, and, upon a rule being obtained, neither party appears to shew cause, the plaintiff is not entitled to receive his costs from the sheriff, but the sheriff and the plaintiff are both entitled to their costs from the claimant or his agent, upon a rule to shew cause. *Philby* v. *Ikey*, 2 D. P. C. 222.

—— **On Appeal.**]—A sheriff seized, under an execution, goods which were claimed by the holder of a bill of sale. In interpleader proceedings the bill of sale was held to be void, and the holder thereof was ordered to pay the costs of the sheriff who had appeared at the hearing. The bill of sale holder appealed from the decision against the validity of his bill of sale, and served the sheriff with notice of appeal, which asked that the execution creditor might be ordered to pay the sheriff's costs. There was no suggestion that the execution creditor was less able than the bill of sale holder to pay the costs. The sheriff appeared on the hearing of the appeal, and asked for his costs:—Held, that it was an error to serve him with notice of appeal, but that he ought not to have appeared on the appeal, and was not entitled to costs. *Webster, Ex parte, Morris, In re*, 52 L. J., Ch. 375; 22 Ch. D. 136; 48 L. T. 295; 31 W. R. 111—C. A.

In an appeal from the chief judge in bankruptcy on an interpleader order to the Court of Appeal, the sheriff's costs of the appeal were ordered to be paid by the party who should ultimately be decided to be in the wrong. *Streeter, Ex parte, Morris, In re*, 19 Ch. D. 216; 45 L. T. 634; 30 W. R. 127—C. A.

Power of Master to award in Action.]—Under the Rules of 1883, Ord. LIV. r. 12 (i), limiting the power of the master to award costs other than those of any proceedings before him or specially authorised—the master in making an order barring the claimant upon an interpleader summons under Ord. LVII., when the applicant is a defendant, has no power under rule 15 to make it a term of the order that the plaintiff shall pay the costs of the defendant in the original action, apart from those in the interpleader proceedings, and an order to this effect is, notwithstanding 36 & 37 Vict. c. 66, s. 49, subject to appeal. *Hanson* v. *Maddox*, 53 L. J., Q. B. 67; 12 Q. B. D. 100; 50 L. T. 123; 32 W. R. 183.

At what Time.]—No costs in matters arising out of interpleader motions are allowed until the termination of the proceedings. *Hood* v. *Bradbury*, 6 Man. & G. 981; 7 Scott (N.R.) 892.

Affidavit on Application for.]—An issue was directed, and afterwards the claim was abandoned:—Held, on an application to the court for costs, that an affidavit in support of it must be entitled in the names of the parties in the original cause. *Elliott* v. *Sparrow*, 1 H. & W. 370.

Costs of Issues.]—Where an issue is tried, the unsuccessful party is liable for the costs. *Bowen* v. *Bramidge*, 2 D. P. C. 213.

An application by the successful party for costs may be made before judgment actually signed, but the rule cannot be drawn up except on condition of its being signed. *Bland* v. *Delaus*, 6 D. P. C. 293; 1 W. W. & H. 75.

—— **Apportionment of.**]—The court will, when necessary, apportion the costs of an issue among the different parties, according to the result of the issue upon their different interests. *Dixon* v. *Yates*, 2 N. & M. 177; 5 B. & Ad. 313; 2 L. J., K. B. 198.

—— **Claimant Defeated.**]—Where the claimants of goods taken in execution fail upon an issue, directed to try the validity of the claim, the course is to require them to pay the costs of the application, and of the subsequent proceedings. *Melville* or *Lott* v. *Smark*, 3 Man. & G. 57; 5 Scott (N.R.) 357.

So, where the claimants set up a claim as assignees of a bankrupt, and they fail upon the insufficiency of proof of the bankruptcy. *Ib.*

—— **Success as to Part.**]—An issue was directed between A., the claimant, and B., the execution creditor, to try whether five horses, or one or some of them, were or was, when taken in execution, the property of A. The jury found that two horses only belonged to A. A. obtained a rule nisi for payment to him of the general costs of the issue, the costs of the application under the Interpleader Act, and the costs of the rule. The court gave neither party the general costs of the issue, nor the costs of the trial, but gave to each such portion of the costs as applied to the part on which he had succeeded, and allowed A. his costs of the application under the Interpleader Act. *Lewis* v. *Holding*, 2 Man. & G. 875; 3 Scott (N.R.) 191; 9 D. P. C. 652; 10 L. J., C. P. 204.

Where a plaintiff claimed 182*l.*, and recovered only 50*l.*, and a judge, in the exercise of the discretion given to him by the statute, directed each party to pay his own costs, the court refused to grant a rule to set aside the order. *Ker* v. *Edwards*, 8 Scott, 337; 8 D. P. C. 29.

An issue was directed between the claimant and execution creditor, the costs of the issue to abide the order of the court. The claimant claimed the whole of the goods seized, but proved his right to part only:—Held, that he was entitled, notwithstanding, to the general costs of the issue, as if he had been plaintiff in trover; and also to the costs of the original and subsequent application to the court. *Staley* v. *Bedwell*, 2 P. & D. 309; 10 A. & E. 145; 8 L. J., Q. B. 233.

—— **Mixed Witnesses.**]—Upon the taxation of costs on an issue between the claimant of goods and an execution creditor, to try whether goods taken in execution were the property of the claimant, where the claimant succeeds as to part, and the execution creditor as to the other part, the rule as to the costs of mixed witnesses which prevails in an action does not apply. *Davis* v. *Clifton*, 6 El. & Bl. 392; 25 L. J., Q. B. 344; 2 Jur. (N.S.) 490; 4 W. R. 546.

C. claimed property seized under a fi. fa. in an action of D. against A. The sheriff having applied under 1 & 2 Will. 4, c. 58, s. 6, a judge ordered an issue to try C.'s right, C. to be the plaintiff and D. the defendant. By the verdict, C.'s claim was affirmed for more than five-sixths, but negatived as to the residue. The court directed the costs to be taxed, upon the principle of each party having succeeded as to a part without reference to the fact which was the plaintiff and which the defendant. *Ib.*

The correct rule is to ascertain the extent to which each party has substantially succeeded, without reference to the question which party is plaintiff or defendant. *Ib.*

—— **Of Right to Bill of Exchange.**]—Where an issue has been directed, to try the right to a bill of exchange, the bonâ fide owner of it is entitled to the amount of the bill and all costs from the wrongful claimant, so as completely to indemnify

himself. *Jones* v. *Regan*, 9 D. P. C. 580 ; 5 Jur. 607.

Scale—Payment into Court—Value of Goods.]—Where a claimant is successful in interpleader proceedings, he is entitled to costs on the value of the goods seized, as assessed by the county court judge, and not merely on the amount he has paid into court to meet the amount of the execution and costs. *Studham* v. *Stanbridge*, 64 L. J., Q. B. 473 ; [1895] 1 Q. B. 870 ; 15 R. 406 ; 43 W. R. 543.

Interest.]—Plaintiffs in an interpleader suit are not liable to interest lost to the successful party, after payment of the fund into court during the litigation between the defendants. *East India Co.* v. *Campion*, 4 Cl. & F. 616 ; 11 Bli. (N.S.) 158 ; reversing in part 6 L. J., Ch. 37. And see *Campion* v. *Colvin*, 3 Bing. (N.C.) 789 ; 5 L. J., C. P. 317.

Appeal from Order as to.]—No appeal lies from a judge's order dealing with the costs of an interpleader issue made as between the parties. *Hartmont* v. *Foster*, 51 L. J., Q. B. 12 ; 8 Q. B. D. 82 ; 45 L. T. 429 ; 30 W. R. 129—C. A.

Jurisdiction of Judge.]—A summons was taken out, after verdict, for the costs of an interpleader issue. The judge at chambers referred the summons to the judge before whom the trial took place ; the latter judge made an order on the summons at Westminster :—Held, that he had jurisdiction to make such order. *Hartmont* v. *Foster*, supra.

After an interpleader order had been made by which the question of costs was reserved, the defendant obtained an order to discharge the interpleader order unless the plaintiff took certain steps within a given time. The plaintiff failed to take these steps within the time, and the defendant then obtained an order that the plaintiff should pay the costs :—Held, that the court had jurisdiction to make the order, as an interpleader order does not remove the case from the control of the court. *Wicks* v. *Wood*, 26 W. R. 680.

Where a sheriff is relieved, and an issue is directed to try the rights of adverse claimants, the court may adjudicate after the trial on the costs of appearing to the sheriff's rule and of the issue. *Seaward* v. *Williams*, 1 D. P. C. 528.

—— **Of Master.**]—At the hearing of an interpleader summons before a master, the claimant abandoned his claim. The master thereupon ordered that his claim be barred, and that the defendant in the original action pay the amount claimed after deducting his costs. The plaintiff appealed to the judge at chambers, who dismissed the appeal, on the ground that the master's decision was final, but on appeal to the divisional court :—Held, that the master had exceeded his jurisdiction, for that although by Ord. LIV. r. 12 (i), he was empowered to deal with the costs of the interpleader proceeding before him, he was not, either under that order or under Ord. LVII. r. 15, empowered to deal with the costs of the action, and therefore an appeal would lie. *Hanson* v. *Maddox*, 53 L. J., Q. B. 67 ; 12 Q. B. D. 100 ; 50 L. T. 123 ; 32 W. R. 183.

Enforcing Payment of.]—A party entitled to costs under an interpleader order is not bound to take out execution under 1 & 2 Will. 4, c. 58, s. 7, but may make the order a rule of court, and issue execution under 1 & 2 Vict. c. 110, c. 18. *Cetti* v. *Bartlett*, 9 M. & W. 840 ; 1 D. (N.S.) 928 ; 11 L. J., Ex. 293.

A party in an interpleader issue who has obtained an order for his costs under 1 & 2 Will. 4, c. 58, s. 7, is a judgment creditor within 17 & 18 Vict. c. 125, ss. 60, 61. *Hartley* v. *Shemwell*, 1 B. & S. 1 ; 30 L. J., Q. B. 223 ; 7 Jur. (N.S.) 774 ; 9 W. R. 520.

The costs of an interpleader rule were not "expenses of the execution," within the 43 Geo. 3, c. 46, s. 5. *Hammond* v. *Navin* or *Nairn*, 1 D. (N.S.) 351 ; 9 M. & W. 221 ; 11 L. J., Ex. 14.

On Payment out of Court, &c.]—*See* ante, col. 383.

Expenses of Possession.]—*See* ante, col. 356.

J. M.

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See DISCOVERY.

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A. EXCISE DUTY AND REGULATIONS.

Spirits—Manufacture.]—Spirits manufactured in Jersey, partly from materials not the produce of the United Kingdom, were imported and the proper duty paid for them, under 3 & 4 Will. 4, c. 52, s. 40:—Held, that they were subject to the regulations of excise in the same manner as spirits manufactured in England, and that the importer must deliver a request note under 2 Will. 4, c. 16, ss. 5 and 6, for obtaining a permit. *Reg.* v. *Excise Commissioners*, 6 Q. B. 975; 14 L. J., Q. B. 179; 9 Jur. 618.

—— **What are.**]—The term "spirits" in 6 Geo. 4, c. 80, ss. 107, 133; 7 & 8 Geo. 4, c. 53, s. 32; and 2 Will. 4, c. 46, s. 10, signified an inflammable liquid produced by distillation, either pure, or mixed only with ingredients which did not convert it into some article of commerce not known, in common parlance, under the appellation of "spirits." *Att.-Gen.* v. *Bailey*, 1 Ex. 281; 17 L. J., Ex. 9.

Sweet spirits of nitre were not within 6 Geo. 4, c. 80, ss. 6 and 7, by which penalties were imposed for distilling spirits without a licence, and the spirits were forfeited, and might be seized; or within 7 & 8 Geo. 4, c. 52, s. 32, which enacts forfeiture of excisable goods deposited in any place with intent to defraud the revenue. *Bailey* v. *Harris*, 12 Q. B. 905; 18 L. J., Q. B. 115; 13 Jur. 341.

A person who distils spirits for the purpose of making, by the addition of nitric acid, sweet spirits of nitre for sale, is a distiller of spirits within 6 Geo. 4, c. 80, ss. 6, 7, requiring an excise licence and liable to the penalties imposed by s. 39 on persons having any private or concealed still for making or distilling low wines or spirits. *Att.-Gen.* v. *Bailey*, 16 M. & W. 74; 16 L. J., Ex. 63.

—— **Validity of Contracts.**]—The 6 Geo. 4, c. 80, s. 124, enacted that no dealer in British spirits shall sell, send out, &c., any plain British spirits exceeding the strength of twenty-five above proof, or any compounded spirits (except shrub) exceeding that of seventeen under proof, on pain of forfeiting such spirits:—Held, that this section did not apply to a distiller or rectifier; and, therefore, that when a rectifier had sold and sent out plain British spirits of the strength of twenty-seven and a half, such contract of sale was not illegal, nor were the spirits prohibited goods, and the seller might recover the price. *Wetherell* v. *Jones*, 3 B. & Ad. 221; 1 L. J., K. B. 139.

A contract was made for spirits to be paid for by bills at three months from delivery; but no opportunity for delivery was given by the purchaser till a new duty was imposed on spirits by 43 Geo. 3, c. 81:—Held, that the distiller was entitled to charge the amount of the additional duty on spirits. *Haig* v. *Napier*, 1 Dow, 255.

Wines—Legatee and Executor.]—A legatee, under a bequest of wines, which arrived in the port of London in a ship before the death of the testator, the report of the arrival of the ship being made before, but the entry of the wines not being made until after the death of the testator, is not subject to the payment of the duties, the executor being bound to pay them out of the assets. *Sewart* v. *Denton*, 2 Chit. 456.

—— **Imported by Ambassador.**]—Where a foreign ambassador on the termination of his embassy and departure from this country, employed an agent to dispose of certain wines by auction, which he had imported duty free, and such agent employed a broker and an auctioneer, who effected the sale:—Held, that the latter was personally liable to pay the duties in respect of such wines, although he had, from time to time, as he received the proceeds of the sale, paid over the net amount to his immediate employer, the agent. *Att.-Gen.* v. *Thornton*, 13 Price, 805; 1 M'Clel. 600.

The ambassador's privilege ceased to protect the wines from duty when so sold to a purchaser. *Ib.*

Foreign Wines—What are—"Sweets"—Sale of "Best Sherry, British."]—A., who held a licence for retailing "sweets and made wines," but had no licence for the sale of foreign wines, on being asked for a bottle of best sherry, sold a bottle of liquor labelled "Best Sherry, British." He was thereupon charged with selling foreign wine without a licence:—Held, that the justices, in dismissing the information against him on the ground that the liquor was not sold as being foreign wine, were wrong, and that the case must be remitted to them. Sherry is the name of a foreign wine, therefore, under 23 Vict. c. 27, s. 21, liquor labelled "Best Sherry, British," must, as against the seller, be deemed to be foreign wine. *Richards* v. *Banks*, 58 L. T. 634; 52 J. P. 23.

Beer—What is—Botanic Beer.] — The appellant sold a liquor called "botanic beer" without having a retail licence for the sale of beer. It contained sugar, herbs and water, but no hops or malt, and had six per cent. of proof spirit:—Held, that such a liquor was "beer" within the meaning of s. 4 of 48 & 49 Vict. c. 51, and that the appellant was rightly convicted. *Howorth* v. *Minns*, 56 L. T. 316; 51 J. P. 7.

Excisable Liquors—Sweets and made Wines.]—By 9 Geo. 4, c. 61, s. 18, a penalty is imposed on every person who shall without a licence sell any excisable liquor by retail to be drunk on the premises; and by s. 37, excisable liquor is to include sweets or wines, which now are or hereafter may be charged with duty either by customs or excise. By 4 & 5 Will. 4, c. 77, s. 9, the excise duty on sweets or made wines is repealed; but the duty on licences to be taken out by retailers is continued, and all such licences shall still be taken out:—Held, that a person who, since 4 & 5 Will. 4, c. 77, sold sweets or made wines by retail without a licence, could not be convicted under s. 18 of 9 Geo. 4, c. 61, sweets and made wines being no longer excisable liquors. *Reg.* v. *Lancashire JJ.*, 7 El. & Bl. 839; 26 L. J., M. C. 171; 3 Jur. (N.S.) 1095; 5 W. R. 658.

—— **Beer — Billiard Licence.**] — Excisable liquors are liquors subject to the duty of excise; and, therefore, beer, upon which an excise duty is no longer paid, is not an excisable liquor. A person was licensed under 8 & 9 Vict. c. 109, to keep a house for billiard playing; and the licence provided that he should not knowingly allow the consumption of excisable liquors in the house by persons resorting thereto. He was also licensed under 3 & 4 Vict. c. 61, and 32 & 33 Vict. c. 27, to sell beer, wine, &c., to be consumed in the house. He had allowed the consumption of beer by persons resorting to the house for the purpose of playing billiards, and was convicted of an offence against the tenor of his billiard licence:—Held, that he had not been guilty of selling excisable liquor, and was wrongly convicted. *Jones* v. *Whittaker*, 39 L. J., M. C. 139; L. R. 5 Q. B. 541; 22 L. T. 535; 18 W. R. 1197.

Excise Licence—Right to—Music Hall.]—The proprietors of a music hall, having duly obtained a music and dancing licence, applied as being the proprietors of a place of public entertainment licensed by justices of the peace, to the Commissioners of Inland Revenue for an excise licence to sell by retail, beer, spirits and wine on the premises under s. 7 of 5 & 6 Will. 4, c. 39:—Held, that the commissioners had properly refused to grant an excise licence until a licence of justices had first been obtained under the Licensing Act of 1872; that s. 7 of 5 & 6 Will. 4, c. 39, had been repealed by the later act (35 & 36 Vict. c. 94), except so far as the rights of proprietors of theatres were concerned; and that a music hall was not a theatre. *Reg.* v. *Inland Revenue Commissioners, Empire Theatre, In re*, 57 L. J., M. C. 92; 21 Q. B. D. 569; 59 L. T. 378; 36 W. R. 696; 52 J. P. 390.

Refreshment Houses — Licences for.] — *See* REVENUE.

B. SALE BY RETAIL.

1. RETAIL DEALER.

Retail Dealer, who is.]—If a person takes a house or part of a house either in his own name or in the name of any other person, and there personally, or by his agent, makes sales of spirits by retail, he carries on business there as a retailer of spirits, even though no spirits are actually stored on the premises. *Stallard* v. *Marks*, 47 L. J., M. C. 91; 3 Q. B. D. 412; 38 L. T. 566; 26 W. R. 694.

—— **Wine and Spirit Merchant's Traveller.**]—S. and S. were convicted under 6 Geo. 4, c. 81, s. 2, for retailing spirits in Cheltenham without a retailer's excise licence. They carried on business as wine and spirit merchants in Worcester, and held all the necessary licences for dealing in and retailing spirits there. They did not hold a licence to retail spirits at Cheltenham; but they caused premises at Cheltenham to be let to D., one of their travellers, for their own use, took out a licence for the purpose of carrying on there the business of dealers in beer, and put up a board inscribed with their names as "Distillers, Wine Merchants and Brewers, Worcester." D. took orders for spirits at these premises and transmitted them to Worcester, where S. and S. executed them by sending spirits from Worcester:—Held, that the conviction must be affirmed, for S. and S. must be taken to carry on business at Cheltenham as retailers of spirits, although the spirits they sold were kept in and delivered from a store in another town. *Ib.*

A traveller for a fully-licensed firm of wine and spirit merchants at B. occupied an office and premises at C., where he resided, and where amongst other places he solicited and obtained orders, which he forwarded to his employers at B., who delivered the goods so ordered direct to the purchaser. The firm neither rented nor occupied any premises at all at C., nor did they store goods upon their traveller's premises. Upon an information being exhibited by an inland revenue officer against the traveller under the above acts, charging him with taking an order for spirits at his office at C., without having in force a proper licence authorising him so to do:—Held, that he was a bonâ fide traveller taking orders for his employers who were duly licensed to sell spirits, &c., and therefore not liable to take out a licence. *Stuchbery* v. *Spencer*, 55 L. J., M. C. 141; 51 J. P. 181.

"Licensed to sell Beer by Retail."]—The holder of a licence to sell beer under 26 & 27 Vict. c. 33, s. 1, is a person "licensed to sell beer by retail" within the meaning of s. 18 of 1 & 2 Will. 4, c. 32, *Shoolbred* v. *St. Pancras JJ.*, 59 L. J., M. C. 63; 24 Q. B. D. 346; 62 L. T. 287; 38 W. R. 399; 54 J. P. 231.

Wholesale Licence—Measure of Quantity.]—The holder of an excise licence under the Excise Act, 1825 (6 Geo. 4, c. 81), is entitled to sell strong beer only in casks containing not less than 4½ gallons imperial standard gallon measure, or in not less than two dozen reputed quart bottles at one time, to be drunk elsewhere than on his premises. The Inland Revenue Act, 1863 (26 & 27 Vict. c. 33), s. 1, provides that the holder of such a licence may take out an additional licence to sell beer "in any less quantity or in any other manner"; and by s. 3 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), it is declared to be an offence to sell intoxicating liquor by retail unless authorised by licence so to do. "Sale by retail" is defined by the Beer Act, 1834 (4 & 5 Will. 4, c. 85), s. 19, as a sale in any less quantity than 4½ gallons. Appellant, the holder of an excise licence under the Excise Act of 1825, having no additional licence, sold beer in quantities at one time exceeding the quantity prescribed in the licence, but in pint and half-pint bottles;

and in respect of such sale was convicted by justices of having sold by retail without a licence, in contravention of s. 3 of the Licensing Act, 1872 :—Held, that the conviction was bad, a sale at one time of a quantity exceeding 4½ gallons not being a sale by retail within that section. *Fairclough* v. *Roberts*, 59 L. J., M. C. 54 ; 24 Q. B. D. 350 ; 62 L. T. 700 ; 38 W. R. 330 ; 54 J. P. 421.

2. SALE WITHOUT LICENCE.

Sale of Wine—Wine Dealer's Licence.]—A shopkeeper, holding a wine dealer's excise licence, granted under 6 Geo. 4, c. 81, s. 2, and for which the annual duty of 10*l.* 10*s.* is payable, is entitled without any certificate from justices, to sell by retail wine to be consumed off the premises. *Palmer* v. *Thatcher*, 47 L. J., M. C. 54 ; 3 Q. B. D. 346 ; 37 L. T. 784 ; 26 W. R. 314.

Clubs—Supply of Liquor to Member.]—The appellant was manager of an institution carried on bonâ fide as a club, under rules by which members paid an entrance fee and subscription ; trustees were appointed, in whom all the club property was vested, and there was a committee of management (for whom the appellant acted) to conduct the general business. The club was not licensed for the sale of intoxicating liquors, but these were supplied, at fixed prices, to members for consumption on and off the premises, 33 per cent. above the cost price being charged for liquors to be consumed off the premises, and the money produced thereby going to the general funds of the club. The appellant having, in the course of his employment as manager, supplied intoxicating liquors to a member (who paid for them) for consumption off the premises :—Held, that the appellant did not "sell by retail" intoxicating liquors within the meaning of s. 3 of the Licensing Act, 1872, and therefore was not liable to conviction for an offence under the section. *Graff* v. *Evans*, 51 L. J., M. C. 25 ; 8 Q. B. D. 373 ; 46 L. T. 347 ; 30 W. R. 380 ; 46 J. P. 262.

The manager of a club in the form of a limited company—the shareholders in which constitute the members of the club—is not liable criminally, under the Licensing Act, 1872, for the sale at the club of intoxicating liquors to members. *Newell* v. *Hemingway*, 58 L. J., M. C. 46 ; 60 L. T. 544 ; 16 Cox, C. C. 604 ; 53 J. P. 324.

—— **Supply of Liquors to Person while "Honorary Member"—Subscription paid—Person afterwards rejected as Member.**]—A limited company carrying on a proprietory club had no licence, the election of members being in the hands of a committee. Liquor was supplied by the company to and paid for by a person who had been elected an "honorary member" pending inquiries and pending his election as a member, and had paid his subscription. He was subsequently not elected as a member, and his subscription was returned :—Held, that there was a sale by retail of the liquor by the company for which the company were liable in penalties. *Bowyer* v. *Percy Supper Club*, [1893] 2 Q. B. 154 ; 5 R. 472 ; 69 L. T. 447 ; 42 W. R. 29 ; 17 Cox, C. C. 669 ; 57 J. P. 470.

—— **Sale by Member to Stranger.**]—A stranger entered a working-men's subscription club, by one of the rules of which visitors were forbidden to pay money direct to the manager. W., a member, entered the stranger's name as a visitor ; the stranger then put down 8*d.*, asking for two pints of ale. W. received the money, and the ale was supplied to the stranger :—Held, that W. sold liquor to the stranger without a licence. *Stevens* v. *Wood*, 54 J. P. 742.

—— **Unauthorised Sale by Club Steward—Liability of Trustees.**]—The appellants, who were trustees and members of the managing committee of a club, were convicted under the Licensing Acts for selling liquor without a proper licence to persons not members of the club. It appeared that the liquor was sold in the club premises by the steward of the club, who in selling it acted contrary to the orders of the appellants, and without their knowledge or assent. The money which he received for the liquor was paid by him to the account of the club :—Held, that the conviction was wrong, for the appellants were not, under the circumstances, responsible for the act of the steward. *Newman* v. *Jones*, 55 L. J., M. C. 113 ; 17 Q. B. D. 132 ; 55 L. T. 327 ; 50 J. P. 373.

—— **Sale to Agent of Member.**]—Certain premises which had been licensed as a beerhouse were, on the refusal of a renewal of the licence, formed into a working-men's club. In the bar of the club was a placard stating that no payment would be received for refreshments from any person other than bonâ fide members. The wife of a member, however, having been provided with money by her husband went to the club, paid for and was supplied with beer, having first been asked if it was for her husband and she stating that it was. The justices found that there had been a sale of intoxicating liquor, and that the person to whom it was sold was not a member of the club ; they therefore convicted the club steward who supplied the liquor :—Held, that on the facts the conviction was right. *Woodley* v. *Simmonds*, 60 J. P. 150.

—— **"Second Offence."**]—The manager of a club was duly convicted under s. 17 of 4 & 5 Will. 4, c. 85, of selling beer by retail without having an excise retail licence. Subsequently he was convicted under s. 3 of the Licensing Act, 1872, of selling intoxicating liquor, to wit beer, without a licence. Upon the hearing of the latter charge the magistrate treated it as a second offence, and imposed the full penalty of 100*l.* authorised in the case of "the second offence" by s. 3, sub-s. 2, of the Licensing Act, 1872 :—Held, that there could only be a conviction under s. 3 of the Licensing Act, 1872, for a second offence where the conviction for the first offence had been under the same statute, and that the second conviction was therefore bad. *Authers* or *Anthers*, *In re*, 58 L. J., M. C. 62 ; 22 Q. B. D. 345 ; 60 L. T. 454 ; 37 W. R. 320 ; 16 Cox, C. C. 588 ; 53 J. P. 116.

Pretended Club—Manager the Proprietor.]—E. was summoned under 35 & 36 Vict. c. 94, s. 4, for selling liquors without a licence. Over the door a signboard was painted "The C. Working Men's Club." The interior was fitted up like a public-house, and E. professed to be manager, and ordered everything on the credit of the club, but could not tell who were members, nor how the accounts were kept, and neither committee nor secretary had any means of checking him :—

Held, that there was evidence to justify the justices in holding that it was only a pretended club, and that E. was the real proprietor. *Evans* v. *Hemingway*, 52 J. P. 134.

Rebuilding Premises—Adding Strip of Land.]—The holder of a beer licence rebuilt his premises and made them more commodious. In doing so he advanced the frontage and took in a strip of garden, five feet wide, on which a part of the new bar stood. The justices convicted him of selling at a place where he was not authorised:—Held, that the justices were wrong and that there was no evidence to support the conviction, the premises not being substantially altered in rebuilding. *Deer* v. *Bell*, 58 J. P. 513.

Sale at Nominal Price.]—The 3 & 4 Vict. c. 61, s. 13, which imposed a penalty on persons selling beer by retail without a licence, applied to persons selling beer at 1½*d.* the quart. *Read* v. *Storey*, 6 H. & N. 423; 30 L. J., M. C. 110; 7 Jur. (N.S.) 344; 3 L. T. 674; 9 W. R. 418.

"Illegally Dealing in Intoxicating Liquor"—Purchaser as well as Seller.]—The provision in s. 17 of the Licensing Act, 1874, that persons found upon suspected premises entered by a constable in pursuance of a warrant to search for liquors sold or kept for sale contrary to law, shall be presumed to be guilty of "illegally dealing in intoxicating liquor" until the contrary be shewn, is not confined to a seller, but applies also to a buyer, of such liquors *McKenzie* v. *Day*, 62 L. J., M. C. 49; [1893] 1 Q. B. 289; 5 R. 161; 68 L. T. 345; 41 W. R. 384; 17 Cox, C. C. 604; 57 J. P. 216.

Husband's Liability for Wife's Acts.]—Upon an information for unlawfully selling beer under 4 & 5 Will. 4, c. 85, s. 17, it was proved that the appellant's wife had actually supplied the beer to three persons who had asked the appellant for beer, and to whom he had said whilst pointing to his wife, "You must ask her":—Held, that upon this evidence the conviction was right. *Reg.* v *Smith*, 7 W. R. 162.

A. was charged under s. 3 of the Licensing Act, 1872, with selling intoxicating liquor without a licence. A. kept a tobacco shop and refreshment house, but had no licence to sell liquors by retail. A.'s wife sold bottles of ale to customers, but there was no evidence that A. knew anything of her so acting. The justices held A. liable for the acts of his wife and convicted A.:—Held, the justices were wrong. *Allen* v. *Lumb*, 57 J. P. 377.

Aiding and Abetting.]—The owner of licensed premises obtained possession of them after the licence-holder had absconded and put in a new tenant, to whom he supplied liquors for sale. The new tenant had not obtained a licence:—Held, that the owner was rightly convicted of aiding and abetting the new tenant in selling liquors without a licence under s. 5 of 11 & 12 Vict. c. 43, and s. 3 of the Licensing Act, 1872. *Owen* v. *Langford*, 55 J. P. 484.

At Races—Special Licence.]—A person duly licensed by the justices and by the excise to sell beer by retail in town, but having no licence to sell beer at races in the adjoining borough, is rightly convicted of selling beer at a regatta in the borough, and is not protected by 6 Geo. 4, c. 81, s. 11. *Ash* v. *Lynn*, 7 B. & S. 255; 35 L. J., M. C. 159; L. R. 1 Q. B. 270; 12 Jur. (N.S.) 485; 14 L. T. 224; 14 W. R. 583.

—— Public Races, what are.]—Races were held in a field occupied by an individual who let it for that purpose, and any one of the public, on payment of a small sum, was admitted into the field:—Held, that these races were "public races," within 6 Geo. 4, c. 81, s. 11, which enables any person licensed to sell beer by retail to be drunk on the premises to carry on his business in booths, tents or other places at the time and place of holding any public races. *Boughey* v. *Rowbotham*, 4 H. & C. 711; 15 L. T. 222; 15 W. R. 75.

At Fairs.]—The right by custom, prescription, or charter to sell beer at fairs without an excise retail licence is abrogated by 25 & 26 Vict. c. 22, s. 12. *Huxham* v. *Wheeler*, 3 H. & C. 75; 33 L. J., M. C. 153; 10 Jur. (N.S.) 545; 10 L. T. 342; 12 W. R. 713.

An alehouse-keeper, who has obtained an ordinary justice's and excise licence, may, by virtue of such licence, sell beer in booths at any lawful fair. It is not necessary to get a special excise licence for that purpose. *Haywood* v. *Holland*, 28 L. T. 702; 21 W. R. 920.

Irregularity in obtaining Licence.]—By 25 & 26 Vict. c. 22, s. 13, and 26 & 27 Vict. c. 33, s. 20, sub-s. 1, an occasional licence for the sale of intoxicating liquors is to be granted by an officer of excise upon the written consent of a justice "usually acting at the petty sessions for the petty sessional division within which the place of sale is situate." S. obtained from a duly authorised officer of excise an occasional licence for the sale of intoxicating liquors; the justice who signed the written consent did not usually act for the petty sessional division within which the place of sale was situate. S. having sold intoxicating liquors at the time and place mentioned in the occasional licence, was convicted by justices of selling intoxicating liquors without a licence. It was not proved that he had acted otherwise than bonâ fide:—Held, that although an irregularity had been committed in obtaining the licence, yet it protected him from penal consequences, and that the conviction was wrong. *Stevens* v. *Emson*, 45 L. J., M. C. 63; 1 Ex. D. 100; 33 L. T. 821—C. A.

At Public Ball—Occasional Licence.]—A licensed victualler, within the metropolitan police district, who had obtained an occasional licence from the excise, with the consent of a justice of the peace, under 25 & 26 Vict. c. 22, s. 13, and 26 & 27 Vict. c. 33, s. 20, required also an occasional licence from the commissioner of police under 27 & 28 Vict. c. 64, s. 5, in order to enable him lawfully to supply excisable liquors at a public ball held, off his own premises, on premises which were neither a public-house nor a refreshment-house. *Hannant* v. *Foulger*, 8 B. & S. 425; 36 L. J., M. C. 119; L. R. 2 Q. B. 399; 15 W. R. 787.

Temporary Authority to Sell—Proposed Transferee.]—The grant to a proposed transferee of a beerhouse of a temporary authority to sell beer under s. 1 of the Licensing Act, 1842, does not operate to cancel the existing licence, and while

the licence-holder remains in possession of the premises he cannot be convicted under s. 3 of the Licensing Act, 1872, of selling intoxicating liquor without being duly licensed. *Andrews* v. *Denton*, 66 L. J., Q. B. 520; [1897] 2 Q. B. 37; 76 L. T. 423; 45 W. R. 500; 61 J. P. 326.

Exemption from Penalties—Age of "Heir"—Death of Licence-holder.]—A person under the age of twenty-one may be an "heir" within the meaning of s. 3 of the Licensing Act, 1872 (35 & 36 Vict, c. 94), which provides certain exemptions from penalties on the death of the licence-holder. *Rose* v. *Frogley*, 62 L. J., M. C. 181; 5 R. 530; 69 L. T. 346; 57 J. P. 376.

3. Sale under 20*s*. Value or on Credit.

No Action Maintainable—In what Cases.]—The 24 Geo. 2, c. 40, s. 12, extends to spirits mixed with water. *Scott* v. *Gillmore*, 3 Taunt. 226; 12 R. R. 641.

That statute extends to a score for grog, beer and herrings, as to such part as was for the grog, but not to the other items, which consequently may be recovered. *Gilpin* v. *Rendle*, 1 Selw. N. P. 61.

In an action for the amount of a tavern bill, the plaintiff is not entitled to recover for any items under 20*s*. for spirits supplied to his guests. *Burndyeat* v. *Hutchinson*, 5 B. & Ald. 241; 24 R. R. 345.

But the statute does not apply to spirits supplied by a hotel-keeper to a guest who is resident in his hotel. *Proctor* v. *Nicholson*, 7 Car. & P. 67.

The statute applies not only to liquors sold for the personal consumption of the purchaser, but to liquors sold to a publican to sell again. *Hughes* v. *Done* or *Doane*, 4 P. & D. 708; 1 Q. B. 294; 5 Jur. 837.

If a person sells two sorts of spirits at the same time to an amount above 20*s*., he may recover the price, although the amount of each species of spirits is under 20*s*. *Owens* v. *Porter*, 4 Car. & P. 367.

It is a defence to an action on a bill of exchange against the acceptor, that it was accepted for the amount of spirits sold to him by the plaintiff in quantities under the value of 20*s*. *Scott* v. *Gillmore*, 3 Taunt. 226; 12 R. R. 641.

But at nisi prius, it was held that a bill accepted by an officer in the recruiting service, in payment of small quantities of spirits under the value of 20*s*., supplied by a publican, to be used out of his house, to recruits and others under the command of the acceptor, was valid. *Spencer* v. *Smith*, 3 Camp. 9.

Pleas to a declaration on a bill, with counts for goods sold; first, that part of the consideration of the bill was spirituous liquors, sold at different times in quantities less in value than 20*s*.; and secondly, that the plaintiff and defendant accounted together, and that the latter had given the former a bill for the amount of the goods mentioned in the common counts, which bill was still outstanding and unsatisfied, are issuable pleas, and cannot be treated as nullities, so as to entitle the plaintiff to sign judgment as for want of a plea. *Gaitskill* v. *Greathead*, 1 D. & R. 359.

A publican took from a person, who boarded and lodged in his house, a bill and a note, both at one time, for a score, part of which consisted of a demand for spirits; but not to the amount of either bill or note; money was also paid on account:—Held, in action on the securities, that, although they were given at the same time, the publican might recover on one of them, and also that he might apply the money paid in reduction of the demand for spirits, although such demand could not be recovered. *Crookshank* or *Cruickshanks* v. *Rose*, 5 Car. & P. 19; 1 M. & Rob. 100.

Where parties, having cross demands, settle and balance their accounts, it is no defence to an action brought for the balance, that a great part of the amount was for spirituous liquors, delivered in quantities under 20*s*. in value. *Dawson* v. *Remnant*, 6 Esp. 24.

The vendor of spirits in small quantities, for the price of which he is disabled from recovering, who has another demand against the vendee, may apply a payment made to him by his debtor to the price of the spirits, unless at the time of payment the debtor directs a different appropriation of it. *Philpott* v. *Jones*, 4 N. & M. 14; 2 A. & E. 14; 4 L. J., K. B. 65.

In the absence of such contemporaneous directions by the debtor, the creditor may so apply the payment at any time afterwards. *Ib.*

C. Qualification for Licences.

1. Persons.

a. Residence.

When Unnecessary.]—M., who held a strong beer licence, applied to licensing justices for a certificate to take out a retail licence to sell beer, wine and spirits, not to be consumed on the premises. The justices refused the licence under 32 & 33 Vict. c. 27, s. 8, sub-s. 4, on the ground that the applicant was not qualified as by law is required by reason of his intention not to reside on the premises:—Held, that as the holder of a strong beer licence was entitled, under 26 & 27 Vict. c. 33, s. 1, to the retail licence without any other qualification, residence was not required; and that as the justices, therefore, had not determined according to law, a mandamus must be granted to them to hear and determine the application according to the statutes in that behalf. *Reg.* v. *De Rutzen*, 45 L. J., M. C. 57; 1 Q. B. D. 55; 33 L. T. 726; 24 W. R. 343.

Certificate of.]—The 3 & 4 Vict. c. 61, s. 2, which enacts that every applicant for a licence to retail beer shall produce to the officer of excise a certificate from an overseer that he is the real resident holder and occupier of the house in which he shall apply to be licensed, is directory only; and therefore a licence may be valid, notwithstanding the certificate omits to state that the applicant is such householder. *Thompson* v. *Harvey*, 4 H. & N. 254; 28 L. J., M. C. 163; 7 W. R. 281.

But a licence granted to a person who is not in fact such householder is void, the first section being imperative. *Ib.*

—— **Discretion of Overseer.**]—An overseer to whom application is made to certify that a person applying for a licence to retail beer in a dwelling-house is a real resident holder and occupier of the house is not compelled to certify, but has a discretion, *Reg.* v. *Kensington*, 12 Q. B. 654; 17 L. J., Q. B. 332; 12 Jur. 747.

Overseers have not an arbitrary discretion to grant or refuse certificates, but are bonâ fide

to inquire into and certify as to the rating and occupancy of persons requiring licences for the sale of beer. *Reg.* v. *Withyham*, 2 C. L. R. 1657.

—— **Refusal to Certify — Mandamus.**] — In November a person applied to the overseers to certify that he was resident occupier of premises in their parish. They found that the premises were not wholly in his occupation, and consequently refused their certificate. In the May following he made another similar application, but they again refused it, believing him not entitled to any certificate, as no notice had been given to them that any alteration had been made in the occupation, although it was probable that the applicant had in fact become the occupier during the interval. The applicant thereupon obtained a mandamus directing the overseers to inquire whether he was the occupier in May, and to certify accordingly. They returned that they had inquired, but could not ascertain whether he was occupier in May, but stated that he was then the occupier of the premises. The court refused to grant the applicant the costs of the mandamus, as the refusal of the overseers in May to certify was not wrongful, and it was even doubtful whether he was at that time entitled to a certificate. *Reg.* v. *Langridge*, 3 C. L. R. 361 : 24 L. J., Q. B. 73 ; 1 Jur. (N.S.) 64 ; 3 W. R. 165.

—— **Certiorari to remove Licence.**]—A certiorari will not lie to remove a licence for the sale of beer granted by a collector or supervisor of excise without the production of the overseers' certificate. *Reg.* v. *Salford Overseers*, 18 Q. B. 687 ; 21 L. J., M. C. 223 ; 16 Jur. 907.

Retail Off-Licences — Wholesale Beer and Spirit Dealers—Unlicensed Servant of Licensed Limited Company.] — The servant of a limited company which is duly licensed in the name of three directors to deal in beer and spirits wholesale, not being himself so licensed, is not duly qualified as an applicant for additional retail off-licenses in respect of a branch establishment belonging to the company and managed by him on their behalf. *Reg.* v. *Jones, Davies, Ex parte*, 59 J. P. 87.

b. Character.

Conviction for Felony.]—By 33 & 34 Vict. c. 29, s. 14, every person convicted of felony shall for ever be disqualified from selling spirits by retail, and no licence shall be granted to any person who shall have been so convicted ; and if any person, after having been so convicted, shall take out or have a licence, the same shall be void to all intents and purposes ; and every person who, after having been so convicted, shall sell spirits by retail shall incur the penalty for doing so without a licence :—Held, that the section applied to a person convicted of felony either before or after the act passed ; and that licences held by a person convicted before the act became void on the passing of the act. *Reg.* v. *Vine*, 44 L. J., M. C. 60 ; L. R. 10 Q. B. 195 ; 31 L. T. 842 ; 23 W. R. 649 ; 13 Cox, C. C. 43.

Pardon.]—By s. 14 of the Wine and Beerhouse Act Amendment Act, 1870, "Every person convicted of felony shall for ever be disqualified from selling spirits by retail, and no licence to sell spirits by retail shall be granted to any person who shall have been so convicted as aforesaid" :—Held, that a person who had been convicted, but who had received a free pardon under the Queen's sign manual, was not disqualified by the above section from holding a licence, inasmuch as the effect of the pardon was to absolve such person not only from the punishment awarded him, but also from all disqualifications attaching to the offence. *Hay* v. *Tower Division JJ.* or *Middlesex JJ.*, 59 L. J., M. C. 79 ; 24 Q. B. D. 561 ; 62 L. T. 290 ; 38 W. R. 414 ; 54 J. P. 500.

Conviction for selling Spirits without Licence.] —Where an applicant for the removal of a licence from a fully licensed public-house has been convicted of selling spirits without licence, an order of justices "authorising him to apply for and hold any excise licences that may be held by a publican" is valid. Whether the applicant would be liable to penalties for selling beer and wine under the publican's licence, quære. *Reg.* v. *Roper*, 63 L. J., M. C. 68 ; 10 R. 598 ; 70 L. T. 409 ; 58 J. P. 512.

Living in Concubinage.]—A. was convicted under 3 & 4 Vict. c. 61, s. 6, of having obtained a licence to retail beer by means of a certificate, the matters certified therein being false. The certificate stated that he was a person of good character. He was, however, proved to be living with a woman in a state of open concubinage, and had three illegitimate children by her :—Held, that he was improperly convicted ; that the mere proof of such immorality did not constitute a person not to be a person of good character. *Leader* v. *Yell*, 16 C. B. (N.S.) 584 ; 33 L. J., M. C. 231 ; 10 Jur. (N.S.) 731 ; 10 L. T. 532 ; 12 W. R. 915.

c. Holding other Licences.

Refreshment and Wine Licence.]—A beer-house-keeper having obtained a refreshment-house licence, applied for a wine licence under 23 & 24 Vict. c. 27, s. 7, when an objection was taken that he was not entitled to such licence as not coming within that section. He provided travellers and others who came to his house with bread and cheese and other victuals as they required them :—Held, that he was entitled to a wine licence. *Munn* v. *Southall*, 7 L. T. 356.

"Keeping Shop for Sale of Goods other than Foreign Wine."]—Semble, that a person who has a spirit-dealer's retail licence to sell spirits in bottles, and who has a wholesale beer-dealer's licence authorising the sale of casks of ale of four and a half gallons, sufficiently fulfils the description of "a person who keeps a shop for the sale of goods and commodities other than foreign wine," and therefore is entitled to a certificate of justices authorising the sale of wine by retail, pursuant to 23 Vict. c. 27, s. 3. *Reg.* v. *Bishop*, 50 J. P. 167.

Confectioner.]—A confectioner who has held a wine licence for consumption on the premises, and who supplies luncheons, is sufficiently within the description of persons entitled to apply for and hold a publican's licence within 9 Geo. 4, c. 61, s. 1, being a person about to keep an inn, alehouse or victualling-house. *Reg.* v. *Surrey JJ.*, 52 J. P. 423.

Publican and Grocer.]—The 6 & 7 Will. 4, c. 38 (Irish), s. 3, prevents a person who is already

a publican from obtaining a licence to carry on the business of a grocer on the same premises, as absolutely as it does to prevent a person licensed as a grocer from carrying on in the same premises the business of a publican. *M'Kenna* v. *Pape*, 1 H. L. Cas. 6.

d. Fraud.

A licence, though obtained by fraud, is valid, unless the fraud is practised by the party to whom it is granted. *Rex* v. *Minshall*, 1 N. & M. 277.

e. Custom.

Beer—Customary Rights.]—The 11 Geo. 4 & 1 Will. 4, c. 64, does not supersede the custom of a borough, that no person shall carry on the trade of an alehouse-keeper therein who is not a burgess. *Leicester Corporation* v. *Burgess*, 2 N. & M. 131; 5 B. & Ad. 246; 2 L. J., K. B. 187.

f. Exemption.

Exemption from Obligation to Obtain Licence—Children of Officers in Peninsular War.]—The statute 56 Geo. 3, c. 67, which enables children of the officers and men who served his majesty in the Peninsular war to set up and exercise a trade in any city, town, or place within this country, without let, suit, or molestation, notwithstanding any statute, law, ordinance, custom, or provision to the contrary, does not exempt this class of persons from the provisions of the general public statutes, and therefore a person of this class is not relieved from the necessity of obtaining a licence to sell intoxicating liquors; the statute has reference only to customs, charters, by-laws, and the like existing in particular localities. *Killin* v. *Swatton*, 76 L. T. 55; 45 W. R. 235; 18 Cox, C.C. 477; 61 J. P. 150.

2. Houses.

Rating—Sufficiency of.]—The appellant was the owner of a house, part of which was situate in the township of C., in the city of M., and was rated thereto on an annual value of 8*l.*, and the other part of which house was situate in the township of M., not within the city, and was rated to such township on an annual value of 8*l.* 10*s.* Both townships, which each contained a population exceeding 10,000, were situate in the same parish and poor-law union, to which union the rates of both townships, though separately levied and collected, were paid over. The justices having refused the owner's application for a certificate for the renewal of a beer licence under 32 & 33 Vict. c. 27, on the ground that her house was not sufficiently rated within the city of M. in the amount required by 3 & 4 Vict. c. 61, s. 1:—Held, that the justices were right. The house, though rated in two separate sums of 8*l.* and 8*l.* 10*s.*, was not rated in "one sum of 15*l.* at the least," and so did not come within the words of s. 1 of the 3 & 4 Vict. c. 61, and was not therefore within that act; nor did it come within s. 4 as an "extra-parochial or other place where no rates were made or collected." *Jennings* v. *Manchester JJ.*, 22 L. T. 412.

An application for a licence to sell beer by retail not to be consumed on the premises was refused by justices, on the ground that the house was not duly qualified by law, not being of sufficient value under 3 & 4 Vict. c. 61, s. 1. The Wine and Beerhouse Act, 1869, s. 8, requires the justices, where such an application is refused on the ground that the house is not duly qualified as by law required, to specify in writing to the applicant the grounds of their decision. A minute of the decision, with the grounds of it, was made and read out by the chairman in court, in the presence of the applicant, but no copy was delivered to him. On a rule for a mandamus to the justices to hear and determine the application:—Held, that the provisions as to the rating qualification for houses for the sale of beer and cider for consumption off the premises under 3 & 4 Vict. c. 61, s. 1, had not been affected by the Licensing Act, 1872, s. 45, which must be construed as applying only to premises licensed before the act, or to be licensed under it, for the sale of intoxicating liquor thereupon. *Reg.* v. *Cumberland JJ.*, 51 L. J., Q. B. 142; 8 Q. B. D. 369; 30 W. R. 178; 46 J. P. 7.

A beerhouse situated in a township having a population of less than 10,000 inhabitants, according to the last parliamentary census, must, if such township is within a parish containing more than 10,000 inhabitants, be rated at one sum to the rate for the relief of the poor of the township in which such house is situate on a rent or on an annual value of 15*l.* per annum at the least, or otherwise the licence is null and void under 3 & 4 Vict. c. 61, s. 1. *Preston* v. *Buckler*, 39 L. J., M. C. 105; L. R. 5 Q. B. 391; 22 L. T. 653; 18 W. R. 1104.

Justices cannot refuse an off wine and spirit licence on the ground that the house is not of the annual value of 30*l.*, or that there is an internal communication with other premises. *Reg.* v. *Morison*, 55 J. P. 87.

Where an indoor beer licence which had been renewed since 1869, was refused to be renewed by the licensing justices on the ground that though the house was of sufficient annual value when the application was heard at the adjourned annual meeting, yet it had not been so on 25th August, the date of the original general annual meeting, the value having been increased during the interval:—Held, that the justices had exceeded their jurisdiction, and a rule for a mandamus was made absolute. *Reg.* v. *Montagu*, 49 J. P. 55.

—— **House and Shop.**]—G. occupied a house and a shop, which were together rated in 15*l.*; the house and shop were attached to and communicated with each other, and the shop was used for the sale of groceries and beer:—Held, that the shop was part of the premises occupied with the house within the meaning of 3 & 4 Vict. c. 61, s. 1, and that in ascertaining the ratable value of the house the value of the shop might be taken into account. *Garatty* v. *Potts*, 40 L. J., M. C. 1; L. R. 6 Q. B. 86; 23 L. T. 554; 19 W. R. 127.

D. GRANTING OF LICENCES BY JUSTICES.

1. Original Licence.

Jurisdiction—In Boroughs.] — Borough justices have no jurisdiction to grant licences for inns and alehouses under 9 Geo. 4, c. 61, except in such boroughs as have separate courts of quarter sessions. *Candlish* v. *Simpson*, 1 B. & S. 357; 30 L. J., M. C. 178; 8 Jur. (N.S.) 34; 4 L. T. 437; 9 W. R. 745.

A borough may be a town corporate within 9 Geo. 4, c. 61, s. 1, though it has no separate court of quarter sessions. *Brown* v. *Nicholson*, 5 C. B. (N.S.) 468 ; 28 L. J., M. C. 49 ; 5 Jur. (N.S.) 99 ; 7 W. R. 88.

A licence was granted by justices of a borough, a place having a separate commission of the peace, but no separate court of quarter sessions, at a licensing meeting held on the 7th of September, which had been duly appointed by them as they had always been accustomed to do :—Held, that the licence so granted was valid, notwithstanding that the justices for the county (who had concurrent jurisdiction in the borough) had previously appointed a licensing meeting for the 8th. *Ib.*

—— **Division of County—Island in British Channel.**]—H. had a house in an island in the British Channel, and had for thirty-eight years, without having a justices' or excise licence, sold intoxicating liquors to all visitors there, no other house being in the island. He was summoned for selling without a licence :—Held, that the island was part of the county to which it was nearest, and that the licensing justices of any division of the county had jurisdiction to grant the ordinary licences to sell intoxicating liquors there. *Wright* v. *Harris*, 49 J. P. 628.

—— **Concurrent.**]—By charter, the mayor and some of the aldermen of London have jurisdiction in Southwark ; but, as the charter contains no non-intromittent clause as to the justices of the county of Surrey, the latter have a concurrent jurisdiction with the former. Where there were two sets of magistrates having a concurrent jurisdiction, and one appointed a meeting to grant ale licences, their jurisdiction attached so as to exclude the others appointing a subsequent meeting ; but they might all meet together on the first day. But if, after such appointment, the other set of magistrates met on a subsequent day, and granted other licences, their proceeding was illegal, and the subject of an indictment. *Rex* v. *Sainsbury*, 4 Term Rep. 451 ; Nolan, 8 ; 2 R. R. 433.

Disqualification of Justices by reason of Interest.]—W. having applied to the licensing justices for a licence for a new hotel, and the three justices who were sitting having refused it, afterwards applied to the court for a mandamus to have the case heard again on the ground that B., one of the justices, was interested as owner in one of the licensed houses near the proposed hotel. The affidavits shewed that B.'s wife had succeeded to the licensed house, and was tenant for life, but it was a small house without hotel accommodation, and not likely to be injured by the new licence being granted :—Held, (a) that a mandamus could not be granted, because the decision not having been set aside or quashed on certiorari, the case could not be heard again. (b) If a certiorari were applied for, the affidavits ought to state that the party applying and his solicitor did not know at the time that one of the justices was interested. *Reg.* v. *Kent JJ.*, 44 J. P. 298.

See further, JUSTICE OF THE PEACE.

—— **Penalty—Election of Licensing Committee.**]—Voting at an election of a licensing committee by a justice who is a common brewer within the licensing district exposes such justice to the penalty imposed by s. 60 of the Licensing Act, 1872. *Att.-Gen.* v. *Willett*, 60 J. P. 643.

Discretion of Justices.]—On an application under 32 & 33 Vict. c. 27, for a certificate for a licence to sell beer to be consumed on the premises, in respect of a house not previously licensed, the justices have the same discretion as to granting or refusing the certificate as they have in granting or refusing a licence under 9 Geo. 4, c. 61 ; and they may and ought to take into consideration the number of houses in the neighbourhood already licensed, and refuse the certificate if they think an additional beerhouse unnecessary or undesirable in the interest of the public. *Reg.* v. *Lancashire JJ., Tyson, In re*, 40 L. J., M. C. 17 ; L. R. 6 Q. B. 97 ; 23 L. T. 461 ; 19 W. R. 204.

Sect. 8 of the Wine and Beerhouse Act, 1869, which enacts that certificates for off retail licences under that act are only to be refused upon one of the four grounds therein specified, is repealed by s. 1 of the Beer Dealers Retail Licences Act, 1880, only so far as it relates to beer licences ; and the discretion of licensing justices as to the granting of certificates for off retail wine or spirit licences is still subject to the limitations imposed by s. 8 of the Wine and Beerhouse Act, 1869. *Reg.* v. *Scott*, 58 L. J., M. C. 78 ; 22 Q. B. D. 481 ; 60 L. T. 231 ; 37 W. R. 301 ; 53 J. P. 119.

When a licence or a certificate of a house licensed on the 1st of May, 1869, has afterwards dropped or been refused, the justices, on the true construction of s. 19 of 32 & 33 Vict. c. 27 (the Wine and Beerhouse Act, 1869), have the same discretion to refuse a fresh certificate for a licence to sell beer to be consumed on the premises as if the application was in respect of a house which had not been licensed on the 1st of May, 1869, and the repeal of the declaratory sect. 3 of 34 & 35 Vict. c. 88, is immaterial. *Reg.* v. *Curzon*, 42 L. J., M. C. 155 ; L. R. 8 Q. B. 400 ; 29 L. T. 32 ; 21 W. R. 886.

Although, under the 32 & 33 Vict. c. 27, s. 19, justices cannot refuse to grant a certificate in respect of a house which was licensed on the 1st May, 1869, except for one of the causes mentioned in s. 8, yet, if the licence has been actually forfeited, they may treat a subsequent application for a certificate as an original application, and may exercise a discretion in refusing it. *Hargreaves* v. *Dawson*, 24 L. T. 428.

A house had an existing licence on the 1st May, 1869, but at the licensing meeting in August the licence was lost on account of the personal misconduct of the then tenant. At the licensing meeting in August, 1870, the present tenant applied for a certificate, which was refused on the ground that he had not shewn the necessity for such a house in the neighbourhood :—Held, that the justices were justified in treating such application as an original one, and in exercising their discretion in refusing it. *Ib.*

The occupier of a house licensed under 9 Geo. 4, c. 61, having been fined for an offence against the tenor of his licence, was ejected by his landlord on the 17th of May. In June, H. was let into possession, and on the 5th of June the petty sessions refused to indorse the licence to H., under 5 & 6 Vict. c. 44. H. then gave up possession, and at the general licensing meeting on the 4th September the house was unoccupied, and no application was made for a licence. A. afterwards became tenant, and applied at the special

sessions on the 20th of November for a new licence, but after hearing the case on the merits the justices refused to grant a new licence. On appeal, the quarter sessions, finding him to be a proper person, dismissed the appeal, on the ground that the granting or refusing of such new licence was within the discretion of the justices at special sessions :—Held, that the justices had a discretion to grant or refuse the licence. *Reg.* v. *Rowell*, 41 L. J., M. C. 175 ; L. R. 7 Q. B. 490 ; 26 L. T. 732.

Upon an application to licensing justices for a certificate for a licence to sell wine to be consumed on the premises, it appeared that on May 1, 1869, a licence was in force with respect to the house for the sale of beer to be consumed on the premises :—Held, that upon the true construction of s. 19 of the Wine and Beerhouse Act, 1869, the discretion of the justices in refusing the application was unlimited, for the existence of a licence with regard to the sale of beer did not confer any privilege upon an application for a certificate in respect of the sale of either wine or cider. *Reg.* v. *King*, 57 L. J., M. C. 20 ; 20 Q. B. D. 430 ; 58 L. T. 607 ; 36 W. R. 600 ; 52 J. P. 164—C. A.

Provisional Licence—Final Order—Deviation from Plans—Duty of Justices.]—A provisional licence was granted upon plans submitted to the justices, but before building was commenced it was discovered that the plans had been drawn for a level site, whereas the actual site was on a slope. The justices having refused to sanction the requisite alterations, the house was built as nearly in accordance with the original plans as the site allowed. The justices refused the final order on the ground, after the confirming committee had approved the plans submitted, they had no power to permit any alteration :—Held, that the justices had power to make the final order, which they were bound to exercise if the building was substantially in accordance with the plans ; that the building was substantially in accordance with the plans, and therefore that the justices were bound to make the final order. *Reg.* v. *Pownall*, 63 L. T. 418 ; 54 J. P. 438.

"Special Occasion"—Exemption from Closing—Discretion.]—It is for the justices (being the local authority under the Licensing Act, 1872), to determine what is a "special occasion" in their own district, on which a licence exempting a licensed victualler from the provisions of the above statute relating to the closing of his premises, may be granted. *Devine* v. *Keeling*, 34 W. R. 718 ; 50 J. P. 551.

Grant on Conditions.]—Justices have no power to grant a licence to sell excisable liquors with the condition attached that they are not to be drunk or consumed on the premises, or to any other class of houses than inns, hotels, alehouses and victualling houses wherein the liquors may be drunk or consumed upon the premises. *Reg.* v. *Wilkinson*, 10 L. T. 370.

—— **Sunday Closing.**]—The condition under the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 49, requiring the licensed premises therein mentioned to be closed during the whole of Sunday, can only be inserted in a new licence if the applicant for it himself applies to the licensing justices to insert such condition. *Reg.* v. *Kirkdale JJ.*, 56 L. J., M. C. 24 ; 18 Q. B. D. 248 ; 51 J. P. 214.

Refusal—Statement of Grounds for.]—By 32 & 33 Vict. c. 27 (the Wine and Beerhouse Act, 1869), s. 8, no application for a licence to sell beer by retail not to be consumed on the premises shall be refused, except upon one or more of four grounds specified. Justices, on refusing a licence, declined to state on which of the grounds they refused it :—Held, that they were bound to state the ground, and that, not having done so, they had not heard and determined the application according to law ; and a mandamus was granted commanding them to hear and determine the application. *Reg.* v. *Sykes*, 45 L. J., M. C. 39 ; 1 Q. B. D. 52 ; 33 L. T. 566 ; 24 W. R. 141.

By the provisions of the statutes relating to licensing, certain licences for the sale of intoxicating drinks not to be consumed on the premises are not to be refused, except on one or more of four grounds specified. Justices on refusing to grant such a licence did not state any ground for such refusal. They were not, however, asked to state the ground for such refusal ; and on an application for a mandamus against them to hear and determine the application for the licence, the chairman of the justices made an affidavit that they had in fact acted on one of the grounds on which they were empowered to refuse the licence :—Held, that the justices were bound to state their grounds at the time of refusing the application, and the mandamus therefore went. *Smith, Ex parte*, 3 Q. B. D. 374 ; 26 W. R. 682. *S. C.*, nom. *Reg.* v. *Chertsey JJ.*, 47 L. J., M. C. 104.

An application for a licence to sell beer by retail not to be consumed on the premises was refused by justices, on the ground that the house was not duly qualified by law, not being of sufficient value under 3 & 4 Vict. c. 61, s. 1. The Wine and Beerhouse Act, 1869, s. 8, requires the justices, where such an application is refused on the ground that the house is not duly qualified as by law required, to specify in writing to the applicant the grounds of their decision. A minute of the decision, with the grounds of it, was made, and read out by the chairman in court, in the presence of the applicant, but no copy was delivered to him. On a rule for a mandamus to the justices to hear and determine the application :—Held, that, in the absence of any request by the applicant for a writing shewing the reasons for the decision of the justices, the notice was sufficient. *Reg.* v. *Cumberland JJ.*, 51 L. J., Q. B. 142 ; 8 Q. B. D. 369 ; 30 W. R. 178 ; 46 J. P. 7.

If justices omit to state the grounds of their refusal, it constitutes a substantial defect in their decision. *Reg.* v. *Eales*, 42 L. T. 735 ; 44 J. P. 553.

Notice of Application — Sufficiency.] — An applicant to licensing justices for a certificate under the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), authorising the grant to him of a licence to sell by retail beer to be consumed off his premises, under 3 & 4 Vict. c. 61, was already the holder of a certificate and additional licence for the same purpose under 26 & 27 Vict. c. 33. In the notice required by s. 7 of the 32 & 33 Vict. c. 27, he had set forth his name and address, and the situation of his shop, but merely stated his intention to apply for a certificate to sell by retail beer to be consumed off the premises. The justices refused a certificate on the ground that the notice was insufficient : — Held, that the applicant under the circumstances was entitled

to the certificate he applied for. *Reg.* v. *Over Darwen JJ.*, 39 L. T. 444.

—— **Description of Situation of Premises in Notice.**]—By s. 7 of the Wine and Beerhouse Act, 1869, an applicant for a justices' certificate to sell by retail wine, &c., to be consumed off the premises, shall in his notice set forth a description of the situation of his house or shop:—Held, that the section merely requires that the situation should be described in the notice in such a way that the house or shop can be identified; and that it is in the discretion of the justices to permit, in the case of a house or shop situate in a small country town, a modification of description appropriate to large cities. *Reg.* v. *Penkridge JJ.*, 61 L. J., M. C. 132; 66 L. T. 371; 56 J. P. 87.

—— **Time for Giving.**]—The holder of a licence to sell beer in a house of which he was occupier, gave the notices required by 32 & 33 Vict. c. 27, s. 7, of his intention to apply for a certificate authorising a licence under that act for the sale of beer in that house. On his application at the general annual licensing meeting on the 20th of August, the certificate was refused upon the ground that he had been convicted of misconduct when occupying another licensed house. The meeting was adjourned to the 17th September. On the 25th August A. gave notice that he should apply at the adjourned meeting for a certificate in respect of the same house then occupied by him. The justices refused to hear the application, and upon appeal to the quarter sessions the appeal was dismissed on the ground that the notice was too late:—Held, first, that under 9 Geo. 4, c. 61, s. 3, a notice of application for a certificate under that act may be given twenty-one days before an adjourned meeting. *Reg.* v. *Yorkshire, W. R., JJ., Drake, Ex parte*, 10 B. & S. 840; 39 L. J., M. C. 17; L. R. 5 Q. B. 33; 21 L. T. 490; 18 W. R. 259.

Held, secondly, that, reading together 9 Geo. 4, c. 61, s. 3, and 32 & 33 Vict. c. 27, ss. 5, 7, the notice by A. of his application for a certificate under the latter act was in time. *Ib.*

—— **Computation of Time.**]—The twenty-one days' notice required by s. 7 of the Wine and Beerhouse Act, 1869, to be given by persons intending to apply for new licences is not to be reckoned from the first day of the general annual licensing meeting but from the day on which the application is actually heard. *Reg.* v. *Pownall*, 62 L. J., M. C. 174; [1893] 2 Q. B. 158; 5 R. 486; 70 L. T. 138; 57 J. P. 424.

—— **Service of Notice of Application on Police.**]—An application was made for a new wine "off" licence, and objection was taken that no notice had been given by the applicant to the superintendent of police of the division. The notice was not sent to the superintendent's residence, as he did not reside or have an office in the division, but was merely left for him at one of several police-stations in the division:—Held that the service of the notice was invalid, and that the justices were right in refusing to hear the application. *Reg.* v. *Riley*, 53 J. P. 452.

A petty sessional division included a borough; the borough had a superintendent of police, there being another superintendent for the rest of the division:—Held, that an applicant for a new licence in respect of premises within the borough should serve the notice upon the superintendent of the borough. *Reg.* v. *Birley*, 55 J. P. 88.

—— **Adjournments—Jurisdiction of Justices.**]—An applicant for a new licence to sell wine and beer to be consumed on or off the premises gave notice of his application for a general annual licensing meeting to be held on the 26th of August. He did not apply on that day, but appeared at the adjourned general annual licensing meeting held on the 30th of September, and made his application. The justices refused the licence, on the ground that they had no jurisdiction to grant it, and that the applicant must be taken to have abandoned his notice by not applying on the 26th of August:—Held, that the justices had jurisdiction to entertain the application, and that the notice for the first day of the general annual licensing meeting held good for all adjournments. The meeting continued for all purposes from the moment of its commencement to the last moment of the adjourned meeting or meetings as if they formed a single day. *Reg.* v. *Armstrong, Duffy, Ex parte*, 65 L. J., M. C. 35.

Duty of Hearing Parties.]—Justices at an annual licensing meeting are bound to hear the parties applying for licences, if they desire it, and cannot properly decide on the notices alone, or by a general resolution to grant no new licences in a particular locality. *Reg.* v. *Walsall JJ.*, 2 C. L. R. 100; 3 W. R. 69.

Acting on a general resolution with respect to the granting or refusing of licences, prepared by the justices at the general annual licensing meeting, is not a hearing of the application for a licence, and the court will in such case interfere. *Reg.* v. *Sylvester*, 31 L. J., M. C. 93; 8 Jur. (N.S.) 484; 5 L. T. 794.

Second Application.]—A grocer applied at the general annual licensing meeting in August for a certificate to sell spirits under 35 & 36 Vict. c. 94, s. 68, by retail off his premises. The application was refused on the ground that he did not hold a wholesale dealer's excise licence. He took out this licence, gave fresh notices, and applied again for a certificate at the adjourned sessions in September. The magistrates refused the application, on the ground that it had already been disposed of and could not be re-heard:—Held, that the second application ought to be heard, as it was not concluded by the previous decision. *Maughan, Ex parte*, 1 Q. B. D. 49; 33 L. T. 603; 24 W. R. 205. *S. C.*, nom. *Reg.* v. *Kirkdale JJ.*, 45 L. J., M. C. 36.

—— **After Refusal to Holder.**]—B., who was the holder of a licence granted to him under 3 & 4 Vict. c. 61, for the sale of beer in a beerhouse occupied by him, gave the proper notices required by 32 & 33 Vict. c. 27, of his intention to apply for a certificate to obtain a licence for the sale of beer in the house. He made his application at the general annual licensing meeting, but the certificate was refused upon the ground that he came within the 3rd sub-section of the 8th section of 32 & 33 Vict. c. 27. The meeting was held upon the 20th of August, and was adjourned till the 17th September. On the 25th of August, D. gave notice that he should apply at the adjourned meeting for a certificate in respect of the same house, which he alleged was occupied by him. The justices refused to

entertain the application, as they had already refused the certificate on the application of B. Upon appeal to quarter sessions, the appeal was dismissed without hearing it on the merits:—Held, that the refusal to grant the certificate to B., upon a ground personal to him, did not prevent D. from making an application for a certificate in respect of the same house. *Reg.* v. *Yorkshire, W. R., JJ., Drake, Ex parte*, supra, col. 415.

Confirmation, when Required.]—By the Licensing Act, 1872, 35 & 36 Vict. c. 94, s. 37, a new licence shall not be valid unless confirmed by the licensing committee. By s. 74, a new licence means a licence granted at a general annual licensing meeting in respect of premises not theretofore licensed for the sale of intoxicating liquors:—Held, that a licence to sell exciseable liquors under 9 Geo. 4, c. 61, and the Licensing Act, 1872, upon premises theretofore licensed for the sale of wine and beer only, is a new licence within the above sections, and requires confirmation by the licensing committee. *Marwick* v. *Codlin*, 43 L. J., M. C. 169; L. R. 9 Q. B. 509; 30 L. T. 719; 22 W. R. 823.

Justices Equally Divided—Provisional Licence—Final Order.]—Licensing justices agreed to grant a provisional licence for a railway refreshment room according to plans shewn, though they directed change of site, which the applicant agreed to, but there was never any further assent of justices to any other site. At the application for the final order the eight justices were equally divided, and no adjournment was granted. A rule nisi for a mandamus being granted, the justices then met again, and agreed by a majority to make a final order:—Held, that the rule for the mandamus might be made absolute, but without costs, and not to be drawn up except on further application. *Reg.* v. *Cox*, 48 J. P. 440.

New Licence or Renewal.]—See *Reg.* v. *Market Bosworth JJ.*, post, col. 427.

New Licence or Transfer.]—See *Reg.* v. *Dublin (Recorder)*, post, col. 434.

2. REMOVALS.

Off-Licence—Order Sanctioning Removal—Notice of Application.]—The provisions of s. 50 of the Licensing Act, 1872, apply to off-licences; and where the removal of an off-licence from one house to another is applied for, the applicant must give the notice prescribed by the section to the owners of the house from which it is sought to remove the licence. *Reg.* v. *Thornton*, 66 L. J., Q. B. 774; [1897] 2 Q. B. 308; 77 L. T. 26; 61 J. P. 470.

3. RENEWALS.

Provisional Licence.]—A provisional licence granted under s. 22 of the Licensing Act, 1874, may be renewed in the same manner as an ordinary licence. *Reg.* v. *County of London JJ., Buckle, Ex parte*, 59 L. J., M. C. 71; 24 Q. B. D. 341; 62 L. T. 458; 38 W. R. 269; 54 J. P. 213.

A renewal of a provisional licence may be granted, notwithstanding that the premises have been completed, and that an application to have it declared final has been made and refused. *Ib.*

Application for—At what Sessions.]—Although a beerhouse-keeper may apply for a renewal of his certificate in the first instance to the justices at their adjourned meeting, he cannot, upon being refused a certificate at the original meeting, renew his application at the adjourned meeting. *Rushworth, Ex parte*, 23 L. T. 120.

A beerhouse-keeper applied at a licensing meeting for a certificate, which was unexpectedly opposed on the ground that his house was frequented by prostitutes, whereupon the justices refused his certificate. He thereupon gave fresh notices, and again applied for a certificate at the adjournment day, with evidence to rebut the charge, when the justices refused to hear his application, on the ground that they had heard and adjudicated upon it at the former meeting:—Held, that they were justified in their refusal. *Ib.*

—— **Justices' Power to Adjourn.**]—At the general annual licensing meeting justices in their private room decided to postpone the consideration of the applicant's licence till the adjourned licensing meeting. No reason was given in court for the postponement, and no objection was in fact made in court. Subsequently the clerk to the justices wrote to the applicant that an objection had been made to the renewal of her licence, and that such objection would be heard at the adjourned meeting. At a later date the chief constable, under direction of the justices, wrote to the applicant giving her notice to attend at the adjourned meeting, saying he would object, and giving the grounds of his objection. The applicant attended the adjourned meeting, and claimed that the justices had no power to refuse the renewal of her licence, as no objection had been made in open court at the general annual meeting:—Held, that the justices have full power and discretion to adjourn from time to time the consideration of the renewal of any licence, whether upon objection made by others, or under the discretionary powers entrusted to them. *Reg*, v. *Anglesea JJ.*, 65 L. J., M. C. 12; 15 R. 614; 59 J. P. 743.

There is no objection to licensing justices meeting in their private room, not to receive objections made to them by others, but to discuss among themselves the expediency of adjourning for future consideration particular licences as to which they feel that discussion is necessary; but the instant a complaint is formally made the applicant ought to have notice of it, and a full opportunity to meet it. *Ib.*

Semble, under the proviso to section 42 of the Licensing Act, 1872, the justices cannot themselves be objectors, but if they may be objectors within the meaning of the proviso they must make their objection in open court. *Ib.*

—— **Adjournment of Application—Conviction—Pending Appeal.**]—Where due notice was given of opposition to the granting of the renewal of a licence on the ground that the applicant had been convicted of permitting drunkenness to take place on his premises, and the licensing justices adjourned the hearing of the application over the month of September, pending the hearing of an appeal to quarter sessions by the applicant against the conviction:—Held, that they had no power to do so, and a mandamus must be issued

directing them to hear and determine the application. *Webber* v. *Birkenhead JJ.*, 61 J. P. 664.

——**Notice of Adjourned Meeting.**]—G. applied, under 35 & 36 Vict. c. 94, s. 42, for the renewal of a licence to sell beer by retail, to be drunk on the premises, and attended at the general licensing meeting in August, 1873, having received no notice of opposition, and not having been required to attend by the justices. He paid the fees to the justices' clerk, who said "All right," on which he left, supposing his licence would be renewed. The justices had by themselves considered the various applications for renewal, and had determined to adjourn eleven cases, amongst which was G.'s, for the purpose of satisfying themselves of the value; and they gave notice in open court that the eleven cases would be adjourned to the 24th of September, but knowledge of this was not brought home to G. On the 24th of September, G. not being present, the justices refused to renew his licence on the ground that the premises were not of the requisite value. He then applied for a mandamus to the justices to grant him a licence:—Held, that he was not entitled to the mandamus, as prayed: but that the justices were bound to have given him notice, and required his attendance at the adjourned meeting, and that a mandamus must be granted to hold an adjourned licensing meeting, and after notice to G., to hear and determine his application. *Reg.* v. *Farquhar*, L. R. 9 Q. B. 258.

Change of Occupation—Expiration of Licence.]—S., tenant of a house and licensed to sell exciseable liquors therein, made over the house in June, 1881, to W., who forthwith sub-let it to B. B. applied at a special sessions for a transfer of the licence, which was opposed by S., and refused. At the time of the general licensing meeting B. was in occupation, but was about to leave owing to illness in her family, and did not apply for a renewal of the licence. She left shortly afterwards, and the house was shut up, and no exciseable liquors had been sold there since June. In September, after the close of the licensing meeting, the landlord learnt that the house was vacant and took possession. The licence expired on the 10th of October. The landlord afterwards let it to D., who in January, 1882, applied to a special session for a renewal of the licence:—Held, that B., as occupier, though not holding a licence, was a person entitled to apply at the general sessions for a renewal of the licence, and that the event mentioned in 9 Geo. 4, c. 61, s. 14, of the occupier of a house being about to quit the same neglecting to apply at the general meeting for a licence to continue to sell exciseable liquors therein, had occurred, so that an application under that section could be made. *Reg.* v. *Liverpool JJ.*, or *Lancashire JJ.*, or *Lawrence*, 52 L. J., M. C. 114; 11 Q. B. D. 638; 49 L. T. 244; 32 W. R. 20; 47 J. P. 596—C. A.

Held, also, overruling *Todd, Ex parte* (3 Q. B. D. 407), and *White* v. *Coquetdale JJ.* (7 Q. B. D. 238), that it was not necessary that the application should be made before the expiration of the period for which the old licence was in force, and that the justices in special sessions had jurisdiction to grant the application. *Ib.*

By 9 Geo. 4, c. 61, s. 14: "If any person duly licensed under this act shall before the expiration of such licence . . . . remove from or yield up the possession of the house specified in such licence; or if the occupier of any such house, being about to quit the same, shall have wilfully omitted or shall have neglected to apply, at the general annual licensing meeting, or at any adjournment thereof, for a licence to continue to sell exciseable liquors by retail, to be drunk or consumed in such house, it shall be lawful for the justices assembled as aforesaid at a special session . . . . to grant to . . . . any new tenant or occupier of any house having so become unoccupied . . . . a licence to sell exciseable liquors by retail. . . ."—The licence-holder of an inn yielded up possession of the premises in December, 1890: at a special session in May, 1891, a new tenant unsuccessfully applied for a transfer of the licence; at the adjourned general annual licensing meeting in September, 1891, another new tenant unsuccessfully applied for a renewal of the licence; neither of the applicants appealed to quarter sessions. The then current licence expired on October 10, 1891. In March, 1892, the appellant, who had become tenant of the house, applied, under 9 Geo. 4, c. 61, s. 14, for a licence:—Held, that the justices had jurisdiction to grant the application. *Reg.* v. *Liverpool JJ.* (11 Q. B. D. 638), considered and followed. *Baldwin* v. *Dover JJ.*, 61 L. J., M. C. 215; [1892] 2 Q. B. 421; 56 J. P. 423.

At a general licensing meeting in 1884, the justices refused to renew M.'s licence for an inn. The house was shut up, then sold in January to J., who in July, 1885, obtained a mandamus to hear the application. The justices in obedience to the rule reheard the case in January, 1886, and granted the renewal for the year ending October, 1885, but refused to renew the licence for the then current year ending October, 1886, as no application had been made at the general meeting in September, 1885:—Held, that though the justices had no power to renew the licence for 1886, yet the court would give them power by making absolute a second rule for a mandamus to hear the application. *Reg.* v. *Miskin Higher JJ.*, 50 J. P. 247.

Grant on Conditions.]—At a general annual licensing meeting, the occupier of a house, licensed as a public-house, under 9 Geo. 4, c. 61, applied for a renewal of the licence. The justices renewed the licence, but with the following notice upon it:—"This licence is renewed on condition that the licensed premises shall, before the next general annual licensing meeting, be improved and made of the annual value of 30*l.*, in default of which this licence will not be renewed":—Held, that the justices had no power to impose such a condition; that the provision in the Licensing Act, 1872, s. 46, as to improving the premises does not apply to a house already licensed under 9 Geo. 4. c. 61, and that the condition was null and void. *Reg.* v. *Exeter JJ.*, or *Reg.* v. *Mann*, 42 L. J., M. C. 35; L. R. 8 Q. B. 235; 27 L. T. 847; 21 W. R. 329.

—— **Restriction to original Premises.**]—For some time previous to February, 1874, an inn called "Newill's Hotel" was kept by N., part of the ground floor being let off as a shop. In February, 1874, N. transferred the licence of Newill's hotel to S., who had become tenant of the whole house, including the shop. In July, 1874, S. took in the shop to the inn, and in August applied for a renewal of his licence. The renewal was not opposed, nor was S. required to attend at the licensing meeting. The justices

renewed the licence, but described the licensed premises thereon as Newill's hotel, consisting of such parts of the premises as were lately in the occupation of N., "and used by her under and for the purposes of the licence granted to her in renewal of which this licence is granted." S. appealed to the quarter sessions against the insertion of the description:—Held, that the licence was not irregular. *Stringer* v. *Huddersfield JJ.*, 33 L. T. 568.

Grounds of Refusal—Statement of.]—When justices refuse an application for the licence of a beerhouse which was licensed on May 1st, 1869, and has been continuously so licensed, they are bound to state their grounds at the time of refusing the application, and if they do not so state them, a mandamus will be granted commanding them to hear and determine the application. *Reg.* v. *Smith* (L. R. 8 Q. B. 146) distinguished. *Reg.* v. *Thomas* or *Bristol JJ.*, 61 L. J., M. C. 141; [1892] 1 Q. B. 426; 66 L. T. 289; 40 W. R. 478; 56 J. P. 151.

J., the holder of an "on" beer licence, was convicted in November, 1885, of allowing prostitutes to remain on his premises. He received notice of opposition to the renewal of his licence on that ground and gave up possession. T. became tenant on the 16th September, 1886, and gave notice that he would apply for a renewal. At the general annual licensing meeting on 24th September, 1886, the justices refused the renewal either to T. or to J. without stating any grounds. The quarter sessions confirmed the decision:—Held, that the justices must state the ground of their refusal. *Tranter* v. *Lancashire JJ.*, 51 J. P. 454.

The licensing justices at the general meeting on hearing the report of the superintendent of police that the applicant for the renewal of an indoor beer licence had been convicted of permitting drunkenness on the premises, told him to come again at the adjournment day. Notice to attend was given, but no specific objection was stated. After hearing the superintendent on oath prove the conviction, and afterwards calling him into their private room, the justices refused the renewal, but gave no reason for their decision:—Held, that the justices had not heard and determined the case according to the statute, and a mandamus to hear the application was directed. *Reg.* v. *Redditch JJ.*, 50 J. P. 246.

Grounds of Refusal, Sufficiency of.]—A court of quarter sessions, at an annual licensing meeting, refused to renew a licence to keep an inn, alehouse and victualling house, on the ground that the applicant declined to take out an excise licence for the sale of spirits:—Held, that this was not a sufficient legal ground for such refusal. *Reg.* v. *Sylvester*, 2 B. & S. 322.

—— **Remoteness from Police Supervision—Character and Necessities of Neighbourhood.**]—On the hearing of an application for the renewal of a licence for the sale of intoxicating liquors under the Licensing Acts, 1828, 1872 and 1874, the licensing justices have a discretion to refuse the renewal on the ground of the remoteness from police supervision, and the character and necessities of the neighbourhood. *Sharpe* v. *Wakefield*, 60 L. J., M. C. 73; [1891] A. C. 173; 64 L. T. 180; 39 W. R. 551; 55 J. P. 197—H. L. (E.)

—— **No Necessity for Licence.**]—The appellant, the occupier of a grocer's shop, had for several years past received a certificate authorising him to hold, and he still held, a licence for the sale by retail of beer not to be consumed on his premises, in pursuance of 1 Will. 4, c. 64, and the acts amending the same; it was admitted that he was a person of good character, that his shop was duly qualified by law, and that his application to justices at a general annual licensing meeting for the renewal of his certificate was duly made. He was duly served with notice of objection to his application, on the ground that such a licence was not required in his district; and the justices refused to renew his certificate on this ground only:—Held, upon a case stated by quarter sessions, after appeal thereto, that the refusal of the justices was justified by s. 1 of 45 & 46 Vict. c. 34. *Kay* v. *Over Darwen JJ.*, or *Reg.* v. *Kay*, 52 L. J., M. C. 90; 10 Q. B. D. 213; 47 L. T. 411; 31 W. R. 273; 47 J. P. 388.

—— **Long-closing of Premises.**]—G. obtained a transfer of a licence in 1885, but never opened the premises owing to a pending negotiation with another tenant which ultimately fell through. In August, 1885, G. obtained a renewal on his promise to open the premises, but he did not re-open until 23rd August, 1886, when the negotiation ended. G. had some days previously been served with notice of objection, and on 26th August the justices refused the renewal on the ground that the re-opening was not bonâ fide. On appeal to quarter sessions this decision was affirmed:—Held, that the objection was relevant, and having been competently entertained and decided, the high court would not interfere with the decision. *Griffiths* v. *Lancashire JJ.*, 35 W. R. 732; 51 J. P. 453.

Enlargement of Premises.]—W. bought a small two-storeyed house in an obscure cross street, and on applying to the justices for a transfer shewed them plans representing a three-storeyed house, which he had also bought in the leading thoroughfare, the back yard of which joined the back yard of the inn, and he proposed to join the two houses and use them as one. The justices approved and granted the transfer. At the next general annual meeting W. informed the justices that he had joined the two houses, thereby doubling the premises, and no one opposing, a renewal licence was granted. W. was then charged with selling liquors in the new house without a licence, and the justices dismissed the case, holding the new part of the premises covered by the licence:—Held, that as it was a question of fact for the justices whether the licence covered the added portion as well as the original inn, the court could not interfere in any way, and there was no question of law involved. *Ballam* v. *Wiltshire*, 44 J. P. 72.

A house licensed under the Licensing Act, 1872, (35 & 36 Vict. c. 94), for the sale of intoxicating liquors by retail, was enlarged by the occupier, and the sale of such liquors was carried on in the part added:—Held, that the licence must be taken to include reasonable additions to the original premises, and that it was a question of fact whether, after such alterations, the premises were substantially the same as those licensed. *Reg.* v. *Raffles*, 45 L. J., M. C. 61; 1 Q. B. D. 207; 34 L. T. 180; 24 W. R. 536.

If a licensed alehouse has additions made to it, it does not follow that the occupier must give the

notice provided for by 9 Geo. 4, c. 61, s. 10, as "for a house not theretofore kept as an inn." It is a question of fact for the justices, whether by such additions the house has become a new house. *Reg.* v. *Smith*, 15 L. T. 178.

The occupier of a licensed house added to his premises the adjoining house, and made them all one establishment. Upon applying for a renewal of his licence, the magistrates refused, upon the ground that the premises were not the same, and that no notice had been given as for an original licence. Upon an appeal against this refusal, the quarter sessions renewed the licence, subject to a case as to whether, under the circumstances, the notices were necessary :—Held, that the sessions were right in renewing the licence. *Ib.*

Alteration of Premises—Old Beerhouse.]—In the case of a beerhouse coming within the provisions of s. 19 of the Wine and Beerhouse Act, 1869, on an application for the renewal of the licence, the magistrates, in the absence of any objection within s. 8, have no choice but to grant a renewal without qualification, save where there have been such alterations in the premises since the last renewal as in the opinion of the justices destroy the identity of the premises, when they may treat the beerhouse as a new beerhouse, and grant or refuse a new licence for it at their discretion. *Reg.* v. *Bradford JJ.*, 74 L. T. 287 ; 60 J. P. 265.

—— **Res judicata.**]—Where the occupier of a house licensed before 1 May, 1869, had been convicted for selling on an unlicensed addition, and the conviction had been quashed by a divisional court on the ground that the premises, though altered and rebuilt, were substantially the same as those licensed, the justices are bound by the decision of the divisional court, and cannot refuse a subsequent application for a renewal of the licence under s. 19 of the Wine and Beerhouse Act, 1869, on the ground that the house had been rebuilt, and is a new house. *Deer* v. *Wirral JJ.*, 64 L. J., M. C. 85 ; 15 R. 280 ; 43 W. R. 286.

Evidence—Character.]—If an applicant for a certificate for the renewal of a beerhouse licence does not produce evidence of good character, the justices may refuse the certificate on the ground that he has "failed to produce" such evidence, although no evidence has been given against him, and he has not been called upon for evidence of good character, and it has been the practice of the justices not to require an applicant to produce such evidence where a certificate for renewal of a licence is asked for. *Morgan, Ex parte*, 23 L. T. 605.

Justices in licensing sessions refused a certificate for the renewal of a licence, under 32 & 33 Vict. c. 27, s. 19, on the ground that the applicant had failed to produce satisfactory evidence of good character. The applicant then appealed to quarter sessions under 9 Geo. 4, c. 61, s. 27 :—Held, that fresh evidence of character was admissible before the quarter sessions, and if that was satisfactory he was entitled to a certificate. *Reg.* v. *Pilgrim*, 40 L. J., M. C. 3 ; L. R. 6 Q. B. 89 ; 23 L. T. 410 ; 19 W. R. 99.

O., the holder of an indoor beer licence which existed before 1869, received due notice before the general annual licensing meeting of opposition to the renewal on the ground merely that he had been convicted. The justices having refused the renewal on the first ground set forth in 32 & 33 Vict. c. 27, s. 8, O. appealed to quarter sessions, and produced witnesses who gave evidence of his good character. The quarter sessions dismissed the appeal, expressing the opinion that O. had proved his good character ; but, that in consequence of his conviction, he was not a fit person to hold a licence. On a rule for a mandamus to rehear :—Held, that the court of quarter sessions having acted not on the character of the applicant, but on the question whether he was a proper person to keep a beerhouse, they had exceeded their jurisdiction, and that a mandamus must issue. *O'Brien, In re Reg.* v. *Lancashire JJ.*, 55 J. P. 580—C. A. Reversing in part, 64 L. T. 562 ; 55 J. P. 279.

—— **Prostitutes frequenting House.**]—S., before applying for renewal of his publican's licence, had been duly served with notice of opposition on the ground that the house was not conducted satisfactorily, it being the habitual resort of prostitutes. It was proved that several times seventeen prostitutes were seen in the house at one time and known to S., and no evidence was given that any refreshments were supplied. The quarter sessions refused the licence :—Held, there being evidence admissible as to prostitutes frequenting, and the justices having held that they did frequent, this court could not interfere with their refusal of the licence. *Sharp* v. *Hughes*, 57 J. P. 104.

—— **"Disorderly Character"**]—Upon an application for the renewal of a licence, the notice of objection stated the ground of objection, "That your house is of a disorderly character." Upon the hearing of the application the justices admitted evidence of three convictions against previous holders of the licence, but it was admitted that the applicant bore a good character :—Held, that the evidence was properly admitted, inasmuch as it was not necessary that evidence directed to the disorderly character of a licensed house should be confined to such matters only as affected the personal character of the applicant by showing that he himself had contributed to the disorderly character of the house. *Reg.* v. *Miskin Higher, JJ.*, [1893] 1 Q. B. 275 ; 5 R. 121 ; 67 L. T. 680 ; 41 W. R. 252 ; 57 J. P. 263.

Notice of Objection—Necessity for.]—It is not competent for justices to refuse to grant the renewal of a licence on account of an objection originated by themselves, unless they have first given notice of objection and taken evidence in accordance with the provisions contained in the Licensing Act, 1872, s. 42, sub-ss. 2, 3. *Gascoyne* v. *Risley*, 36 W. R. 605.

The jurisdiction of justices as regards the refusal of renewals of off beer licences, under the Licensing Acts, 1872, 1874, and 45 & 46 Vict. c. 34, can only be exercised provided the applicant for renewal has been served with notice of objection, and the other requirements in the first two enactments above stated have been complied with. *Reg.* v. *Essex JJ.*, 46 J. P. 761.

The appellant, who had for many years before and during 1869, held an excise licence for the sale of beer and cider, to be consumed on the premises, and had in each subsequent year regularly obtained the justices' certificate for the renewal of such licence in pursuance of the

Wine and Beerhouse Act, 1869, s. 19, was, in December, 1878, convicted of Sunday trading at prohibited hours, and the conviction was indorsed upon the licence. At the annual licensing meeting in 1879, no notice having been served upon the appellant, the justices (who were the respondents) announced that the appellant having been convicted must attend personally at the adjournment, and caused a letter to be written by their clerk, by which they required the appellant to attend in person to make the application, if a renewal of the licence were applied for. At the adjournment, the appellant attended and made application for a certificate, but the respondents, without hearing any evidence on oath, refused the application, and then gave no ground for the refusal. Quarter sessions, upon appeal, affirmed the respondents' refusal, but stated a special case:—Held, that the only objection to the renewal of the appellant's licence being the indorsed conviction and the appellant having received no notice of an objection of which the grounds for refusal were authorised by s. 8 of the act of 1869, the respondents had not considered any sufficient grounds of objection as if due notice had been given within s. 42 of the Licensing Act, 1872, and s. 26 of the Licensing Act, 1874. *Reg.* v. *Eales*, 42 L. T. 735; 44 J. P. 553.

—— **Person holding Protection Order.**]—Sect. 42 of the Licensing Act, 1872, provides that, "where a licensed person applies for the renewal of his licence . . . . the justices shall not entertain any objection to the renewal of such licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence has been served on such holder not less than seven days before the commencement of the general annual licensing meeting." The occupier of licensed premises being about to leave the same, an interim authority was granted to the appellant under 5 & 6 Vict. c. 44, s. 1, to carry on the business until the next special session for transfer of licences. Such session and the general annual licensing meeting being held simultaneously, the appellant made applications thereat for a transfer of the licence under 9 Geo. 4, c. 61, s. 14, and also for a renewal of the licence. Both applications were refused by the justices, because they were not satisfied as to the appellant's good character. No notice of intention to oppose the renewal of the licence had been served upon the appellant:—Held, that the appellant was not a "licensed person" applying for a renewal of "his" licence within the meaning of the above-mentioned section, and therefore was not entitled to the notice therein mentioned. *Price* v. *James*, 61 L. J., M. C. 203; [1892] 2 Q. B. 428; 67 L. T. 543; 41 W. R. 57; 56 J. P. 471—C. A.

Notice of Objection—Sufficiency of.]—In the case of a beerhouse licensed before 1869, notice of opposition to renewal on the ground that the applicant has been convicted, is sufficient notice that he will be required to give evidence of his character. *Reg.* v. *Lancaster JJ.*, 55 J. P. 580. Approving *Reg.* v. *Birmingham JJ.*, 40 J. P. 132.

—— **Power to Adjourn.**]—By s. 42 of the Licensing Act, 1872, justices at the general annual licensing meeting shall not entertain any objection to the renewal of a licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal has been served upon the holder of the licence in the prescribed manner: "Provided that the justices may, notwithstanding that no notice had been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard and the objection considered, as if the notice hereinbefore prescribed had been given":—Held, that an objection to the renewal of a licence made privately to justices before they came into court at the general annual licensing meeting was not a good "objection made" within the meaning of the proviso to s. 42, and that, therefore, the justices had no power to adjourn the case. *Reg.* v. *Merthyr Tydvil JJ.*, 54 L. J., M. C. 78; 14 Q. B. D. 584; 49 J. P. 213.

M. applied for a renewal of a licence at a general annual licensing meeting, having received no notice of opposition. The justices refused the application, and M. obtained a mandamus commanding them to hold an adjourned meeting, and to hear and determine in pursuance of the statutes in that behalf the merits of the application for the renewal. To this writ the justices returned that such adjourned meeting had been held; that notice of opposition had been duly served not less than seven days before the said adjourned meeting, and that they had heard and determined the application. The licence was refused. M. pleaded that they had not heard and determined the application pursuant to the statutes in that behalf by reason that they had no jurisdiction to entertain the objection or refuse the licence:—Held, that the justices had jurisdiction to entertain the objection and to refuse the licence. *Reg.* v. *Howard*, 23 Q. B. D. 502; 60 L. T. 960; 37 W. R. 617; 53 J. P. 454.

A verbal objection to the renewal of a licence made in open court at the general annual meeting need not state the grounds of objection to give the justices jurisdiction to adjourn the hearing of the application. The proviso of s. 42, sub-s. 2 of the act of 1872 is not qualified by s. 26 of the act of 1874. *Daykin* v. *Parker*, 63 L. J., M. C. 246; [1894] 2 Q. B. 556; 9 R. 574; 71 L. T. 379; 42 W. R. 625; 58 J. P. 835—C. A.

Notice of Intention to Oppose—Mode of Service.]—Upon an application for a renewal of a licence, a written notice of intention to oppose the renewal was handed to a boy at the applicant's licensed premises, the applicant received the notice more than seven days before the annual licensing meeting:—Held, that the service of the notice was sufficient within s. 42 of the Licensing Act, 1872, and that the justices had therefore jurisdiction to entertain the objection. *Portingell, Ex parte*, 61 L. J., M. C. 1; [1892] 1 Q. B. 15; 65 L. T. 603; 40 W. R. 102; 56 J. P. 276—C. A.

—— **Time for Service—Adjourned Meeting.**]—The appellant, the holder of a public-house licence, was served with notice of opposition to the renewal of his licence "at the adjourned annual licensing meeting" for the part of the division in which his house was situated. The notice was served upon the appellant less than seven clear days before the commencement of the

general annual licensing meeting for the division, but more than seven clear days before the commencement of the adjourned meeting. The appellant applied at the adjourned meeting for a renewal, when the justices, after hearing evidence for and against the application, refused it:—Held, that the commencement of the adjourned meeting was, for the purposes of s. 42, sub-s. 2, of the Licensing Act, 1872, "the commcenement of the general annual licensing meeting," that the notice was therefore served in time, and that the justices had jurisdiction to hear evidence in opposition to the renewal. *Reg.* v. *Anglesey JJ., Williams, Ex parte*, 61 L. J., M. C. 149; [1892] 1 Q. B. 850; 56 J. P. 440.

New or Renewal Licence—Effluxion of Current Licence after Refusal of Renewal—Application by new Tenant.]—At an adjourned general annual licensing meeting in 1885, the renewal of a public-house licence was refused to P. P. did not appeal to the quarter sessions, and his current licence expired on the 10th of October following. He closed the premises as a public-house, and continued to occupy them as his private residence until Midsummer, 1886, when he left and C. became tenant. At the general annual licensing meeting in 1886, C. applied for a licence, but the justices, considering his application to be one for the grant of a new licence, in their discretion, refused it, on the ground that there were already a sufficient number of licensed houses in the district. Upon an application by C. for a rule for a mandamus to be directed to the justices:—Held, that C.'s application was not an application for a "new" licence, but one for the "renewal" of a licence. The justices accordingly could not refuse it upon the ground they did, and they ought to hold an adjournment to hear and determine the application. *Reg.* v. *Market Bosworth JJ.*, 56 L. J., M. C. 96; 57 L. T. 56; 35 W. R. 734; 51 J. P. 438.

Where a licensed person goes out of occupation of licensed premises and those premises are closed, the new occupier of those premises is entitled to apply at the general licensing session for a renewal to him of the licence, although he was not himself licensed before. *Symons* v. *Wedmore*, 63 L. J., M. C. 44; [1894] 1 Q. B. 401; 10 R. 118; 69 L. T. 801; 42 W. R. 301: 58 J. P. 197.

The holder of a licence of a beerhouse which had been licensed before and ever since May 1, 1869, applied at general licensing sessions for a renewal of the licence, and was refused, on the ground that he was not the real resident holder and occupier. The beerhouse was then closed to the public. At the adjourned general licensing sessions a person who had not been previously licensed, but was then the resident occupier of the premises under a lease from the owners, applied for a renewal of the licence to himself:—Held, that he was entitled so to apply. *Price* v. *James*, supra, col. 425, discussed; *Reg.* v. *Liverpool JJ.*, supra, col. 419, followed. *Ib.*

—— **Disqualification of Licensed Person—Application by Owner.**]—Where a licensed person has become personally disqualified or has had his licence forfeited, the owner of the premises cannot apply under 9 Geo. 4, c. 61, s. 14, for a renewal of the licence, but must apply under 37 & 38 Vict. c. 49, s. 15, for the grant of a new licence, and such application must be made to the next special sessions. *Reg.* v. *Liverpool JJ.*, supra, col. 419, distinguished. *Stevens* v. *Green*, or *Sharnbrook JJ.*, or *Bedfordshire JJ.*, 58 L. J., M. C. 167; 23 Q. B. D. 143; 61 L. T. 240; 37 W. R. 605; 53 J. P. 423.

—— **When Licence Expired.**]—A new occupier of an inn licensed under 9 Geo. 4, c. 61, was refused a transfer of the licence, on the ground of a conviction for drunkenness. Three years afterwards, at the first licensing meeting after the owner was able to obtain possession of the premises, the present applicant applied for a renewal of the previous licence, and was refused on the ground that the neighbourhood did not require it. Upon appeal, the quarter sessions, without hearing the merits, decided that this was an application for a new licence, and that they had no jurisdiction under 35 & 36 Vict. c. 94:—Held, that the quarter sessions were right, and that the definition of renewal of a licence in s. 74 refers only to a licence existing during the previous year. *Turbath, Ex parte*, 31 L. T. 513.

—— **Forfeiture.**]—Although, under the 32 & 33 Vict. c. 27, s. 19, justices cannot refuse to grant a certificate in respect of a house which was licensed on the 1st May, 1869, except for one of the causes mentioned in s. 8, yet, if the licence has been actually forfeited, they may treat a subsequent application for a certificate as an original application, and may exercise a discretion in refusing it. *Hargreaves* v. *Dawson*, 24 L. T. 428.

A house had an existing licence on the 1st May, 1869, but at the licensing meeting in August the licence was lost on account of the personal misconduct of the then tenant. At the licensing meeting in August, 1870, the present tenant applied for a certificate, which was refused on the ground that he had not shewn the necessity for such a house in the neighbourhood:—Held, that the justices were justified in treating such application as an original one, and in exercising their discretion in refusing it. *Ib.*

—— **House not used as an Inn.**]—A man who had had a public-house licence for many years was refused the renewal of it, on the ground that the neighbourhood was sufficiently supplied, he not having taken out an excise licence or used his house as an inn:—Held, that the application was not for a new licence, and that the justices had a discretion as to granting or refusing the application, under 9 Geo. 4, c. 61, s. 1, and were not fettered by the limitations in ss. 8 and 19 of 32 & 33 Vict. c. 27, which are confined to applications for licences for the sale of beer, cider, and wine. *Reg.* v. *Smith*, or *Smith* v. *Herefordshire JJ.*, 48 L. J., M. C. 38; 39 L. T. 604.

No Appearance in support of Opposition.]—At the general annual meeting the hearing of an application for renewal was appointed for 10 a.m. Notice of opposition had been duly served, but, on the case being called, neither the opponent nor his solicitor was present. Justices, after sending for both, and they not attending, waited five minutes and then decided by a majority of five to four to renew the licence. The opponent and his solicitor then arrived and asked to be heard, but the justices refused to reopen the matter. On an order nisi for a mandamus:—Held, (1) that it was entirely a matter of discretion

for the justices to treat the case as determined or to re-open it; (2) as no motion for a mandamus was made for three months, the court discharged the order nisi with costs. *Reg.* v. *Robson*, 57 J. P. 133.

Majority of Justices.]—The granting of a renewal certificate by justices presiding at licensing sessions must be the act of the majority of the court, and a minority or two or more of such justices is not competent to grant and sign the said certificate when the remaining justices form a majority, and object to the grant being made. In such cases the majority should make an order of refusal, and not merely record their dissent. *Reg.* v. *O'Connell*, 20 L. R., Ir. 625.

Upon an application to renew a licence six justices sat, the licence was granted and signed by four of such justices: the court refused to grant a certiorari on the ground that the justices were, as a fact, equally divided. *Reg.* v. *Rogers*, 56 J. P. 183.

Six-day Licence as a Seven-day Licence.]—The holder of a six-day licence, under the provisions of 35 & 36 Vict. c. 94, s. 49, is not entitled, on the renewal of his licence, to exchange it for an ordinary or seven-day licence. *Reg.* v. *Cathcart*, 4 L. R., Ir. 567. S. P., *Reg.* v. *Dublin (Recorder)*, 2 L. R., Ir. 386; 44 J. P. 688—C. A.

Where a licence was originally granted subject to the condition under s. 49 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), requiring the licensed premises to be closed during the whole of Sunday, it can only be renewed subject to that condition, and cannot be renewed as an ordinary seven-day licence. *Reg.* v. *Crewkerne JJ.* or *Sparks*, 57 L. J., M. C. 127; 21 Q. B. D. 85; 60 L. T. 84; 36 W. R. 629; 52 J. P. 372—C. A.

T., a publican, held a six-day licence, which had existed as a six-day licence for three years only, a former holder thereof having held the ordinary licence for many years before that date. T. applied for a renewal without the six-day condition being inserted:—Held, that the justices were not bound to renew such licence as a seven-day licence. *Reg.* v. *Liverpool JJ.*, 52 J. P. 376.

Appeal to Quarter Sessions—Costs.]—Licensing justices are not a court of summary jurisdiction, and where, on appeal to quarter sessions from their refusal, at the instance of an objector, to renew the licence, a renewal has been granted, there is no jurisdiction to give costs against the objector. *Boulter* v. *Kent JJ.*, 66 L. J., Q. B. 787; [1897] A. C. 556; 77 L. T. 288; 46 W. R. 114; 61 J. P. 532—H. L. (E.)

4. Transfers.

Application to Special Sessions—9 Geo. 4, c. 61, s. 14.]—The power of granting a licence at special sessions under 9 Geo. 4, c. 61, s. 14, to a new tenant, where a person duly licensed under that act gives up possession of the house during the continuance of his licence, extends only to the period for which the former tenant's licence would have lasted. *Todd, In re* and *Ex parte*, 47 L. J., M. C. 89; 3 Q. B. D. 407.

F., duly licensed under 9 Geo. 4, c. 61, on the 3rd of August, 1877, gave up possession of the licensed premises, and B. became tenant. The licence expired on the 10th of October following. At the general annual licensing meeting, held on the 28th of August, 1877, B. applied for a transfer of the licence to him, but the justices refused the application on the ground of his previous misconduct. On the 28th of September B. gave up his tenancy, and was succeeded by G., who on the 29th of November also gave up the tenancy, and was succeeded by T. After giving the proper notices, T. applied at a special sessions, under 9 Geo. 4, c. 61, s. 14, for a licence in respect of the premises. The justices declined to entertain the application on the ground that they had no jurisdiction:—Held, that, inasmuch as the application was made after the expiration of the period for which the previous licence remained in force, the decision of the justices was right. *Ib.* Overruled in *Reg.* v. *Liverpool JJ.*, or *Lancashire JJ.*, or *Lawrence*, infra.

K., licensed to sell intoxicating liquors under 9 Geo. 4, c. 61, died on the 27th of September. At the general annual licensing meeting on the 2nd of October, application was made by the lessees of the house for a fresh licence, without giving the requisite notices under 35 & 36 Vict. c. 94, as there was no time to give them. This application was rejected, on the ground that they were not in occupation of or about to occupy the premises. K.'s licence expired on the 10th of October. On the 13th of November, W., as assignee of the heir of K., gave notice that he would apply at the special sessions on the 4th of December for a new licence in respect of the house under 9 Geo. 4, c. 61, s. 14:—Held, following *Simpkin* v. *Birmingham JJ.* (L. R. 7 Q. B. 482), that the justices had no jurisdiction to entertain the application, as it was made after the expiration of the period for which the previous licence remained in force. *White* v. *Coquetdale JJ.*, 50 L. J., M. C. 128; 7 Q. B. D. 238; 44 L. T. 715; 30 W. R. 16; 45 J. P. 539. *See next case.*

S., tenant of a house and licensed to sell excisable liquors therein, made over the house in June, 1881, to W., who forthwith sublet it to B. B. applied at a special sessions for a transfer of the licence, which was opposed by S., and refused. At the time of the general licensing meeting B. was in occupation, but was about to leave owing to illness in her family, and did not apply for a renewal of the licence. She left shortly afterwards and the house was shut up, and no excisable liquors had been sold there since June. In September, after the close of the licensing meeting, the landlord learnt that the house was vacant and took possession. The licence expired on the 10th of October. The landlord afterwards let it to D., who, in January, 1882, applied to a special sessions for a renewal of the licence:—Held, that B. as occupier, though not holding a licence, was a person entitled to apply at the general sessions for a renewal of the licence, and that the event mentioned in 9 Geo. 4, c. 61, s. 14, of the occupier of a house being about to quit the same neglecting to apply at the general meeting for a licence to continue to sell excisable liquors therein, had occurred, so that an application under that section could be made. *Reg.* v. *Liverpool JJ.*, or *Lancashire JJ.*, or *Lawrence*, 52 L. J., M. C. 114; 11 Q. B. D. 638; 49 L. T. 244; 32 W. R. 20; 47 J. P. 596—C. A.

Held, also, overruling *Todd, Ex parte* (3 Q. B. D. 407), and *White* v. *Coquetdale JJ.* (7 Q. B. D. 238), that it was not necessary that the application should be made before the expiration of the period for which the old licence was in force,

and that the justices in special sessions had jurisdiction to grant the application. *Ib.*

Change of Tenancy.]—The tenant of a beerhouse, holding a beerhouse licence, assigned his interest in the premises to another, and gave up possession to him on the 14th of February. At the general licensing sessions, on the 6th of March, the old tenant applied for a certificate for a renewal of the licence, which was refused on the ground that he had been convicted of an offence under 32 & 33 Vict. c. 27, s. 8. The new tenant had not time after the transfer to him to give the requisite notices to enable him to apply at the general licensing sessions :—Held, that he was entitled to apply at a special sessions, under 9 Geo. 4, c. 61, s. 14. *Reg.* v. *Middlesex JJ.*, 40 L. J., M. C. 184 ; L. R. 6 Q. B. 781 ; 25 L. T. 41 ; 19 W. R. 960.

A house in Middlesex having been licensed for some years under 9 Geo. 4, c. 61, L., the licensed tenant, gave up possession on the 6th of February to T. At the adjourned general annual licensing meeting on the 24th of March, application for a licence was made on behalf of T. This was refused, and no appeal was made. The licence having expired on the 5th of April, the house was shut up. On the 4th of May T. applied to the special sessions, who refused the licence on the ground that the renewal of the licence had been refused at the general meeting. T. again applied on the 4th of July to the special sessions ; and the justices refused a licence on the ground that the case was not within s. 14. On appeal, the general sessions refused on the same ground : —Held, that having applied to the general licensing meeting and been refused, T. could not afterwards go to the special sessions. *Reg.* v. *Taylor*, 42 L. J., M. C. 13 ; L. R. 7 Q. B. 487.

Under 9 Geo. 4, c. 61, where a house which has been kept as an hotel without a licence is transferred to a new occupier, the notices for a licence must be given by the new occupier. *Bryant* v. *Beattie*, 4 Bing. (N.C.) 254 ; 5 Scott, 751 ; 7 L. J., C. P. 78.

W., duly licensed under 9 Geo. 4, c. 61, applied at a general licensing meeting on the 15th of September for a renewal of his licence, which was refused. The licence expired upon the 10th of October following, and he then ceased to sell excisable liquors, but continued in occupation of the house until the 13th of October ; he then gave up possession to S., who, after giving the proper notices, applied at a special sessions for a new licence in respect of the premises. The justices refused the application, on the ground that as W. was not licensed within the terms of s. 14 at the time of his removal from the house, they had no jurisdiction :—Held, that the decision of the justices was right. *Simpkin* or *Reg.* v. *Birmingham JJ.*, 41 L. J., M. C. 102 ; L. R. 7 Q. B. 482 ; 26 L. T. 620 ; 20 W. R. 702.

Grant to New Tenant under 9 Geo. 4, c. 61, s. 14—Second Application by same Tenant under same Section.]—On the 2nd of September, 1890, the duly licensed tenant of a country beerhouse removed from the house without having applied for the renewal of the licence at the general annual licensing meeting on the 30th of August. On the same day a new tenant entered into occupation of the house, and on the 5th of September obtained at petty sessions a temporary licence under 5 & 6 Vict. c. 44, until the 27th. On the 27th an adjournment of the general annual licensing meeting was held, and also a special session for the transfer of licences under 9 Geo. 4, c. 61, s. 14, and at the latter the new tenant applied for and obtained under the section a licence until the 10th of October then next ensuing. On the 3rd of January, 1891, he again applied at a special transfer session held on that day under the same section for a grant of a licence to continue until the 10th of October, 1891 :—Held, that, having already held a licence in respect of the premises from the 27th of September to the 10th of October, 1890, he was not a "new tenant" within the meaning of the section, and that the justices had no jurisdiction to grant the application. *Reg.* v. *Powell*, 60 L. J., Q. B. 594 ; [1891] 2 Q. B. 693 ; 65 L. T. 210 ; 39 W. R. 630—C. A.

Successive New Tenants—Application by.]—The holder of a country publican's licence left the house in April. F., a new tenant, applied for a transfer in August, but the justices refused it and suggested an application for a new licence. The new licence was applied for, and being opposed was refused in September. W., a new tenant, went into occupation in October, and applied in November for a transfer, when the justices refused to hear W., on the ground that they had heard F.'s application and refused it, and that the matter was therefore res judicata : —Held, that the justices must hear W.'s application. *Reg.* v. *Upper Goldeross JJ.*, 62 L. T. 112 ; 53 J. P. 823.

T., in October, 1888, applied for a transfer of an "on" beer licence, which was refused. He appealed to quarter sessions, and the quarter sessions held he had no right of appeal, but stated a case for the High Court on the point. The High Court, in October, 1889, held that T. had a right of appeal. T. then applied at transfer sessions, in November, 1889, for a transfer, but the justices refused to hear him on the ground that they had heard the same application before, in 1888 :—Held, that the justices were bound to hear the application, as it was made in a new licensing year. *Reg.* v. *Welby*, 54 J. P. 183.

Tenant giving up Possession—Application by Landlord—Appeal to Quarter Sessions.]—K., the licensed tenant of a public-house, abandoned possession in December, and the house was shut up. At the next general annual licensing meeting in September K. did not apply for a renewal, but the landlord asked for a renewal either in K.'s name or his own, which the justices refused. A new tenant, P., entered a few days after the adjourned annual licensing meeting, and applied at the next transfer sessions in October for a transfer of the licence, which was refused. P. then appealed to quarter sessions in January, when the refusal was confirmed. P. then applied in June for an order for a mandamus to the general annual licensing meeting to rehear his application :—Held, that P. was precluded from asking for a mandamus because of his appeal to quarter sessions, and that his application was for a mandamus to the wrong justices. *Reg.* v. *Newcastle-upon-Tyne JJ.*, 51 J. P. 244—C. A.

Lapsed Licence—Discretion of Justices to refuse Transfer.]—On an application for a renewal or transfer of a licence, in order to limit the discretion of the justices to one of the four

grounds of refusal mentioned in s. 8 of the Wine and Beerhouse Act, 1869, it must be shewn that the licence has been continuously in force from May 1, 1869, down to the date of the application. *Freer* v. *Murray*, 63 L. J., M. C. 242; [1894] A. C. 576; 6 R. 237; 71 L. T. 444; 58 J. P. 508—H. L. (E.)

Where an application for renewal was made on September 10, 1891, and was refused, and the licence expired in the ordinary course on October 10, such licence is not "in force" within the meaning of s. 19 of the act of 1869, and, therefore upon an application on November 17th under s. 14 of the Licensing Act, 1828, the justices' discretion to refuse a transfer is not limited to the four grounds specified in s. 8 of the act of 1869. *Reg.* v. *Curzon* (L. R. 8 Q. B. 400) followed. *Ib.*

C. having a lease of a licensed house at M. till 1879, began in 1875 to build a new house of his own at I., for which he obtained a licence and allowed the licence at M. to drop. A new tenant entered the premises at M. in 1879, and applied from then until 1883 for a new licence, which was always refused; he then applied for a transfer of the licence at M. which had expired in 1877:—Held, that the justices had a discretion to refuse the transfer, and could not be compelled by mandamus to hear the application. *Minnett, Ex parte*, 51 J. P. 84.

Forfeiture, effect of — Beerhouse Licence existing before 1869—Discretion.]—A licence existing on 1st May, 1869, for the sale of beer to be consumed on the premises, was forfeited by the conviction of the holder under the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 15, for permitting the premises to be used as a brothel:—Held, that the licence was not "in force" within the meaning of the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), s. 19, and that the licensing justices at special sessions had a general discretion to refuse applications by the landlord and a new tenant of the premises for a transfer of the licence, and were not limited to the four grounds of refusal specified in s. 8. *Reg.* v. *West Riding JJ.*, 57 L. J., M. C. 103; 21 Q. B. D. 258; 36 W. R. 855; 52 J. P. 455.

Where Female Licensee Marries during the Year.]—P., a single woman, held a beerhouse licence under 1 Will. 4, c. 64, in the country, and in November she married H., who applied for a transfer to himself, under 9 Geo. 4, c. 61, s. 14, and the justices refused it, holding that, as P. was no longer the real resident occupier, the licence became void on her marriage:—Held, the justices were wrong, and that the licence remained good till its expiration on 10th October then next. *Hazell* v. *Middleton*, 45 J. P. 540.

Transfer to New Premises where original Premises required for Public Purposes.]—B., the holder of a beerhouse licence, in the country, under 1 Will. 4, c. 64, got notice to quit his house, as it was taken for a public purpose, and he quitted on the 4th October. On 5th November he entered on another house about two miles off, and at the next special transfer sessions, on 2nd December, applied to the justices for a transfer under 9 Geo. 4, c. 61, s. 14, of the licence of the premises which had been taken to the new premises; but the justices refused it, on the ground that the locality of the new house was already fully supplied with licensed houses:—Held, that the justices had an absolute discretion, and that it could not be interfered with by the high court. *Boodle* v. *Birmingham JJ.*, 45 J. P. 635.

The licensee of premises which had been continuously licensed for the sale of beer on and off the premises from a date prior to May 1, 1869, and which were about to be pulled down for a public purpose, applied at special sessions for a transfer of the licence to other premises:—Held, that the justices' power of refusing the transfer was not limited to the four grounds mentioned in s. 8 of the Wine and Beerhouse Act, 1869. *Traynor* v. *Jones*, 63 L. J., M. C. 31; [1894] 1 Q. B. 83; 10 R. 26; 69 L. T. 862; 42 W. R. 201; 58 J. P. 132.

Temporary Transfer—Conviction of Licensed Person.]—Under the Licensing Act, 1874, s. 15, application was made at a special licensing sessions by the owner of a beerhouse, licensed continually from a date anterior to 1869, the tenant of which had been convicted of felony, for the grant of a licence in respect of the same premises. The justices refused the application, on the ground that the house was of a disorderly character:—Held, that the justices at special licensing sessions, as well as the justices at the general annual licensing meeting, had discretion so to refuse the application. *Reg.* v. *Rowell*, (L. R. 7 Q. B. 490) followed. *Reg.* v. *Moore*, or *Hertfordshire, JJ.*, 50 L. J., M. C. 121; 7 Q. B. D. 542; 45 J. P. 768.

New Licence or Transfer—Agreement for Sale subject to Transfer to Purchaser.]—R. & Co. had for several years carried on the business of family grocers, tea, wine and spirit merchants, in certain premises in S. Street, in the city of Dublin, and one of the firm had been each year duly licensed as a publican, to sell beer, wine and spirits for consumption upon the premises, but had never carried on business as publican. At the October sessions of 1883, their publican's licence had been duly renewed by H., one of their firm. In September, 1884, R. & Co. entered into an agreement with M. to sell to him the premises, and it was therein provided that M. should pay a deposit of 800*l.*, pending completion of the purchase, and making out title, &c.; and they also entered into a collateral agreement with M. that he should forthwith take all necessary steps to obtain, at the ensuing October licensing sessions, a transfer of the licence attached to the premises, and that, if M. obtained such transfer, the purchase should be completed on or before the 29th November, 1884, but that, if such transfer was refused, M. should be at liberty to rescind the contract, and be repaid his deposit. On the 2nd October, 1884, by an indorsement on the licence, H. purported to assign all his interest therein to M. No ad interim transfer of the licence to M. had been obtained. M. having applied to the recorder at the October licensing session of 1884 for a certificate enabling him to obtain a publican's licence, and such application having been opposed on the ground of the number of previously licensed houses in the neighbourhood:—Held, that the case was distinguishable from *Reg.* v. *Dublin Recorder* (Ir. R. 11 C. L. 412); that M.'s application was in substance, as well as in form, an application for a new licence, and that, therefore, the court, in dealing with it

was entitled to take into consideration the number of existing licensed houses in the neighbourhood. *Reg.* v. *Dublin Recorder*, 16 L. R., Ir. 424—C. A.

Notice of Application—New Tenant—Licensing Act, 1828, s. 14.]—Sect. 40, sub-s. 2 of the Licensing Act, 1872 (requiring fourteen days' notice of an application for the transfer of a licence), does not apply to an application by a new tenant under s. 14 of the Licensing Act, 1828, for a licence in respect of a house, the licence-holder of which has yielded up possession before the expiration of the licence. *Reg.* v. *Hughes*, 62 L. J., M. C. 150; [1893] 2 Q. B. 530; 5 R. 518; 42 W. R. 94; 58 J. P. 151.

A., the holder of a publican's country licence, received notice to quit on the 29th of September, but before that date he obtained the renewal of his licence and refused to quit. The landlord expelled A. by force on the 8th of October, and J. entered into possession. At a special transfer sessions on the 27th of October, though J. had given no notices, the justices granted to J. a licence under 9 Geo. 4, c. 61, s. 14. On certiorari to quash the licence:—Held, that a certiorari being matter of discretion, it would not be granted, as A.'s object seemed to be to blackmail his landlord. Held, also, that, as A. did not apply for the transfer, no notice was required by J. when he applied under 9 Geo. 4, c. 61, s. 14. Semble, as no sale of liquor had taken place under A.'s renewed licence, J. was in strictness bound by the proviso in 9 Geo. 4, c. 61, s. 14, to give the same notices as for a new licence. *Reg.* v. *Wiltshire JJ.*, 57 J. P. 454.

Power of Adjournment.]—The Wine and Beerhouse Act (1869) Amendment Act, 1870 (33 & 34 Vict. c. 29), s. 4, sub-s. 4—which enacts that it shall be in the discretion of the justices to whom an application for a transfer of a licence is made either to allow or refuse the application, or to adjourn the consideration thereof—is intended only to affect the procedure as to adjournment at sessions for the transfer of licences. Therefore, on an application to justices at special sessions for a transfer of a licence to sell beer to be consumed on or off premises in respect of which such a licence was in force on the 1st of May, 1869, and has since been renewed from time to time, the discretion of the justices is limited, as it is on an application at the general licensing meeting for a grant by way of renewal of the licence, and the application for the transfer can only be refused on one or more of the four grounds specified in the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), ss. 8, 19. *Simonds* v. *Blackheath JJ.*, 55 L. J., M. C. 166; 17 Q. B. D. 765; 35 W. R. 167; 50 J. P. 742.

Effect of previous Hearing.]—The holder of a licence to sell beer in a house of which he was occupier, gave the notices required by 32 & 33 Vict. c. 27, s. 7, of his intention to apply for a certificate authorising a licence under that act for the sale of beer in that house. On his application at the general annual licensing meeting on the 20th of August, the certificate was refused upon the ground that he had been convicted of misconduct when occupying another licensed house. The meeting was adjourned to the 17th September. On the 25th August A. gave notice that he should apply at the adjourned meeting for a certificate in respect of the same house then occupied by him. The justices refused to hear the application, and upon appeal to the quarter sessions the appeal was dismissed, on the ground that the notice was too late:—Held, that the refusal of a certificate to the former occupier was no bar to the application by A. *Reg.* v. *Yorkshire, W. R., JJ., Drake, Ex parte*, 10 B. & S. 84; 39 L. J., M. C. 17; L. R. 5 Q. B. 33; 21 L. T. 490; 18 W. R. 259.

5. Personal Liability of Justices.

Refusal of Licence.]—A mandamus was refused where justices had refused an application for a licence, although it was suggested that their refusal proceeded from a mistaken view of their jurisdiction. *Rex* v. *Farringdon Without JJ.*, 4 D. & R. 735. S. P., *Giles, In re*, 2 Str. 181.

An action does not lie against justices for refusing to grant a licence. *Bassett* v. *Godschall*, 3 Wils. 121.

An information was granted against justices of the peace for refusing to grant an ale licence from motives of resentment. *Rex* v. *Harris*, 3 Burr. 1716. And see *Rex* v. *Young*, 1 Burr. 556.

An information against a justice, upon a charge of refusing to grant a licence, will be refused if the reasons assigned for the refusal prove false in fact. *Rex* v. *Athay*, 2 Burr. 653.

An information was granted for refusing to grant licences to those publicans who voted against their recommendation of candidates for members of parliament for the borough. *Rex* v. *Williams*, 3 Burr. 1317. S. P., *Rex* v. *Price*, 3 Burr. 1716.

Improper Grant.]—An information will be granted against a justice of the peace, as well for granting as for refusing an ale licence improperly. *Rex* v. *Holland*, 1 Term Rep. 692; 1 R. R. 362.

Taking Illegal Fees.]—Where the mayor of an ancient borough, in which he was also a justice of the peace, took a fee of 4*s.* from a publican resident within the borough, for renewing his annual licence, and though for fifty-seven years a similar fee had been uniformly received by the mayor for the time being, from every publican within the borough applying to renew his licence:—Held, that such fee was illegal, and might be recovered as money had and received, as the payment could not be considered as voluntary, so as to preclude the party from recovering. *Morgan* v. *Palmer*, 4 D. & R. 283; 2 B. & C. 729; 2 L. J. (o.s.) K. B. 145; 26 R. R. 537.

6. Appeals.

To Quarter Sessions—Refusal to Renew.]—The right of appeal to quarter sessions from a refusal of licensing justices to renew a certificate for a licence to sell beer not to be consumed on the premises, has not been taken away by the Beer Dealers Retail Licences Act, 1882 (45 & 46 Vict. c. 34), s. 1. *Reg.* v. *Schneider*, or *Downing* v. *Schneider*, 52 L. J., M. C. 51; 11 Q. B. D. 66; 48 L. T. 482; 47 J. P. 376.

—— **Refusal to Renew Provisional Licence.**]—Appeal lies to quarter sessions against the refusal of justices to renew a provisional licence. *Reg.* v. *County of London JJ.*, 59 L. J., M. C. 71; 24 Q. B. D. 341; 62 L. T. 458; 38 W. R. 269; 54 J. P. 213.

—— **Refusal to Renew—When Proper Remedy.**]—By the Wine and Beerhouse Act, 1869, s. 8, all the provisions of 9 Geo. 4, c. 61, ss. 27–29, as to appeal (to quarter sessions) from any act of any justice, shall, as far as may be, have effect with respect to the grant of certificates under this act. By the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 75, and schedule 2, ss. 27–29 of Geo. 4, c. 71, are repealed, "except in so far as the sections relate to the renewal or transfer of licences under ss. 4 and 14 of the same act":—Held, that as 32 & 33 Vict. c. 27, s. 8, was left wholly unrepealed, the appeal given under that section by reference to 9 Geo. 4, c. 61, ss. 27–29, remained, notwithstanding the repeal of those sections, and, therefore, justices having refused a certificate for a licence to sell beer, &c., not to be consumed on the premises, on other grounds than those prescribed by 32 & 33 Vict. c. 27, s. 8, the court refused a mandamus on the ground that the applicant might have appealed to the quarter sessions. *Reg.* v. *Smith*, or *Lancashire JJ.*, 42 L. J., M. C. 46; L. R. 8 Q. B. 146; 28 L. T. 129; 21 W. R. 382.

—— **Refusal to Transfer.**]—The holder of an "on" beerhouse licence existing since 1869, received notice of opposition to the renewal. He did not apply for the renewal either at the general annual licensing meeting or the adjournment, and went out of possession on the latter day, when a new tenant entered. The latter applied at the next transfer sessions for a grant of the licence under s. 14 of 9 Geo. 4, c. 61, but the justices refused it. On appeal the quarter sessions held that no appeal would lie, as the case was not within the definition of "transfer" in the Licensing Act, 1872:—Held, that quarter sessions were wrong, and that there was an appeal preserved by the schedule of the Licensing Act, 1872, as to all applications under s. 14 of 9 Geo. 4, c. 61. *Thornton* v. *Clegg*, 59 L. J., M. C. 6; 24 Q. B. D. 132; 61 L. T. 562; 38 W. R. 160; 53 J. P. 742.

The appeal clauses of 9 Geo. 4, c. 61 (the Intoxicating Liquors Licensing Act, 1828), are incorporated in 37 & 38 Vict. c. 49 (the Licensing Act, 1874), s, 15, and therefore when the licence of a public-housekeeper is forfeited by conviction under 35 & 36 Vict. c. 94, s. 9, and the owner of the premises duly applies under 37 & 38 Vict. c. 49, s. 15, to special sessions for a licence and it is refused, he has a right of appeal to quarter sessions *Reg.* or *Newton* v. *Yorkshire, W. R., JJ.*, 52 L. J., M. C. 99; 11 Q. B. D. 417.

—— **Illegal Procedure.**]—When the decision of justices was defective by reason of illegal procedure, it was held that the court of quarter sessions had no jurisdiction to affirm it, as it was within their province to consider whether the procedure at the licensing meeting was legal or not. *Reg.* v. *Eales*, 42 L. T. 735; 44 J. P. 553.

—— **Entry of Appeal—Rule of Sessions.**]—A court of quarter sessions has no power to refuse to allow the entry of an appeal against the refusal of justices to grant a certificate for a licence, on the ground of noncompliance with a rule of the sessions requiring that appeals must be entered and the grounds of appeal given to the clerk of the peace three clear days before the first day of sessions, when all the requirements of 9 Geo. 4, c. 61, s. 27, have been complied with. *Reg.* v. *Pawlett*, 42 L. J., M. C. 157; L. R. 8 Q. B. 491; 29 L. T. 390.

A court of quarter sessions, having refused solely on such a ground to allow an appeal to be entered on the first day of sessions, made an order under 12 & 13 Vict. c. 65, s. 6, for the payment of costs by the appellant to the respondents, as on an appeal which had not been entered or prosecuted:—Held, that the order for payment of costs must be quashed. *Ib.*

Person aggrieved—Who is.]—By 9 Geo. 4, c. 61, s. 27, any person who shall think himself aggrieved by any act of any justices in execution of that act, may appeal against such act to the quarter sessions:—Held, that the words "person who shall think himself aggrieved" mean a person immediately aggrieved, as by refusal of a licence to himself, and not one who is consequentially aggrieved; and therefore, that where magistrates had granted a licence to a party to open a public-house not before licensed, within a very short distance of a licensed public-house, the occupier of the latter house could not appeal against such grant. *Rex* v. *Middlesex JJ.*, 3 B. & Ad. 938.

—— **Mortgagor and Mortgagee.**]—The tenant and occupier of a house licensed for the sale of beer on the premises, in 1876 assigned all his interest in the premises for the residue of his term of years, and the benefit of the licence, to the appellants by way of first mortgage to secure the repayment of moneys advanced by them; and by the mortgage deed irrevocably constituted the appellants his attorneys, in his name, and as his act and deed, to do all acts necessary to procure a transfer of the licence. In 1883, the moneys secured by the mortgage being still unpaid the occupier sent a written application for a renewal of his licence to the justices at their annual licensing meeting, and they adjourned the hearing of the application. At the adjourned hearing the appellants applied, as mortgagees, and under their power of attorney, for a renewal of the licence to the occupier, who appeared, but stated that he did not wish for a renewal. No objection was made to the renewal on any of the grounds specified in 32 & 33 Vict. c. 27, which act applied to the occupier's licence. The justices refused the application, and the appellants appealed to quarter sessions in their own names as mortgagees, and also as attorneys of the occupier and in his name, and for and on his behalf. At the hearing the occupier again appeared, and stated that he did not wish the licence to be renewed, and the quarter sessions thereupon affirmed the order of the licensing justices:—Held, first, that the appellants were persons aggrieved, within 9 Geo. 4, c. 61, s. 27, by the refusal of the licensing justices to renew the occupier's licence, and were therefore entitled to appeal to quarter sessions; secondly, that upon the facts stated the licensing justices and the court of quarter sessions were bound to grant the application of the appellants for a renewal of the licence to the occupier. *Garrett* v. *Middlesex JJ.*, or *Reg.* v. *Garrett*, 53 L. J., M. C. 81; 12 Q. B. D. 620; 32 W. R. 646; 48 J. P. 357.

Borough or County Sessions.]—Under 9 Geo. 4, c. 61, s. 27, an appeal lay to the county quarter sessions against the refusal of justices in special sessions to grant an alehouse licence. *Reg.* v. *Deane*, 2 Q. B. 96; 1 G. & D. 192; 10 L. J., M. C. 126

In a borough having a separate court of quarter sessions under 5 & 6 Will. 4, c. 76, s. 103, the

recorder cannot try an appeal against such refusal, that power being withheld from him by s. 105. *Ib.* S. P., *Reg.* v. *Cockburn* or *Bristol Recorder*, 4 El. & Bl. 265 ; 24 L. J., M. C. 43 ; 1 Jur. (N.S). 373 ; 3 W. R. 69.

But an appeal against refusal of a licence by justices of such borough may still be tried at the quarter sessions. *Ib.*

Admissibility of Fresh Evidence.]—An application for a licence for beer to be consumed on premises not licensed before, was refused on the ground that there was no want of a new beerhouse in the neighbourhood. On appeal to the quarter sessions the justices refused to receive evidence to support this ground of refusal :—Held, that this decision was wrong, and that such an inquiry may be gone into, this application not coming within either of the cases where, under 32 & 33 Vict. c. 27, ss. 8, 19, the grounds of refusal are limited. *Reg.* v. *Lancashire JJ., Tyson, In re*, 40 L. J., M. C. 17 ; L. R. 6 Q. B. 97 ; 23 L. T. 461 ; 19 W. R. 204.

At an annual licensing meeting a certificate for the sale of beer, &c., to be consumed on the premises, was refused in respect of a house whereof a licence was in force on the 1st of May, 1869, for the sale by retail of beer, &c., to be consumed on the premises. The ground of refusal was that the applicant failed to give satisfactory evidence of character. At an appeal to the quarter sessions evidence not before given at the licensing meeting was tendered :—Held, that the appellant had a right to a rehearing of the case at the quarter sessions, and that fresh evidence was therefore admissible. *Reg.* v. *Pilgrim*, 40 L. J., M. C. 3 ; L. R. 6 Q. B. 89 ; 23 L. T. 410 ; 19 W. R. 99.

Fresh Ground of Objection.]—Where justices have refused a renewal of an "on" beer licence existing before 1869, upon one of the grounds specified in s. 8 of 32 & 33 Vict. c. 27, the quarter sessions upon appeal may determine the case upon another of the grounds specified, provided the notice of objection sets out the latter ground. *Whiffen* v. *Blyth*, infra, col. 440.

The holder of an "on" beer licence existing before 1869 applied for a renewal. No notice of opposition was served upon him, but the justices refused the renewal on the ground of personal unfitness of the licensee. The licensee appealed to quarter sessions, and seven days before the hearing of the appeal a notice of opposition was given by the police :—Held, that the quarter sessions had no jurisdiction to entertain such grounds of opposition. *Hoskings* v. *Powell*, 55 J. P. 358.

—— **Res Judicata.**]—After the licensed tenant had gone out of occupation, and before the licence expired, H., as a new tenant, applied to the general annual licensing meeting for the renewal to him of a licence of a beerhouse, licensed before and continuously since 1st May, 1869, but it was refused on the ground of the disorderly character of the house. From this refusal H. appealed to quarter sessions, and the appeal was dismissed after a full hearing. After the expiration of the licence, H. applied to the special sessions for a new licence in his own name, which was refused on the same grounds after a full hearing. H. appealed to quarter sessions, who refused to rehear the evidence, and dismissed the appeal as res judicata. H. applied for a mandamus for a rehearing :—Held, that a mandamus should not be granted. *Reg.* v. *Yorkshire, W. R., JJ., Hill, Ex parte*, 59 J. P. 278.

—— **Grounds of Refusal to renew Licence not stated—Duty of Quarter Sessions.**]—Licensing justices refused to renew the licence of the appellant in respect of a beerhouse which had been licensed on and ever since 1st May, 1869, and stated no grounds for their refusal. On appeal, the court of quarter sessions declined to decide in favour of the appellant, merely on the ground that the licensing justices had not stated the grounds of their refusal. The appellant then withdrew from the proceedings, and the court of quarter sessions proceeded with the hearing of the appeal on its merits, and affirmed the decision of the licensing justices :—Held, that the court of quarter sessions had heard and determined the appeal, and that a rule nisi for a mandamus, requiring that court to hear and determine it, ought not to be granted. *Gorman, Ex parte*, 63 L. J., M. C. 84 ; [1894] A. C. 23 ; 6 R. 89 ; 70 L. T. 46 ; 58 J. P. 316—H. L. (E.)

Rehearing — Waiver of Irregularity by Appearance.]—At an annual licensing meeting an objection was raised to the renewal of the licence of the appellant, the tenant of a beerhouse licensed prior to 1st May, 1869, and the justices directed that notice of objection should be given to him, under s. 42 of the Licensing Act, 1872, and adjourned the meeting. This notice was given by the superintendent of police, and did not express on the face of it that it was given by direction of the justices. The grounds stated in the notice were that persons had been found drunk and disorderly on the premises, and that persons of bad character frequented the premises. The appellant attended at the adjourned meeting, and the justices refused to renew the licence on the ground that he had not produced satisfactory evidence of good character. On appeal to quarter sessions the court refused to renew the licence on the ground that the house was frequented by bad characters. On a case stated :—Held, that the absence of intimation that the notice was given by direction of the justices was an irregularity which was waived by the appearance of the appellant. *Whiffen* v. *Blyth*, 61 L. J., M. C. 82 ; [1892] 1 Q. B. 362 ; 66 L. T. 333 ; 40 W. R. 293 ; 56 J. P. 325—C. A.

Notice of Appeal—Irregularity.]—The notice would not have been irregular if it had stated that it was given by the superintendent of police, or by the clerk to the justices "by direction of the justices sitting at the general annual licensing meeting." *Ib.*

—— **Invalid Notice—Mandamus to Petty Sessions.**]—Where a person applies for the renewal of a licence that is refused, and he appeals to quarter sessions but gives an invalid notice of appeal, he is not entitled to a mandamus to petty sessions to rehear the application. *Reg.* v. *Gloucester JJ., Reg.* v. *Bristol JJ.*, 5 R. 276 ; 68 L. T. 225 ; 41 W. R. 379 ; 57 J. P. 486.

—— **On whom Served.**]—Justices, when acting as licensing justices, under 9 Geo. 4, c. 61, are a "court of summary jurisdiction" within

the meaning of the Summary Jurisdiction Acts, and the Interpretation Act, 1889, s. 13, sub-s. 11; and consequently the provisions of s. 31 of the Summary Jurisdiction Act, 1879, as to service of notice of appeal on the justices' clerk. *Reg.* v. *Glamorganshire JJ.*, 61 L. J., M. C. 169; [1892] 1 Q. B. 621; 66 L. T. 444; 40 W. R. 436; 56 J. P. 437—C. A. But see *Boulter* v. *Kent JJ.*, infra, col. 443.

—— **Service of Notice on "the other Party"—Superintendent of Police opposing Renewal.**]—Where a superintendent of police has served notice of opposition to the renewal of a licence, and has appeared before the licensing justices in support of his opposition, he is "the other party" to the proceedings within the meaning of s. 31 of the Summary Jurisdiction Act, 1879; a person aggrieved by the refusal of the justices to renew the licence must, therefore, as a condition precedent to the hearing of his appeal to quarter sessions, serve upon the superintendent notice of his intention to appeal. *Reg.* v. *Glamorganshire JJ.*, supra; and *Price* v. *James*, infra, col. 442, followed. *Reg.* v. *Gloucester JJ.*, *Reg.* v. *Bristol JJ.*, 5 R. 276; 68 L. T. 225; 41 W. R. 379; 57 J. P. 486.

—— **Time Prescribed.**]—Notice of appeal from the licensing justices of quarter sessions under the Alehouse Act, 1828 (9 Geo. 4, c. 61), s. 57, should now be given in accordance with the provisions of s. 51, sub-s. 2, of the Summary Jurisdiction Act, 1879, within seven days after the day on which judgment was given. *Reg.* v. *Yorkshire, W. R., JJ., Hawkins, Ex parte*, 64 L. J., M. C. 192.

Majority of Justices present—Some Justices refusing to Vote.]—At an appeal to quarter sessions from a refusal to renew a licence, sixteen justices were present and heard the case, but two refused to vote, while eight were for renewing the licence, and six were against it:—Held, that the whole sixteen justices must be counted, and there being no majority in favour of the renewal, the result was that it was refused. *Garton* v. *Southampton JJ.*, 57 J. P. 328.

Court equally divided—Withdrawal of one Justice.]—Upon hearing an appeal from a refusal by licensing justices to renew the licence of a public-house, the court of quarter sessions was equally divided. Ultimately a justice who was in favour of allowing the appeal withdrew from the court, and the remaining members of the court dismissed the appeal. The appellant applied for a rule nisi for a mandamus requiring the court of quarter sessions to hear and determine the appeal:—Held, (i.) that s. 9 of the Licensing Act, 1828 (9 Geo. 4, c. 61), did not apply to the determination of appeals at quarter sessions, and (ii.) that it was competent for the justices who composed the court after the withdrawal of the retiring member to decide the case; and that therefore the appeal had been heard and determined, and a rule nisi for a mandamus ought not to be granted. *Evans, Ex parte*, 63 L. J., M. C. 81; [1894] A. C. 16; 6 R. 82; 70 L. T. 45; 58 J. P. 260—H. L. (E.)

Appeal by way of Special Case—Power of Justices.]—Justices when acting as licensing justices are a "court of summary jurisdiction," and the provisions of s. 33 of the Summary Jurisdiction Act, 1879, giving justices power to state a case on a question of law, apply to such a court. *Reg.* v. *Glamorganshire JJ.*, 61 L. J., M. C. 169; [1892] 1 Q. B. 621; 66 L. T. 444; 40 W. R. 436; 56 J. P. 437—C. A. But see *Boulter* v. *Kent JJ.*, infra, col. 443.

—— **Parties — Respondent.**]—When a case was stated in reference to the refusal of a licence, the superintendent of police of the division, who had appeared to oppose the licence before the justices, and to whom notice in writing of the appeal had been given by the appellant, was rightly constituted respondent. *Price* v. *James*, 61 L. J., M. C. 203; [1892] 2 Q. B. 428; 67 L. T. 543; 41 W. R. 57; 56 J. P. 471—C. A.

Costs.]—The sessions hearing an appeal against the refusal of justices to grant a licence, cannot adjourn such appeal to a subsequent session for the purpose of awarding costs there, after taxation in the interval. *Reg.* v. *Belton*, 11 Q. B. 379; 3 New Sess. Cas. 77; 17 L. J., M. C. 70.

Upon appeal against an order refusing a licence, under 9 Geo. 4, c. 61, the sessions in October dismissed the appeal, and ordered the appellant forthwith to pay to the respondents, or to whom they should appoint, certain costs. The order was drawn up with a blank for the amount of the costs. The sessions were adjourned to November, and in the interval the clerk of the peace taxed the costs, and inserted the amount in the order. The January quarter sessions estreated the recognizances of the appellant and his sureties, upon proof that a demand had been made of the costs, and non-payment:—Held, first, that 12 & 13 Vict. c. 45, s. 18, did not take away the jurisdiction given by 9 Geo. 4, c. 61, s. 27, to order costs on appeal from a refusal to grant an alehouse licence, but gave an additional remedy for enforcing such order. *Reg.* v. *Ely JJ.*, 5 El. & Bl. 489; 25 L. J., M. C. 1; 1 Jur. (N.S.) 1017; 4 W. R. 5.

Held, secondly, that there was no forfeiture of the recognizances at the sessions in October or November, and that the January quarter sessions had jurisdiction to order the recognizances to be estreated, under 3 Geo. 4, c. 46, s. 2. *Ib.*

Upon an appeal against a refusal of justices at petty sessions to grant an alehouse licence, the quarter sessions reversed such refusal, and ordered the licence to be granted, and the quarter sessions further ordered the justices to pay the appellant on demand 35*l.* 19*s.* 10*d.* for his costs:—Held, that that part of the order awarding costs was bad, inasmuch as it did not follow the directions as to the payment of costs contained in 12 & 13 Vict. c. 45, s. 5, and 11 & 12 Vict. c. 43, s. 27, which require the costs in the first instance to be paid to the clerk of the peace. *Reg.* v. *Peek*, 20 L. T. 393.

Where licensing justices, on an appeal to quarter sessions against the refusal of a licence, themselves act as objectors, and actively oppose the appeal, they become "parties" to the appeal, and the quarter sessions have jurisdiction to refuse them their costs, or even, semble, to order them to pay costs. Therefore, in such a case, though the appeal has been dismissed, a mandamus will not be granted requiring the quarter sessions to award to the licensing justices indemnity costs under s. 29 of the Licensing Act, 1828. But, semble, if the justices either do not appear at all on the appeal, or appear only for the purpose of informing the quarter sessions upon what grounds they acted, they are not parties, and are entitled

if the appeal is dismissed, to indemnity costs: and therefore, in such a case a mandamus would go to compel the quarter sessions to award them such costs. *Reg.* v. *County of London JJ.*, 64 L. J., M. C. 100; [1895] 1 Q. B. 616; 14 R. 246; 72 L. T. 211; 43 W. R. 387; 59 J. P. 820—C. A.

Licensing justices are not a court of summary jurisdiction, and when on appeal to quarter sessions from their refusal at the instance of an objector to renew the licence, a renewal has been granted, there is no jurisdiction to give costs against the objector. *Boulter* v. *Kent JJ.*, 66 L. J., Q. B. 787; [1897] A. C. 556; 77 L. T. 288; 46 W. R. 114; 61 J. P. 532—H. L. (E.)

E. OFFENCES AGAINST LICENCE.

1. ADULTERATING LIQUORS.

Penalties for—Liability.]—A keeper of a beershop, licensed under 11 Geo. 4 & 1 Will. 4, c. 64, and 4 & 5 Will. 4, c. 85, is liable, not only to the penalties given by those acts for the adulterating or selling adulterated beer, but also to the penalties given by 56 Geo. 3, c. 58, s. 2, for having in his possession any of the prohibited articles therein specified, or any other article or preparation to be used as a substitute for malt or hops. *Att.-Gen.* v. *Lockwood*, 9 M. & W. 378; 6 Jur. 171. Affirmed in error, 10 M. & W. 464.

In order to render such a person liable to those penalties for having in his possession any of the articles enumerated in 56 Geo. 3, c. 58, s. 2, it is unnecessary to aver or prove, either that the party had them in his possession to be used as a substitute for malt or hops, or that he had them in his possession with any criminal intention. *Ib.*

But, where an information is for having in his possession any article not designated by name in that section, it is necessary to shew that it was intended to be used as a substitute for malt or hops in the adulteration of beer. *Ib.*

An information which on 56 Geo. 3, c. 58, s. 2, charged that a retailer of beer received and took into, and had in, his custody and possession, a large quantity of liquorice, is not double. *Ib.*

A publican sold, as a bottle of gin, liquid composed of 26 per cent. alcohol, 70 per cent. water, and 4 per cent. sugar. Evidence was adduced that gin was sold by retailers at varying strength from proof to 20 per cent. under proof. This liquid was 44 per cent. under proof, but the analyst said he should call it "gin whose alcoholic strength was exceedingly low." Justices convicted the publican under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6:—Held, that the facts justified the finding that this liquid was not of the quality of gin, but that the excess of water was a fraudulent increase of the measure of the article within the enacting part of the section. *Pashler* v. *Stevenitt*, 35 L. T. 862.

A publican was convicted under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6, for selling to the prejudice of the purchaser a pint of gin which was not of the nature, substance and quality of the article demanded by such purchaser. A person asked for a pint of gin at the publican's premises. He said that he had gin at 2*s.* and 1*s.* 4*d.* per pint. The purchaser bought a pint at the latter price. On analysis the gin was found to contain 43·15 per cent. of water, that is, it was 43·15 below proof, but the mixture was not injurious to health. The magistrate found that there was no recognised standard of alcoholic strength for gin, but that it varied from proof to twenty under proof:—Held, that whether the mixture in question was what a purchaser buying gin without any further description would reasonably expect to receive was a question of fact for the magistrate; and that there was sufficient evidence to justify the conviction. *Webb* v. *Knight*, 46 L. J., M. C. 264; 2 Q. B. D. 530; 36 L. T. 791; 26 W. R. 14—C. A.

By s. 6 of 42 & 43 Vict. c. 30, it is provided that "in determining whether an offence has been committed under 38 & 39 Vict. c. 63, s. 6, by selling to the prejudice of the purchaser spirits not adulterated otherwise than by the admixture of water, it shall be a good defence to prove that such admixture has not reduced the spirit more than . . . 35 degrees under proof for gin." The appellant sold to the respondent gin more than 35 degrees under proof, but, at the time of sale, brought to his knowledge a printed notice hanging up in the room to the effect that all spirits were sold "as diluted spirits, no alcoholic strength guaranteed":—Held, that although the appellant had not a good defence under 42 & 43 Vict. c. 30, s. 6, he was not by that section deprived of any defence which he would have had under 38 & 39 Vict. c. 63, and that the sale not having been to the prejudice of the purchaser, no offence had been committed under 38 & 39 Vict. c. 63, s. 6. *Gage* v. *Elsey*, 52 L. J., M. C. 44; 10 Q. B. D. 518; 48 L. T. 226; 31 W. R. 500; 47 J. P. 391.

Dilution of Beer by Publican—Mixing Beers of different Strengths.]—By s. 8, sub-s. 2, of the Customs and Inland Revenue Act, 1885, "a dealer in or retailer of beer shall not adulterate or dilute beer, or add anything thereto, except finings for the purpose of clarification." The appellant, a publican, had in his cellar a cask of beer supplied by a firm of brewers, and also a quantity of small beer of much less strength. He drew off a certain quantity from the cask of stronger beer, and filled it up with small beer, adding some finings for clarification; the result, as tested by the quantity of proof spirit in the two kinds of beer, was that the mixture was about 15 per cent. weaker than the beer which was in the cask as it came from the brewers. No water or any other matter or thing (except the finings) was added to the beer. On appeal against a conviction for "diluting" beer under the above section:—Held, that the mixing of the two kinds of beer amounted to a dilution of the stronger beer, and that the appellant was properly convicted. *Crofts* v. *Taylor*, 56 L. J., M. C. 137; 19 Q. B. D. 524; 57 L. T. 310; 36 W. R. 47; 16 Cox, C. C. 294; 51 J. P. 532, 789.

2. PERMITTING UNLAWFUL ASSEMBLIES.

Known Thieves.]—A beerhouse-keeper who occupied a place where excisable liquors were sold, allowed a meeting to be held there for the purpose of getting up a subscription in aid of the wife and children of a man charged with an offence, or for procuring means for his defence. At the meeting were several thieves, or reputed thieves, who were known by him to be such; but no disorderly conduct occurred, and the meeting was not held pursuant to any unlawful design:—Held, that such an assemblage is forbidden by 32 & 33 Vict. c. 99 (Habitual Criminals Act,

1869), s. 10, inasmuch as it affords opportunity and inducement to devise crimes, and that he was guilty of an offence within the meaning of the section. *Marshall* v. *Fox*, 40 L. J., M. C. 142 ; L. R. 6 Q. B. 370 ; 24 L. T. 751 ; 19 W. R. 1108.

Information—Witnesses.]—On the hearing of an information before two justices of the peace, against a person licensed to sell excisable liquors by retail, for that he did "unlawfully and knowingly permit and suffer persons of notoriously bad character to assemble and meet together in his house and premises" :—Held, that he was not a competent witness. *Parker* v. *Green*, 2 B. & S. 299 ; 31 L. J., M. C. 133 ; 8 Jur. (N.S.) 409 ; 6 L. T. 46 ; 10 W. R. 316 ; 9 Cox, C. C. 169.

3. Permitting Disorderly Conduct.

Suffering Prostitutes to Assemble.]—By the Towns Police Clauses Act (10 & 11 Vict. c. 89), s. 35, every person keeping any house, shop, room, or other place of public resort for the sale or consumption of refreshments of any kind, who suffers prostitutes to assemble therein, is subject to a penalty :—Held, that the keeper of a licensed alehouse was within the section, which was therefore cumulative upon other enactments relating to such houses. *Cole* v. *Coulton*, 2 El. & El. 695 ; 29 L. J., M. C. 125 ; 6 Jur. (N.S.) 698 ; 2 L. T. 216 ; 8 W. R. 412.

Prostitutes, as such, are "persons of notoriously bad character" within the meaning of the licence granted under 9 Geo. 4, c. 61. *Parker* v. *Green*, infra.

—— **Scienter.**]—The fact that the same disorderly persons had been seen in the house of an innkeeper, charged for unlawfully permitting and suffering persons of notoriously bad character to assemble and meet together in his house against the tenor of his licence and in his presence, upon other occasions previously to the day to which the information related, was evidence of his knowledge of their character and pursuits. *Parker* v. *Green*, 2 B. & S. 299 ; 31 L. J., M. C. 133 ; 8 Jur. (N.S.) 409 ; 6 L. T. 46 ; 10 W. R. 316 ; 9 Cox, C. C. 169.

—— **Purpose of the Assembly.**]—The Dublin Police Act (5 & 6 Vict. c. 24, s. 7) provides that every person who shall have or keep any house where provisions, liquors or other refreshments are sold or consumed and who shall knowingly permit or suffer prostitutes or persons of notoriously bad character to meet or remain therein shall for every such offence be liable to a penalty of not more than 5*l*. To justify a conviction it is not enough that prostitutes assembled in the house, the magistrate must be satisfied also that they met there for the purpose of prostitution or other disorderly conduct. *Murphy* v. *Ahern*, 18 W. R. 71.

In order to convict a keeper of refreshment-rooms licensed under 23 & 24 Vict. c. 27, of the offence created by s. 32, of knowingly suffering prostitutes to assemble and continue upon his premises, it is not necessary that there should be any indecency in the house ; all that the magistrate has to determine is, whether the facts proved fairly lead to the inference that women came to the house to the keeper's knowledge, not merely to obtain refreshment, but for the purpose of meeting men, as prostitutes. *Belasco* v. *Hannant*, 3 B. & S. 13 ; 31 L. J., M. C. 225 ; 8 Jur. (N.S.) 1226 ; 6 L. T. 577 ; 10 W. R. 867 ; 9 Cox, C. C. 203.

W., a freeman of the Vintners Company of London, selling foreign wines without licence, was subjected by a local act to the same penalties as those licensed to sell. In his house one night a constable saw forty prostitutes, about half of them taking refreshments, and talking with men, and he told W. what they were. An hour afterwards some of the women were there with other prostitutes, only a few of them taking refreshments, and they were going out and coming in with men. There was no indecent or improper behaviour :—Held, there was evidence sufficient to sustain a conviction against W. for suffering persons of notoriously bad character to assemble and meet together contrary to the licence. *Whitfield* v. *Bainbridge*, 12 Jur. (N.S.) 919.

—— **Offence by Servant in Charge.**]—If a keeper of a place of public resort leaves his place in the management of a servant, and prostitutes are suffered to meet together and remain in the house, contrary to 2 & 3 Vict. c. 47, s. 44, the mere relation of master and servant neither makes nor prevents the latter from being an aider and abettor in the offence ; and if the servant in knowingly suffering the prostitutes to meet together and remain is carrying out the master's orders, the master is guilty as principal and the servant as aiding and abetting, and the latter may be convicted under 11 & 12 Vict. c. 43, s. 5. *Wilson* v. *Stewart*, 3 B. & S. 913 ; 32 L. J., M. C. 198 ; 9 Jur. (N.S.) 1130 ; 8 L. T. 277 ; 11 W. R. 640 ; 9 Cox, C. C. 354.

Permitting House to be used as a Brothel—Evidence.]—P. was a licensed victualler, and during his absence elsewhere at work, the police noticed two prostitutes and two men enter the premises, where they proceeded a little later to occupy a double-bedded room, and after three hours the police, having entered the house, found the two women concealed in the bed with P.'s wife, and the men in a room by themselves. No evidence of previous misconduct against P. was given, and his wife and servants gave no rebutting evidence in his favour :—Held, that there was ample evidence that P. permitted the premises to be a brothel, though he was absent, and no previous case of a like kind was proved ; and that the justices were not bound to state a case, there being no point of law raised before them. *Reg.* v. *Holland JJ.*, 46 J. P. 312.

4. Permitting Gaming.

Evidence of Knowledge.]—In order to support a conviction under the Licensing Act, 1872 (35 & 36 Vict. c. 94, s. 17), by which if any person licensed under the act "suffers any gaming or any unlawful game to be carried on on his premises" he is made liable to certain penalties—it is necessary to give some evidence of actual or constructive knowledge on the part of the person charged that gaming was carried on on his premises. *Bosley* v. *Davies*, 45 L. J., M. C. 27 ; 1 Q. B. D. 84 ; 33 L. T. 528 ; 24 W. R. 140.

At the hearing of an information against an hotel-keeper for suffering gaming on his licensed premises, it was proved that a police constable, about half-past twelve in the morning, was in the street in which the premises were situate.

Two of the windows had the blinds up, so that the constable could see three gentlemen, and from what they said it was evident that they were playing cards. He waited for about a quarter of an hour, when the front door was opened by one of the waiters, and he then entered and went upstairs to the room, and found six gentlemen round a table with a quantity of money on it. The manageress of the hotel said that she did not know that they were playing cards, and that they did not have the cards of her, and her statement was confirmed by the card-players, who were in a private room. The hotel-keeper having been convicted:—Held, that the case must be sent back to the justices with an intimation of the opinion of the court that, though actual knowledge on the part of the hotel-keeper or his servants, in the sense of seeing or knowing of, the card-playing, was not necessary to be shewn, yet that some circumstances must be proved from which it could be inferred that they connived at what was going on. *Ib.*

The offence of suffering gaming on licensed premises may be committed by connivance, either on the part of the principal or the person in charge. *Redgate* v. *Haynes*, 45 L. J., M. C. 65; 1 Q. B. D. 89; 33 L. T. 779.

A gentleman took a sitting-room and three bed-rooms in an hotel; one of these bed-rooms was occupied by himself, the other two by a horse trainer and jockey, both of whom lived in the immediate neighbourhood. The hotel-keeper retired to bed shortly before 11 P.M. and the hall porter was left in charge. Between 1.30 and 2.15 the following morning the three persons were discovered in the sitting-room playing cards for money, the noise they made having been heard outside the premises. During all this time the hall porter, whose duty it was to stay up and attend to customers, was in a parlour at the extreme end of the house where he could not hear what was going on:—Held, that there was sufficient evidence to convict the hotel-keeper of suffering gaming on her premises, and that it was unnecessary to prove an actual knowledge on her part of what was going on. *Ib.*

Where gaming had taken place upon licensed premises to the knowledge of a servant of the licensed person employed on the premises, but there was no evidence to show any connivance or wilful blindness on the part of the licensed person, and it did not appear that the servant was in charge of the premises:—Held, that the justices were right in refusing to convict the licensed person of suffering gaming on the premises under the Licensing Act, 1872, s. 17. *Mullins* v. *Collins* (L. R. 9 Q. B. 292) discussed. *Somerset* v. *Hart*, 53 L. J., M. C. 77; 12 Q. B. D. 360; 48 J. P. 327.

Where gaming had taken place upon licensed premises to the knowledge of a servant of the licensed person who was in charge of the premises, but without any knowledge or connivance on the part of the licensed person:—Held, that the licensed person had suffered gaming to be carried on on the premises within the meaning of s. 17 of the Licensing Act, 1872, and was rightly convicted. *Somerset* v. *Hart* (12 Q. B. D. 360) distinguished. *Bond* v. *Evans*, 57 L. J., M. C. 105; 21 Q. B. D. 249; 59 L. T. 411; 36 W. R. 767; 52 J. P. 612.

By Private Friends.]—A licensed person was after the hours of closing bonâ fide entertaining some private friends at his own expense, and these friends, in his company, were playing cards for money. He was convicted under the Licensing Act, 1872, s. 17, for suffering gaming to be carried on on his premises:—Held, that there was nothing in s. 30 of the Licensing Act, 1874 (37 & 38 Vict. c. 49), which exempts from liability for supplying intoxicating liquors to private friends, to render this conviction unlawful. *Hare* v. *Osborn*, 34 L. T. 294.

An innkeeper is guilty of an offence against the tenor of his licence if he allows friends, whom he has invited for the purpose, to play at cards for money in a private room. *Patten* v. *Rhymer*, 3 El. & El. 1; 29 L. J., M. C. 189; 6 Jur. (N.S.) 1030; 2 L. T. 352; 8 W. R. 496.

Gaming, what is.]—A licensed person suffered to be played on the licensed premises a game called "puff and dart," the object in which is to hit a mark on a target with a small dart blown through a tube. The players each contributed 2*d.* as entrance money, the total sum so contributed being applied to the purchase of a rabbit as a prize for the winner of the game:—Held, that he was rightly convicted of suffering gaming on the licensed premises under 35 & 36 Vict. c. 94, s. 17, sub-s. 1. *Bew* v. *Harston*, 47 L. J., M. C. 121; 3 Q. B. D. 454; 39 L. T. 233; 26 W. R. 915.

Four persons, including a licensed beerseller, played, on the licensed premises, twenty or thirty games at ten-pins for a pint of beer each game, the beer being supplied as it was won or lost, and being drunk by all the players, but paid for only by the losers:—Held, that this was an offence against his licence, which provided that he should not "knowingly suffer any unlawful games or any gaming whatsoever" (in 9 Geo. 4, c. 61, ss. 13 and 21) on the licensed premises, and that he had been rightly convicted. *Danford* v. *Taylor*, 20 L. T. 483.

9 Geo. 4, c. 61, s. 21, provides that an innkeeper shall not "knowingly suffer any unlawful games, or any gaming whatsoever," in his inn. A. was convicted upon an information that he did "knowingly suffer an unlawful game, to wit, the game of dominoes, to be played in his house":—Held, that the information charged no offence within 9 Geo. 4, c. 61. *Reg.* v. *Ashton*, 1 El. & Bl. 286; 22 L. J., M. C. 1; 17 Jur. 501.

The appellant, a licensed person, suffered a game of skill called "skittle-pool" to be played for small stakes of money on a billiard table in the licensed premises:—Held, that he could properly be convicted of suffering gaming under the Licensing Act, 1872, s. 17, sub-s. 1. *Dyson* v. *Mason*, 58 L. J., M. C. 55; 22 Q. B. D. 351; 60 L. T. 265; 16 Cox, C. C. 575; 53 J. P. 262.

"Opening, Keeping, or Using" Licensed House for Betting—Penalty.]—A licensed victualler is still liable to summary conviction and a penalty of 100*l.* under s. 3 of the Betting Houses Act of 1853, for "opening, keeping, or using his licensed house for the purpose of betting with persons resorting thereto," notwithstanding that by s. 17 of the Licensing Act, 1872, "any licensed person opening, keeping, or using" his house for the same purpose is liable to a penalty for the first offence of 10*l.*, and for any subsequent offence of 20*l.* together with the liability of having the conviction indorsed upon his licence, there being no implied repeal of s. 3 of the act of 1853 by s. 17 of the act of 1872, but,

on the contrary, that section and its penalties being kept in full force and operation by s. 59 of the last-mentioned act. *Sims* v. *Pay*, 58 L. J., M. C. 39; 60 L. T. 602; 16 Cox, C. C. 609; 53 J. P. 420.

Suffering House to be used in Contravention of the Betting Houses Act.]—The keeper of a licensed house allowed a person who made bets near it to deposit in the house the stakes received by him; such stakes had been received by him outside the house:—Held, that the licensed person was not liable to be convicted for suffering his house to be used in contravention of the Betting Houses Act (16 & 17 Vict. c. 119). *Davis* v. *Stephenson*, 59 L. J., M. C. 73; 24 Q. B. D. 529; 62 L. T. 436; 38 W. R. 492; 17 Cox, C. C. 73; 54 J. P. 565.

5. Permitting Drunkenness.

Scienter.]—A person licensed to sell intoxicating liquors cannot be convicted of "permitting drunkenness" unless he has knowledge of the drunkenness complained of. *Somerset* v. *Wade*, 63 L. J., M. C. 126; [1894] 1 Q. B. 574; 10 R. 105; 70 L. T. 452; 42 W. R. 399; 58 J. P. 231.

Person Drunk on his own Premises.]—The term "licensed premises" as used in the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 12, means licensed premises while they are open to the public for the purposes of the licence; consequently, a licensed person who is found drunk on licensed premises in his own occupation, after licensed hours and when the premises are closed to the public, is not liable to a penalty under s. 12. *Lester* v. *Torrens*, 46 L. J., M. C. 280; 2 Q. B. D. 403; 25 W. R. 691.

A licensed person cannot be convicted of permitting drunkenness under s. 13 of the Licensing Act, 1872, by reason of getting drunk on his own premises. *Warden* v. *Tye*, 46 L. J., M. C. 111; 2 C. P. D. 74; 35 L. T. 852.

Evidence—No evidence of Drink being supplied to Drunken Person.]—To constitute the offence of permitting drunkenness on licensed premises within the meaning of s. 13 of the Licensing Act, 1872, it is unnecessary to prove that the drunken person had been actually served with drink on the premises by the landlord or his servants. *Hope* v. *Warburton*, 61 L. J., M. C. 147; [1892] 2 Q. B. 134; 66 L. T. 589; 40 W. R. 510; 56 J. P. 328.

—— **Person Drunk away from the House.**]—A licensed person may be convicted for permitting drunkenness on his premises upon evidence that a person who had been drinking on such premises was found drunk at some distance from them. *Ethelstane* v. *Oswestry JJ.*, 33 L. T. 339.

—— **Evidence of Sale to Drunken Person.**]—A licensed person charged under s. 13 of the Licensing Act, 1872, with the offence of permitting drunkenness to take place on his premises, may be rightly convicted of that offence, although the evidence shews a sale of intoxicating liquor to a drunken person which is also an offence under the same section. *Edmunds* v. *James*, 61 L. J., M. C. 56; [1892] 1 Q. B. 18; 65 L. T. 675; 40 W. R. 140; 56 J. P. 40.

Sale of Liquor to Drunken Person.]—A publican was convicted by justices of selling intoxicating liquor to a drunken person, though at the hearing it had been proved that the liquor had been ordered and paid for by the sober companion of such drunken person:—Held, that the conviction was right and must be affirmed. *Scatchard* v. *Johnson*, 57 L. J., M. C. 41; 52 J. P. 389.

—— **Sale by Barman—Absence of Licensee.**]—The intention of s. 13 of the Licensing Act, 1872, is that responsibility should lie upon a licensed person for an act done by an employé within the scope of his employment. Therefore, if a barman employed by a licensed person sells intoxicating liquor to a drunken person, the licensed person is liable to the penalties imposed by the section, even though he is not present at the sale and has instructed the barman to refuse to supply intoxicating liquor to drunken persons. *Metropolitan Police Commissioner* v. *Cartman*, 65 L. J., M. C. 113; [1896] 1 Q. B. 655; 74 L. T. 726; 44 W. R. 637; 18 Cox, C. C. 341; 60 J. P. 357.

—— **Knowledge of Condition of Customer.**]—The Licensing Act, 1872, s. 13, makes it an offence for any licensed person to sell any intoxicating liquor to any drunken person. A publican sold intoxicating liquor to a drunken person who had given no indication of intoxication, and without being aware that the person so served was drunk:—Held, that the prohibition was absolute, and that knowledge of the condition of the person served with liquor was not necessary to constitute the offence. *Cundy* v. *Le Coeq*, 53 L. J., M. C. 125; 13 Q. B. D. 207; 51 L. T. 265; 32 W. R. 769; 48 J. P. 599.

Person found Drunk on Licensed Premises—Closing Hours.]—Sect. 12 of the Licensing Act, 1872, which imposes a penalty upon every person found drunk on licensed premises, applies to a person found drunk on licensed premises after closing hours. *Reg.* v. *Pelly*, 66 L. J., Q. B. 519; [1897] 2 Q. B. 33; 76 L. T. 467; 45 W. R. 504; 18 Cox, C. C. 556; 61 J. P. 373.

6. Supplying Liquor to Constables.

Act of Servant.]—The servant of a licensed victualler knowingly supplied liquor to a constable on duty, without the authority of his superior officer:—Held, that the licensed victualler was liable to be convicted under 35 & 36 Vict. c. 94, s. 16, sub-s. 2, although he had no knowledge of the act of his servant. *Mullins* v. *Collins*, 43 L. J., M. C. 67; L. R. 9 Q. B. 292; 29 L. T. 838; 22 W. R. 297.

Mens rea.]—In order to convict the licensee of a public-house under sub-s. 2 of s. 16 of the Licensing Act, 1872, for serving a constable with liquor or refreshment while on duty, mens rea, or knowledge on the part of the defendant that the constable was on duty must be proved. *Sherras* v. *De Rutzen*, 64 L. J., M. C. 218; [1895] 1 Q. B. 918; 15 R. 388; 72 L. T. 839; 43 W. R. 526; 59 J. P. 440.

7. Selling Liquor to be Drunk on the Premises.

On the Premises, what is.]—A person who had a licence to sell beer not to be drunk on the premises delivered beer to a customer through a window which opened on a highway, who then sat down on the window sill and drank it:—Held, not a selling of beer to be drunk on the premises, within 3 & 4 Vict. c. 61, s. 13, and 4 & 5 Will. 4, c. 85, s. 4. *Deal* v. *Schofield*, 8 B. & S. 760; 37 L. J., M. C. 15; L. R. 3 Q. B. 8; 17 L. T. 143; 16 W. R. 77.

A person licensed to sell beer by retail, to be drunk or consumed off the premises, supplied a pint of beer to a traveller who sat upon a bench placed and fastened against the wall of the house, returning the mug in which he was served:—Held, that the beershop keeper was properly convicted of the offence of selling beer to be drunk on the premises, within 4 & 5 Will. 4, c. 85, s. 17. *Cross* v. *Watts*, 13 C. B. (N.S.) 239; 32 L. J., M. C. 73; 9 Jur. (N.S.) 776; 7 L. T. 463; 11 W. R. 210.

A person licensed to sell beer not to be drunk on the premises, sold beer to Y., who brought a jug for it and carried it across the highway to the cottage of S., about fourteen yards from the publican's premises, and handed the jug to S., who was standing in his own garden. S., having drunk some of the beer, returned the jug over the wall to Y. and others, who also drank of it standing on the pathway close to the wall. The jug was refilled two or three times, and the beer drunk in the same way. The publican received the money for the beer on each occasion, and saw or might have seen what was going on:—Held, that this evidence did not justify a conviction of the publican under 35 & 36 Vict. c. 94, s. 5, for permitting drinking "on the premises where the beer was sold, or on any highway adjoining or near such premises, with the privity or consent of the seller." *Bath* v. *White*, 3 C. P. D. 175; 26 W. R. 617.

8. Selling during Prohibited Hours.

Applicable to what Houses.]—By the Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 3, "All premises in which intoxicating liquors are sold by retail" are to be closed during certain hours:—Held, that this enactment was not confined to premises licensed by the justices to sell intoxicating liquors, but included premises in which intoxicating liquors were sold in pursuance of an excise licence granted under 24 & 25 Vict. c. 21. *Martin* v. *Barker*, 50 L. J., M. C. 109; 45 L. T. 214; 29 W. R. 789; 45 J. P. 749.

Wholesale Dealer.] — Wholesale dealers in beer are not liable to the penalties in the licensing acts for selling four and a half gallon casks of beer and upwards in prohibited hours, being expressly exempted by s. 72 of the Licensing Act, 1872. *Reg.* v. *Jenkins*, 61 L. J., M. C. 57; 65 L. T. 857; 40 W. R. 318; 55 J. P. 824.

Hours of Closing.]—A place to be within s. 15 of 3 & 4 Vict. c. 61, must be a place of the same kind as those mentioned before it, and a mere aggregation of houses, though separate from other houses, and known by a distinct name, is not such a place, within the statute. *Scott* v. *Washington*, 13 W. R. 939.

A beerhouse situated in a collection of houses which had acquired the name of Bradley Green, which does not contain a population exceeding 2,500, though part of a parish which has a population exceeding that number, may be kept open until eleven o'clock at night. *Washington* v. *Scott*, 6 B. & S. 617.

A beerhouse was situated in a hamlet maintaining its own poor, the population of which did not exceed 2,500, but the hamlet was part of a parish the population of which exceeded that number:—Held, that if the house was in a place which had not the required population, it was also in a parish which had the required population, within 3 & 4 Vict. c. 61, s. 15, and therefore might be kept open until eleven o'clock at night. *Smith* v. *Redding*, 6 B. & S. 617; 35 L. J., M. C. 202; L. R. 1 Q. B. 489; 12 Jur. (N.S.) 618; 14 L. T. 358.

A house in a hamlet which is more than one mile distant from the spot used as a polling-place for the parliamentary borough, though within one mile from the boundary of the borough, is not privileged to be kept open until eleven o'clock at night. *Ib.*

A beerhouse was situated in a parish partly within a borough and partly in a county; the population of the parish exceeded 2,500, but the population of that part of the parish which was out of the borough, and in which the house was situated, was less than 2,500. The amount of poor-rate assessed on property within the borough was more in the pound than that assessed on property out of the borough:—Held, that the house might be kept open until eleven o'clock at night. *Windsor* v. *Jeffery*, 6 B. & S. 617.

Teignmouth is divided into two parishes, viz. East Teignmouth and West Teignmouth. The former contains less than 2,500 inhabitants: but the two together contain more than that number:—Held, that Teignmouth was a place in which a beershop might lawfully be kept open until eleven p.m., under 3 & 4 Vict. c. 61, s. 15 (repealed), and therefore that a beerhouse-keeper whose house was situate in East Teignmouth, was not liable to be convicted under that section for keeping it open after 10 p.m. *Rice* v. *Slee*, L. R. 7 C. P. 378.

—— **Order for "Particular Locality"—Validity.**]—Under 25 & 26 Vict. c. 35, eleven o'clock at night is the hour appointed for closing public-houses in Scotland, although in special cases, and for well-considered reasons, a deviation is allowed with reference to any "particular locality" requiring it. An order by the magistrates of Rothesay for closing at ten, instead of eleven, though limited by its words to a "particular locality," embraced every public-house in the burgh:—Held, that the order was ultra vires. *Macbeth* v. *Ashley*, L. R. 2 H. L. Sc. 352; 30 L. T. 310.

Grocer's and Draper's Shop joined—Draper's Open after Hours.]—A person being licensed to sell by retail intoxicating liquors to be consumed off his premises, was charged with keeping open his premises for the sale of such liquors after ten o'clock at night. He had two shops, a grocer's and a draper's shop, which formed part of his house, and both shops could be entered from the house at the back, as well as by the customers' entrance. The grocery business was carried on

in a shop which had an entrance for customers in one street, and the drapery business in a shop which had an entrance for customers in another street. During the day there were means of going, and customers occasionally passed from one shop to the other, but after ten o'clock shutters or partitions were put up, and all means of communication, except through the house, prevented. The draper's shop was kept open till after ten o'clock at night; but before ten o'clock the openings between the two shops were shut, and the grocer's shop left in darkness. The justices held the charge proved, and convicted him:—Held, that the conviction was wrong, as there was no evidence that the house was open for the sale of liquor after ten o'clock. *Brigden* v. *Heighes*, 45 L. J., M. C. 58; 1 Q. B. D. 330; 34 L. T. 242; 24 W. R. 272.

The occupier of a draper's and grocer's shop, who is licensed to sell in the same shop wines and spirits not to be consumed on the premises, cannot be convicted under the Licensing Act, 1874 (37 & 38 Vict. c. 49), ss. 3, 9, for keeping open premises for the sale of intoxicating liquors after prohibited hours, upon mere proof that the shop is kept open after the prohibited hours, without any sale or exposure for sale of intoxicating liquor. *Tassell* v. *Ovenden*, 46 L. J., M. C. 228; 2 Q. B. D. 383; 36 L. T. 696; 25 W. R. 692.

T. was charged, under 37 & 38 Vict. c. 49, ss. 3, 9, with keeping open premises (elsewhere than in the metropolitan district) for the sale of intoxicating liquors by retail after ten o'clock in the evening. He occupied a shop where he sold drapery, grocery, and wines and spirits not to be consumed on the premises. One evening, after ten o'clock, his shop was found open. There was no proof of any sale or exposure for sale of intoxicating liquors after ten o'clock, nor that liquors were then kept in any other place in the shop, except in a large wooden case closed with shutters and a lock, which was standing in the shop with a printed notice on it, informing customers that wines and spirits could not be supplied after ten o'clock in the evening:—Held, that he was not liable, for it must be taken that the premises, as regarded the sale of intoxicating liquors, were bonâ fide closed at ten o'clock. *Ib.*

Theatre.]—The exemption in favour of theatre proprietors in s. 72 of the Licensing Act, 1872, does not relieve the proprietor of a theatre from complying with the provisions of the licensing acts as to closing hours; and where a theatre bar is kept open for the sale of intoxicating liquors during the time at which licensed premises are directed to be closed, the proprietor is liable to be convicted under s. 9 of the Licensing Act, 1874. *Gallagher* v. *Rudd*, 67 L. J., Q. B. 65; [1898] 1 Q. B. 114; 77 L. T. 367; 46 W. R. 108; 61 J. P. 789.

Keeping open Billiard Table after Closing of Premises—Beerhouse.]—A beerhouse keeper who has obtained a licence to keep a billiard table, and allows billiards to be played after the closing hour for the beerhouse, is not liable to the penalty in 8 & 9 Vict. c. 103, s. 13, which applies only to victuallers licensed under 9 Geo. 4, c. 61. *Bent* v. *Lister*, 52 J. P. 389.

Public Billiard Table used by Lodgers after Hours.]—By 8 & 9 Vict. c. 109, s. 13, the holder of a victualler's licence, who keeps a public billiard table, and allows persons to play thereon when the premises are not allowed to be open for the sale of wines, &c., is liable to a certain penalty. By 37 & 38 Vict. c. 49, s. 10, a person licensed to sell any intoxicating liquor, to be consumed on the premises, may sell such liquor at any time to persons lodging in his house. A man held a victualler's licence for a certain house at H. The closing hour at H. on week-days is eleven p.m., and after that time two gentlemen, lodgers in the house, were found playing billiards. The justices thought that 8 & 9 Vict. c. 109, s. 13, absolutely prohibited all persons without exception from playing at a public billiard table during closing hours, and that such prohibition was not affected by 37 & 38 Vict. c. 49, s. 10. Accordingly, he was convicted:—Held, that the conviction was right. *Ovenden* v. *Raymond*, 34 L. T. 698.

Evidence as to Sale.]—A. went to a beer-house; the door was shut; the landlady said she could not draw, it was past the hour, but she said she would give A. a drop of beer, which she did. She refused money, but said, "You may send me some greens," which was done:—Held, that there was no evidence to justify a conviction for selling beer after the hours prescribed by the act for closing. *Petherick* v. *Sargent*, 6 L. T. 48.

Persons Privileged—Friends.]—A licensed victualler, entertaining his friends in his house, is not liable to the penalty because he has given them refreshment during the prohibited hours. *Overton* v. *Hunter*, 1 L. T. 366.

Bonâ fide Traveller.]—The holder of a licence invited a friend who lived seven miles away to sing at a concert at his house. Before returning home the friend purchased spirits from the licence-holder, it being after closing hours:—Held, that the friend was a bonâ fide traveller. *Dames* v. *Bond*, 55 J. P. 503.

Lodger.]—By the Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 9, "Any person who during the time at which premises for the sale of intoxicating liquors are directed to be closed . . . sells . . . any intoxicating liquor . . . or allows any intoxicating liquors although purchased before the hours of closing to be consumed in such premises," is liable to a penalty. By s. 10 "nothing in this act . . . contained shall preclude a person licensed to sell any intoxicating liquor to be consumed on the premises, from selling such liquor at any time to bonâ fide travellers or to persons lodging in his house." The appellant, a licensed innkeeper, sold and supplied to a bonâ fide lodger in his house intoxicating liquors which were consumed, during the time at which the premises are directed to be closed, in a private room on the premises by the lodger and bonâ fide guests of the lodger after a dinner given by him to them:—Held, that the appellant was not liable to be convicted under s. 9 of the act. *Pine* v. *Barnes*, 57 L. J., M. C. 28; 20 Q. B. D. 221; 58 L. T. 520; 36 W. R. 473; 52 J. P. 199.

Nature of Liquors Sold.]—Upon an information before justices, under 11 & 12 Vict. c. 49, for the sale of British wine within the prohibited hours, it was proved by a practical chemist that the liquor sold contained a large proportion of alcohol, and the justices found that it was wine within the meaning of the statute:—Held, that their conclusion was warranted by the evidence. *Harris* v. *Jenns*, 30 L. J., M. C. 183; 9 C. B. (N.S.) 152; 3 L. T. 408; 9 W. R. 36.

Application of Act to current as well as future Licences.]—A person was convicted by justices under the Licensing Act, 1872, s. 24, for unlawfully allowing beer to be consumed on his premises at the hour of two in the morning of the 18th September, 1872. The Licensing Act, 1872, came into operation on the 10th August, 1872, but he held a licence authorising him to sell by retail excisable liquors, without limitation of hours except on Sundays, which was expressed to continue in force until the 10th October, 1872:—Held, that the Licensing Act applied to current licences from the passing of the act, as well as to future licences. *Jones* v. *Cooper*, 28 L. T. 496; 21 W. R. 732.

9. Being on Premises during Prohibited Hours.

Guests invited to Remain as Friends.]—P. gave a dinner to some friends at a licensed house kept by L. On the breaking up of P.'s party, L. invited nine of P.'s guests, including the appellant, to remain after the hour for closing, to partake of two bottles of claret at his, L.'s, expense. Upon an information charging these nine persons with being found on the premises during prohibited hours, the justices, though satisfied of the bona fides of the transaction, convicted them under s. 25 of the Licensing Act, 1872, on the ground that the landlord, on the arrival of the hour for closing, could not convert them into "private friends," for the purpose of their consuming the wine so supplied to them by him:—Held, that the conviction was right. *Corbett* v. *Haigh*, 5 C. P. D. 50; 42 L. T. 185; 28 W. R. 430; 44 J. P. 39.

Private Friend Playing Cards for Money.]—A private friend of a licensed person bonâ fide entertained by him after the hours of closing at his own expense within the Licensing Act, 1874, s. 30, was playing cards for money on the licensed premises, and was convicted under the Licensing Act, 1872, s. 25, of being on the said premises during the period they were required to be closed:—Held, that the appellant was not on the premises in contravention of the provisions of the licensing acts with respect to the closing of licensed premises, and that the conviction must be quashed. *Cooper* v. *Osborne*, 35 L. T. 347.

Evidence of Offence.]—P. was charged under s. 25 of the Licensing Act, 1872, with being unlawfully found on premises in closing hours. P. was seen to go into the premises, and in three minutes to come out again with a bottle of gin. The justices refused to convict P., because he was not "found on the premises":—Held, the justices were wrong, as the facts proved were equivalent to P. being found, or ascertained to be, actually on the premises. *Thomas* v. *Powell*, 57 J. P. 329.

10. Selling on Sundays.

General Rule.]—The 11 & 12 Vict. c. 49, is not repealed by 17 & 18 Vict. c. 79, or by 18 & 19 Vict. c. 118, and it is, therefore, an offence to open a public-house on Sunday for the sale of beer therein to persons not being travellers, before half-past twelve o'clock in the afternoon. *Reg.* v. *Senior*, 1 L. & C. 401; 33 L. J., M. C. 125; 10 Jur. (N.S.) 547; 10 L. T. 428; 12 W. R. 749; 9 Cox, C. C. 469.

The 18 & 19 Vict. c. 118, applies only to the afternoon service. *Harris* v. *Jenns*, 9 C. B. (N.S.) 152; 30 L. J., M. C. 183; 3 L. T. 408; 9 W. R. 36.

Divine service on Sundays was celebrated in a parish church, commencing at six p.m., and terminating about eight p.m. The only other service in the church on Sundays was in the morning:—Held, that the words "usual hours of afternoon divine service," referred to the usual hours for the celebration of divine service in the afternoon as commonly understood, and therefore that a publican was not liable to a penalty for an offence against the tenor of his licence in keeping his house open between the hours of six and eight p.m., service performed during those hours being evening service, and not afternoon service. *Reg.* v. *Buckinghamshire JJ.*, or *Reg.* v. *Knapp*, 2 El. & Bl. 447; 1 C. L. R. 443; 22 L. J., M. C. 139; 17 Jur. 530; 1 W. R. 385.

The proviso in 9 Geo. 4, c. 61, is repealed by the subsequent statutes on the subject; and the act in force is 18 & 19 Vict. c. 118, which permits innkeepers to sell excisable liquors at all hours on the afternoon of Sunday, Christmas Day, or Good Friday, except from between the hours of three and five, and after eleven p.m. *Whitely* v. *Heaton*, 3 H. & N. 143; 27 L. J., M. C. 217; 4 Jur. (N.S.) 120; 6 W. R. 419.

Sunday—Meaning of.]—By s. 3 of the Licensing Act, 1874 (37 & 38 Vict. c. 49), "All premises in which intoxicating liquors are sold by retail, wherever situate, shall be closed on Christmas Day and Good Friday, as if Christmas Day and Good Friday were respectively Sunday. By s. 1 of the Sunday Closing (Wales) Act, 1881 (44 & 45 Vict. c. 61), all such premises are to be closed "during the whole of Sunday":—Held, that the word "Sunday" in the Welsh Act has only its ordinary meaning, and that a conviction under that act for unlawfully keeping open premises for the sale of intoxicating liquors on Christmas Day was bad. *Forsdike* v. *Colquhoun*, 11 Q. B. D. 71; 49 L. T. 136; 47 J. P. 393.

During Prohibited Hours—Evidence.]—Upon an information against a beerhouse-keeper for opening his house for the sale of beer before half-past twelve on a Sunday, it was proved by a witness that he went to the house on a Sunday at thirty-five minutes after eleven o'clock in the forenoon, and found the door closed, and having knocked he was admitted; that he saw the defendant in the house, and went into the front parlour and found two persons there, who were lodgers; that he went into the back parlour, in which there was a great deal of tobacco smoke, and the tables in the room were wet; that he went thence immediately into the yard of the house, in which there are two privies, forming part of the premises; that the door of one of the privies was open and the door of the other was shut; that it was endeavoured to be closed against him, but he forced it open, and found two persons in the privy, both of whom were men of the town, living close by; that one of these men had a pot in his hand which had beer in it with fresh froth on it, and that this man tried to make away with the pot and prevent its being seen, by putting it down the seat of the privy:—Held, sufficient evidence to support a conviction. *Finch* v. *Blundell*, 5 L. T. 672.

At twenty minutes before one o'clock a.m. on Sunday morning, the outer entrance-door of an alehouse was wide open, the bar, taproom and

parlour were likewise open, and in them were several men and women, some of whom were residents in the parish; a man and three women had a pint cup three-fourths full of beer before them, and the landlady was collecting the drinking-cans. There was no evidence as to the actual selling of beer after twelve o'clock on Saturday night:—Held, that there was some evidence to justify a conviction for keeping the house open for the sale of beer before half-past twelve p.m. on Sundays. *Smith* v. *Vaux*, 6 L. T. 46.

The evidence in support of an information against a beerhouse-keeper for opening his shop on Sunday for the sale of beer before half-past twelve p.m. was, that a little after midnight on Saturday, the door of the house was closed, and all appeared quiet; that a little after two on the Sunday morning, persons looking through the window saw a man drinking with the publican in the house, and that afterwards he let the man out:—Held, that this constituted no evidence of the offence charged, inasmuch as it did not appear but that the man was let into the house on the Saturday, or that the house was open at all on the Sunday before he was let out. *Tennant* v. *Cumberland*, 1 El. & El. 401; 5 Jur. (N.S.) 763; 7 W. R. 161.

On an information for opening a public-house for the sale of spirits before half-past twelve p.m. on Sunday, it appeared that the front door was open at twenty-two minutes past twelve on Sunday morning, and a policeman found in the commercial room four persons, one of whom was a traveller; there was a small quantity of spirits and water in a glass, from which one of the persons had been drinking. The landlady was sitting in the parlour. No spirits had been sold after twenty minutes before twelve o'clock on Saturday night:—Held, that there was no proof that the house was open for the sale of beer, &c., before half-past twelve on Sunday afternoon within 11 & 12 Vict. c. 49, and that the facts did not warrantia conviction. *Cates* v. *South*, 1 L. T. 365.

Refreshment House.]—A licensed refreshment-house keeper, although he does not hold a wine licence, may not sell articles for consumption off the premises on Sundays. *Duffell* v. *Curtis*, 35 L. T. 853.

Refreshment Houses in Wales—Sunday Closing.]—The hours at which refreshment houses in Wales must be closed are regulated by the Licensing Act, 1874, s. 11. The Sunday Closing (Wales) Act, 1881, s. 1, does not apply to such houses. *Berni* v. *Thorney*, 64 L. J., M. C. 271; 72 L. T. 630; 43 W. R. 411.

Sunday Closing (Ireland) Act—Boundary of excepted City.]—A public-house situate within the parliamentary boundary of the city of Cork, but outside the municipal boundary of the city, does not come within the exception contained in s. 1 of the Sale of Liquors on Sunday (Ireland) Act, 1878, excepting Cork and certain other cities from the operation of the act, and it is therefore an offence against the act to sell liquors on Sunday in such public-house. *Knox* v. *Kidney*, 4 L. R., Ir. 597.

Bonâ fide Traveller—Who is.]—To constitute a traveller, within 18 & 19 Vict. c. 118, s. 2, it is not necessary that the party should be journeying on business. *Atkinson* v. *Sellers*, 5 C. B. (N.S.) 442; 28 L. J., M. C. 12; 5 Jur. (N.S.) 21.

A man who goes to a place a short distance from his home, for the mere purpose of taking refreshment, is not a traveller; but one who goes to an inn for refreshment in the course of a journey, whether of business or of pleasure, and whether on foot or otherwise, is a traveller. *Taylor* v. *Humphreys*, 10 C. B. (N.S.) 429; 30 L. J., M. C. 242; 7 Jur. (N.S.) 1288; 4 L. T. 514; 9 W. R. 705.

A person is a traveller if he is out in the pursuit of health or pleasure, but not if he goes abroad for the purpose of going to a public-house; and if the publican has reason to believe, when he supplies refreshment, that he is supplying a traveller, he ought not to be convicted. *Taylor* v. *Humphreys*, 17 C. B. (N.S.) 539; 34 L. J., M. C. 1; 10 Jur. (N.S.) 1153; 11 L. T. 376; 13 W. R. 136.

A person who has taken a ticket for a journey by railway at the usual time before the starting of the train, is a traveller within the meaning of the 2 & 3 Vict. c. 47, s. 42. *Fisher* v. *Howard*, 34 L. J., M. C. 42; 11 Jur. (N.S.) 304; 11 L. T. 373; 13 W. R. 145; 10 Cox, C. C. 144.

A. went to the Victoria Station, Pimlico, on a Sunday, and obtained a ticket to proceed by a train which was to leave the station at ten minutes before one o'clock p.m. At twenty minutes before one o'clock the refreshment-room at the station was open, and thereupon A., went in, and was served with some fermented liquor:—Held, that he was a traveller, and that no penalty was incurred. *Ib.*

Persons arriving by train at the railway station distant a mile from the town in which they reside, and persons resident in the town who go to the station for the purpose of meeting a train, are travellers within 11 & 12 Vict. c. 49, s. 1. *Peache* v. *Colman*, 1 H. & R. 393; 35 L. J., M. C. 118; L. R. 1 C. P. 324; 12 Jur. (N.S.) 273; 14 W. R. 439.

If a licensed victualler in a rural district opens his house on a Sunday before 12.30 p.m. for the purpose of supplying travellers with refreshments, and receives persons who live in the neighbourhood, he is not liable to be convicted of opening his house for the sale of wine, spirits, and other fermented liquors, unless it is shewn that the persons living in the neighbourhood were supplied with refreshments to his knowledge. *Ib.*

C. was charged before justices with having opened his house for the sale of wine and beer on Sundays, before half-past twelve. He kept a refreshment-room communicating with a railway station; he had a notice thereon as to the penalties incurred in case of persons not travellers having refreshment during prohibited hours; he had ordered his servants to ask persons if they were going by train; eight persons were in the room within the prohibited time; he had questioned six of them, but his servant neglected to question two who came in during his absence; of the eight persons, four were strangers who went off by train which started shortly after their entering the room; the others resided about a quarter or half a mile off, and three of them took tickets and went by the train, whilst the fourth had accompanied his son who went by it. The justices convicted:—Held, that the conviction was wrong. *Copley* v. *Burton*, 39 L. J., M. C. 141; L. R. 5 C. P. 489; 22 L. T. 888.

A. walked on a Sunday to a spa two and a half miles distant from his residence for the

purpose of drinking the mineral waters there for the sake of his health, and was supplied with ale at an hotel at the spa before half-past twelve o'clock in the afternoon :—Held, that A. was a traveller within the exception in s. 1 of 11 & 12 Vict. c. 49. *Peplow* v. *Richardson*, L. R. 4 C. P. 168 ; 17 W. R. 410.

The appellants arrived at the town of M. on a Sunday morning during closing hours, having driven from a town twenty miles distant. They went to a public-house and dined there. Some hours afterwards they entered another public-house in the same town during closing hours and were supplied with refreshments there. The appellants having been convicted under s. 25 of the Licensing Act, 1872, of being found on the latter premises during closing hours :—Held, that they were "bonâ fide travellers" within the meaning of s. 25 when they entered the second public-house, notwithstanding that they had already been served as such at the first house, and that the conviction must therefore be quashed. *Oldham* v. *Sheasby*, 60 L. J., M. C. 81 ; 55 J. P. 214.

A man left his home on a Sunday morning and walked three-quarters of a mile to a railway station, and thence took the train to another station about two and a half miles off, where he was employed as a porter. He afterwards left the station and walked to certain licensed premises, where he was served with beer. The licensed premises were less than a mile from the station where he was employed, but more than three miles from his residence :—Held, that he was a bonâ fide traveller within s. 10 of the Licensing Act, 1874. *Cowap* v. *Atherton*, [1893] 1 Q. B. 49 ; 5 R. 86 ; 68 L. T. 88 ; 41 W. R. 158 ; 57 J. P. 8.

A bonâ fide traveller is one who travels three miles for business or pleasure, and does not, therefore, include a person who travels that distance with the object of obtaining drink. *Penn* v. *Alexander*, 62 L. J., M. C. 65 ; [1893] 1 Q. B. 522 ; 5 R. 251 ; 68 L. T. 355 ; 41 W. R. 392 ; 17 Cox, C. C. 615 ; 57 J. P. 118. S. P., *Parker* v. *Reg.*, [1896] 2 Ir. R. 404.

—— **Onus of Proof.**]—The burden of proving that a person is not a traveller is on the informer, *Taylor* v. *Humphreys*, 17 C. B. (N.S.) 539 ; 34 L. J., M. C. 1 ; 10 Jur. (N.S.) 1153 ; 11 L. T. 376 ; 13 W. R. 136.

The law that upon an information against a beerhouse-keeper for opening his house on Sunday for the sale of beer within the hours prohibited by 11 & 12 Vict. c. 49, s. 1, except as refreshment for travellers, the burden of proving that persons drinking in the house are not travellers, is upon the informer,—is unaffected by 32 & 33 Vict. c. 27. *Morgan* v. *Hedger*, 40 L. J., M. C. 13 ; L. R. 5 C. P. 485.

Upon a complaint against a keeper of an ale-house under 2 & 3 Vict. c. 47, s. 42, for keeping his house open for the sale of wine, spirits, &c., "before one o'clock on Sunday afternoon, the same not being for the refreshment of travellers" : —Held, that, notwithstanding s. 14 of 11 & 12 Vict. c. 43, the complainant was bound to prove affirmatively that the persons supplied were not travellers. *Davis* v. *Scrase*, 38 L. J., M. C. 79 ; L. R. 4 C. P. 172 ; 19 L. T. 789 ; 17 W. R. 411.

An information was laid under 11 & 12 Vict. c. 49, s. 1, against a licensed beerhouse-keeper, that he, on a Sunday, did open his house for the sale of beer before half-past twelve p.m., the same not being as refreshments for travellers. On appeal against a conviction on this information :—Held, that it was not necessary, especially since 11 & 12 Vict. c. 43, s. 14, to give evidence negativing the exemption as to travellers, introduced in s. 1 of 11 & 12 Vict. c. 49, and negatived on the face of the information, but that it lay upon the defendant to bring himself within the exemption. *Tennant* v. *Cumberland*, 1 El. & El. 401 ; 7 W. R. 601.

If a person licensed to sell intoxicating liquors on his premises supplies persons within the hours prohibited by the Licensing Act, s. 24 (repealed), the onus lies upon him of shewing that the persons so supplied are bonâ fide travellers. *Roberts* v. *Humphreys*, 42 L. J., M. C. 147 ; L. R. 8 Q. B. 483 ; 29 L. T. 387 ; 21 W. R. 885. *See now* s. 10 of 37 & 38 Vict. c. 49.

—— **Sale of Liquor to be Consumed off the Premises.**]—A licensed person is not entitled, under s. 10 of the Licensing Act, 1874, to sell intoxicating liquor during prohibited hours to a bonâ fide traveller to be consumed off the licensed premises. *Mountifield* v. *Ward*, 66 L. J., Q. B. 246 ; [1897] 1 Q. B. 326 ; 76 L. T. 202 ; 45 W. R. 288 ; 18 Cox, C. C. 515 ; 61 J. P. 216.

Evidence to Support Conviction.]—A policeman found some excursionists and some persons living about a mile off in an hotel during the forbidden hours on Sunday. The manager of the hotel stated that he knew they were all excursionists, to his knowledge no one was served with refreshments who had not a ticket, and he asked all if they had tickets. Upon the policeman naming one of the persons before whom some drink was standing, that person said he was not an excursionist, but, seeing the door was open, he thought it no harm having a glass of ale :—Held, that a conviction of the innkeeper under the Licensing Act, 1872, was justified by this evidence. *Watt* v. *Glenister*, 32 L. T. 856.

—— **Scienter and Belief.**]—A public-house keeper being summoned at petty sessions for keeping his premises open on Sunday for the sale of intoxicating liquor, the magistrates, after stating in open court that they found on the evidence that persons supplied with drink at the premises on the occasion in question were not bonâ fide travellers, convicted the defendant. The conviction did not upon its face negative the existence of a belief by the defendant that the purchasers were bonâ fide travellers, nor the taking by him of reasonable precautions to ascertain whether they were so ; and it appeared by affidavit that the magistrates, though required by the defendant to find these questions, refused to give any further reasons for their decision ; but that they had, in fact, unanimously decided both points against the defendant before making their decision in the case. Upon motion for a certiorari, held, that the conviction should stand. *Reg.* v. *Dublin JJ.*, 8 L. R., Ir. 274.

Calculation of Distances—Public Thoroughfare, what is.]—In calculating the distance from one place to another by the nearest public thoroughfare, for the purpose of determining whether the definition of a bonâ fide traveller in

37 & 38 Vict. c. 40, the Licensing Act, 1874, s. 10, is satisfied, it is proper to measure it across a navigable estuary where there is a public ferry which can be used by any person on payment of a toll. *Coulbert* v. *Troke*, 45 L. J., M. C. 7; 1 Q. B. D. 1; 33 L. T. 340; 24 W. R. 41.

By 37 & 38 Vict. c. 49, s. 10, a person shall not be deemed a bonâ fide traveller unless the place where he lodged the preceding night is at least three miles from the place where he demands to be supplied with liquor, such distance to be calculated by the nearest public thoroughfare. C.'s licensed house was on the opposite shore of the Southampton Water from the town, and was distant from the town by water over a mile, and by the nearest road eight miles. There is an ancient ferry from the town appurtenant to the house, and a toll is also paid to him by all persons landing from boats not belonging to him. The persons supplied with refreshment had lodged the night before in the town, and had crossed the water in their own boats:—Held, that the Southampton water was a public thoroughfare within s. 10; and a conviction that C. had supplied refreshments at prohibited hours to persons not being bonâ fide travellers was right. *Ib.*

A navigable arm of the sea, though not crossed by a ferry, is a public thoroughfare within the meaning of s. 28 of the Licensing (Ireland) Act, 1874 (which corresponds to s. 10 of the English Licensing Act, 1874). *Parker* v. *Reg.*, [1896] 2 Ir. R. 404.

11. Selling at Unlicensed Place.

Sale at Customer's Premises.]—P. held a license for the sale of beer by retail at 11, Stanley Street, Burnley, such beer to be consumed off the premises. A person in his employ was in the habit of calling on a customer for orders, and delivered the beer ordered by the customer the week following that in which the order was given. The beer was delivered in a jar, and paid for by the customer at her house. There was no mark on the jar to distinguish it from those ordered by other customers:—Held, that this was a sale off the licensed premises, and that P. had committed an offence within s. 3 of the Licensing Act, 1872. *Stretch* v. *White* (25 J. P. 485) dissented from. *Pletts* v. *Campbell*, 64 L. J., M. C. 225; [1895] 2 Q. B. 229; 15 R. 493; 73 L. T. 344; 43 W. R. 634; 59 J. P. 502.

The appellant held a licence, under the Beer-house Act, 1830, and the acts amending the same, for the sale of beer by retail at B., to be consumed off the premises. N., a customer of the appellant, residing at A., signed a postcard at A., addressed to the appellant at B., and the postcard was posted at A. The postcard contained an order for six pints of ale, and also contained the words, "I assent to the appropriation by you to this order at your brewery of goods of the above description, and in a deliverable state." One of the appellant's travellers filled up his cart with goods in execution of orders from A., amongst which was a coop or box containing six bottles of ale for N. and six bottles of beer for another customer. One only of the six bottles for N. had a written label on it containing the words, "Mr. N., H. Street, six pints of ale," but the other five bottles were placed near the one which was labelled. Of the six bottles for the other customer one only was labelled for him. The six bottles for N. were delivered to and paid for by him at A. Upon an information against the appellant, under s. 3 of the Licensing Act, 1872, for selling beer at A., where he was not authorised to sell the same, the justices convicted the appellant:—Held, that the sale took place at B., and that the conviction must therefore be quashed. *Pletts* v. *Campbell* (supra), distinguished, *Pletts* v. *Beattie*, 65 L. J., M. C. 86; [1896] 1 Q. B. 519; 74 L. T. 148; 18 Cox, C. C. 264; 60 J. P. 185.

Husband of Licensed Person taking Spirits to Unlicensed House to be Raffled for.]—The appellant, Mrs. S., a married woman, who had a licence to sell intoxicating liquor, was convicted under the 3rd section of the Licensing Act, 1872, of selling intoxicating liquor at a place where she was not authorised by her licence to sell the same. The husband of the appellant was about to be called as a witness for the respondent, but it was objected that he was not a competent, or if competent, not a compellable witness, and the objection was allowed. Evidence, however, was given by a constable of a statement made to him by the husband, in the wife's presence, to the effect that, "on the 24th December, 1883, he took spirits from the licensed house of the appellant to the house of one B.; the drink was then raffled for, and he was present during the raffle; the money was put in a basin on the table, and it was afterwards brought to the inn and put on a table there; one or other of them, the landlady or the husband himself, took it from the table; during the time of the raffle he took some spirits up to B.'s house; he took it all." Other witnesses proved that the liquor brought from the appellant's house by her husband was raffled for at B.'s house, the husband himself being present at the time. The justices convicted the appellant of selling the liquor at B.'s house:—Held, that what took place at B.'s house was a transaction in the nature of a sale within the meaning of s. 62 of the act, and, that, as the appellant was a competent witness, and did not contradict the statement made by her husband, there was sufficient evidence to support the conviction. *Seager* v. *White*, 51 L. T. 261; 48 J. P. 436.

See Sale without Licence, B. 2, supra, col. 401.

12. Other Offences.

Fraudulent Agreements.]—The carrying on by A. of the business of retailing beer in a public-house in the name and by the agency of B., the person licensed by the magistrates, is not a fraud on the licensing system. *Brooker* v. *Wood*, 3 N. & M. 96; 5 B. & Ad. 1052; 3 L. J., K. B. 96.

An agreement entered into for the purpose of enabling a person to sell beer and spirits without a licence is illegal, a licence being required for the protection of public morals. *Ritchie* v. *Smith*, 6 C. B. 462; 18 L. J., C. P. 9; 13 Jur. 63.

Against Police Regulations—Form of Conviction.]—By 4 & 5 Will. 4, c. 85, s. 2, every person applying for a licence to sell beer or cider by retail to be drunk on the premises must annually deposit with the excise a certificate of good character, signed by six householders. By s. 8, a penalty is imposed upon summary conviction on any person who shall in such certificate certify any matter as true, knowing the same to be false. Other sections impose a duty on excise licences for selling beer, and relate to the revenue

of the excise. By 11 & 12 Vict. c. 43, s. 17, summary convictions may be drawn up in a short form. But, by s. 35, nothing in the act shall extend to any proceedings under or by virtue of any of the statutes relating to the revenue of excise. A conviction under s. 8 of 4 & 5 Will. 4, c. 85, for an offence against s. 2 was drawn up in the form given by 11 & 12 Vict. c. 43 :—Held, that the conviction, which was for an offence against a police regulation in s. 2, was sufficient, although there were in the statute other sections relating to the revenue of excise. *Reg.* v. *Bakewell*, 7 El. & Bl. 848 ; 26 L. J., M. C. 150 ; 3 Jur. (N.S.) 1003 ; 5 W. R. 655.

Refusing to Admit a Constable.]—A. was licensed to sell beer, to be consumed in his dwelling-house, and in the premises thereunto belonging. Next to his house was a yard, and at one side of the yard, adjoining to, but not under the same roof, was an outhouse used as a cellar. He refused to admit a constable into his outhouse when required to do so :—Held, that an offence had been committed under 4 & 5 Will. 4, c. 85, s. 7. *Reg.* v. *Tott*, 30 L. J., M. C. 177 ; 7 Jur. (N.S.) 630 ; 4 L. T. 306 ; 9 W. R. 663.

Held, also, that the penalty for a second offence is suspension of the licence, and that a pecuniary fine cannot be added. *Ib.*

—— **Excise Licences only.**]—The respondent, being a person duly licensed as a dealer in spirits in England under 23 & 24 Vict. c. 114, s. 195, and holding an additional excise licence authorising him to sell by retail, in any quantity not less than one reputed quart bottle, at a shop, spirits not to be drunk or consumed on the premises, under 24 & 25 Vict. c. 21, s. 2, refused to admit the respondent, a constable, who demanded to enter the appellant's premises in pursuance of s. 16 of the Licensing Act, 1874. Upon complaint by the appellant, justices refused to convict the respondent :—Held, upon a case stated, that s. 16 of the act of 1874 applies only to premises in respect of which a licence, as defined by the Licensing Act, 1872, s. 74, has been granted and s in force, and not to the respondent's premises, which were required to be licensed by the excise only, and that the justices were right. *Harrison* v. *McL'Meel*, 50 L. T. 210 ; 48 J. P. 469.

Not admitting Police—Wife's authority.]—C., a licensed publican, was summoned for unlawfully refusing to admit a constable contrary to s. 16 of the Licensing Act, 1874. The constable had been in the house twenty minutes previously, but, hearing a noise, desired to enter again. C.'s wife was standing at the door, and being irritated, told the constable he should not go in till he had heard her opinion of him. The constable then went in and found C. serving customers, and made no complaint of the refusal. C.'s wife had no general authority to manage the house, and was never told by C. not to admit a constable :—Held, that C.'s conviction could not be sustained, there being no evidence that he or any manager of his had refused admission. *Caswell* v. *Hundred House JJ.*, 54 J. P. 87.

—— **Intention of Constable.**]—S., a police constable, within the hours of closing on Sunday, knocked at the door of a public-house, and demanded entry, the sole reason given being that he wanted to visit the house. He was told there was no one inside and the door being locked he was refused entry. In point of fact the constable's object was to inspect all the licensed houses to prevent or detect offences, but he had no special ground of suspicion :—Held, that the conviction could not be set aside if the justices were satisfied as to the bonâ fide intention of the constable to prevent violation of the act. *Reg.* v. *Dobbins*, 48 J. P. 182.

A police constable is not entitled, under s. 16 of the Licensing Act, 1874, to demand admittance to a private room on licensed premises merely upon the ground that he desires to prevent or detect any violation of the provisions of the Licensing Acts, 1872 and 1874. In order to support a conviction of a licensed person for refusing to admit a constable to such a room, there must be some evidence affording a reasonable ground for supposing that a breach of the law is taking place or is about to take place there. *Duncan* v. *Dowding*, 66 L. J., Q. B. 362 ; [1897] 1 Q. B. 575 ; 76 L. T. 294 ; 45 W. R. 383 ; 18 Cox, C. C. 527 ; 61 J. P. 280.

Sale of Liquors in Unmarked Measure.]—By the Licensing Act, 1872, s. 8, all intoxicating liquor which is sold by retail, and not in cask or bottle, and is not sold in a quantity less than half a pint, is to be sold in measures marked according to the imperial standards. A publican, being asked for a pint of beer by a customer, went into an inner room, where he drew the beer into a marked measure and poured it into a jug, which he then brought into the room where the customer was sitting and handed to him. The customer could not see the beer drawn, and never saw it while in the measure. The publican having been convicted of an offence under s. 8 :—Held, that the sale was not complete until the beer was handed to the customer, that the beer was not sold in a marked measure as required by the statute, and that the conviction was right. *Addy* v. *Blake*, 19 Q. B. D. 478 ; 56 L. T. 711 ; 35 W. R. 719 ; 16 Cox, C. C. 259 ; 51 J. P. 599.

A customer asked to be served with a "blue" of beer on licensed premises, and the publican handed him a vessel or blue containing beer, saying, "That is two-pennyworth." An inspector of weights and measures tested the blue, and finding it contained one-third of a quart, there being no imperial measure answering to one-third of a quart instituted proceedings against the publican under s. 8, and a conviction ensued : —Held, that the conviction must be affirmed. *Payne* v. *Thomas*, 60 L. J., M. C. 3 ; 63 L. T. 456 ; 39 W. R. 240 ; 17 Cox, C. C. 212 ; 54 J. P. 824.

Publican—Obligation to Supply Reasonable Refreshment to all comers.]—Per Holmes, J. : A publican is under no legal obligation to supply reasonable refreshment to all comers, but his refusal to do so may be a matter for the licensing justices to consider. *Reg.* v. *Armagh JJ.*, [1897] 2 Ir. R. 57.

F. CONVICTION AND PUNISHMENT BY JUSTICES.

1. CONVICTION.

Jurisdiction—Venue.]—Justices of a county, under 18 & 19 Vict. c. 118, have jurisdiction to hear an offence of Sunday trading during the prohibited hours against a beer retailer, and it is not necessary to allege that they are justices

acting in and for the petty sessional division. *Reg.* v. *Shaw*, infra.

The jurisdiction to convict of the offence of using a false certificate for the purpose of obtaining a licence to retail beer, is in the justices acting in and for the places where the offence is committed. *Reg.* v. *Waghorn*, 1 El. & Bl. 647; 22 L. J., M. C. 60; 17 Jur. 785; 1 W. R. 179.

—— **Second Offence.**]—In August, 1869, a beer-house keeper was convicted of keeping her house open for the sale of beer on Sunday, before half-past twelve o'clock in the day-time. On the 6th October, 1869, she was convicted for refusing to admit a constable to her premises:—Held, that the justices had power, under 32 & 33 Vict. c. 27, s. 17, to treat this as a second offence, and under 4 & 5 Will. 4, c. 87, s. 7, to order that she should be disqualified from selling beer, &c., by retail, for the space of two years. *Short, Ex parte*, 39 L. J., M. C. 63; L. R. 5 Q. B. 174; 22 L. T. 94.

—— **Search Warrant for Licensed Premises.**]—Complaint having been made under s. 11 of the Betting House Act, 1853, a search warrant was issued thereunder, and certain licensed premises searched by the police:—Held, that the justices had jurisdiction to issue the warrant in respect of licensed premises: and that the powers of the police under such warrant were not restricted by the words of the section, "all such persons found therein," to all such persons as were actually engaged in contravening the Betting House Act, or in aiding and abetting the contravention thereof. *Anderson* v. *Hume*, 46 J. P. 825.

Proceedings — Validity of Indictment.]—An indictment alleged that K. was licensed to sell beer by retail on the premises; that he was duly summoned to appear before justices acting in and for a county to answer an information and complaint for selling beer in his house during the prohibited hours on a Sunday; that he appeared at the petty sessions; and that the defendant appeared as a witness for him, and committed the alleged perjury. At the trial it appeared that a policeman reported the case to his superintendent, who went to the clerk of the justices and narrated what the policeman had said, whereupon the clerk filled up a blank summons against K. The superintendent took the summons to a justice, who read it and signed it without further inquiry, and the summons was served on K. K. appeared in pursuance of it, and called the defendant as his witness:—Held, that it was not necessary on the trial of the indictment to prove that an information was laid as the basis of the summons. *Reg.* v. *Shaw*, 11 Jur. (N.S.) 415; 12 L. T. 470; 13 W. R. 692; 10 Cox, C. C. 66.

Validity of Convictions—Necessary Forms.]—A conviction for keeping open a beer-house, at times prohibited by the order of justices, under 11 Geo. 4 & 1 Will. 4, c. 64, and 4 & 5 Will. 4, c. 85, is bad, if it omits to aver that the justices made such an order, and to state the particular time at which the beer-house was so kept open. *Newman* v. *Hardwick*, 3 N. & P. 368; 8 A. & E. 124; 1 W. W. & H. 284; 7 L. J., M. C. 101; 2 Jur. 493.

A conviction under 11 Geo. 4 & 1 Will. 4, c. 64, and 4 & 5 Will. 4, c. 85, for keeping a house open for the sale of beer, and selling beer, and suffering it to be drunk on the premises, at a time of day prohibited by an order of justices, and fining the party charged in a single penalty for "the offence," is bad, as it charges three distinct offences. *Newman* v. *Bendyshe*, 2 P. & D. 340; 10 A. & E. 11; 8 L. J., M. C. 58.

In a conviction under 11 Geo. 4 & 1 Will. 4, c. 64, s. 13, and 4 & 5 Will. 4, c. 85, awarding penalties against a publican for permitting disorderly conduct in his house, it is not necessary to state that the house was in the division for which the justices acted. *Wray* v. *Toke*, 12 Q. B. 492; 3 New Sess. Cas. 290; 17 L. J., M. C. 183; 12 Jur. 936.

It need not be averred in such conviction that the penalty was proceeded for within three calendar months next after committing the offence. *Ib.*

It is sufficient in such conviction (being subsequent to 4 & 5 Will. 4, c. 85), and in a warrant founded on it, to allege that the publican, being a seller of beer by retail, and licensed to sell the same by retail, to be drunk and consumed in and upon his premises, under the provisions of the statutes in that case made and provided, permitted, &c., against the tenor of the licence granted to him under the provisions of the said statutes, and contrary to the form of the said statutes, without further pointing out the statutes; and the mention of "statutes" (not statute) is correct. *Ib.*

The charge in such conviction of permitting "drunkenness and other disorderly conduct" against the tenor of such licence, not naming the parties who were permitted to misbehave, nor stating the terms of the licence, is not too vague, nor is the charge double. *Ib.*

In such conviction the words "this being adjudged to be his second offence against the provisions of the aforesaid statutes" are a sufficient adjudication on that point, under s. 13 of 11 Geo. 4 & 1 Will. 4, c. 64, without further shewing the nature of the first offence. *Ib.*

The justices having awarded a penalty of 10*l.*, one moiety, after deducting costs of conviction, to the use of A., and the other moiety, after deducting the costs as aforesaid, to the use of B.:—Held, that the penalty was well imposed, and the adjudication not made bad by the award of costs. *Ib.*

A conviction under 4 & 5 Will. 4, c. 85, s. 8, for signing a false certificate to enable a person to obtain a licence for the sale of beer, drawn up according to the form in Sched. I. (1) to 11 & 12 Vict. c. 43, is valid. *Reg.* v. *Bakewell*, 7 El. & Bl. 848; 26 L. J., M. C. 150; 3 Jur. (N.S.) 1003; 5 W. R. 605.

2. PENALTIES.

By whom Recoverable.]—By 11 Geo. 4 & 1 Will. 4, c. 64, s. 15, penalties are recoverable upon the information of any person before two justices, acting in petty sessions, in and for the division and place in which the house is situate where the offence was committed. *Reg.* v. *Rawlins*, 8 Car. & P. 439.

To whom Payable.] — When justices of a borough, which has a separate commission of the peace, but not a separate court of quarter sessions, in the exercise of their summary jurisdiction, impose penalties for offences against the general law, they act for the county, and the penalties must, under 11 & 12 Vict. c. 43, s. 31, be paid over by their clerk to the treasurer of

the county or place to the quarter sessions of which the appeal from their decision lies: and it makes no difference that the borough has a separate commission of the peace. *Winn* v. *Mossman*, 38 L. J., Ex. 200; L. R. 4 Ex. 292; 20 L. T. 672; 17 W. R. 924.

The 24 & 25 Vict. c. 75, s. 4, which declares that in 9 Geo. 4, c. 61, the words "county or place" include any borough having a separate commission of the peace, though not a separate court of quarter sessions, only applies to the power of granting and withdrawing licences contained in that act, and does not affect the application of penalties fixed by s. 26. *Ib.*

A penalty imposed under 9 Geo. 4, c. 61, s. 26, by justices for a borough which has a commission of the peace, but no court of quarter sessions, is payable to the treasurer of the county in which such borough is situate, and not to the treasurer of the borough on account of the borough fund. *Reg.* v. *Dale*, 1 Dears. C. C. 37; 22 L. J., M. C. 44; 17 Jur. 47; 6 Cox, C. C. 93.

Imprisonment on Non-payment—Order Ultra vires — Distress.]—The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 21, sub-s. 3, does not apply to the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 3, sub-s. 1, s. 51, sub-s. 2, so as to give justices jurisdiction to order imprisonment for non-payment of a penalty exceeding 5*l.*, under s. 3, without first ordering a distress. By the Licensing Act, 1872, s. 2, an unlicensed person selling intoxicating liquors is liable to a penalty or to imprisonment:—Held, that a conviction imposing a penalty exceeding 5*l.*, and, in default of payment, imprisonment, was bad. *Clew, In re*, 51 L. J., M. C. 140; 8 Q. B. D. 511; 46 L. T. 482; 30 W. R. 704; 46 J. P. 534.

By the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 3, a person who sells beer without a licence is liable for a first offence to a penalty of 50*l.* or imprisonment with or without hard labour for a month. By s. 51, where a court of summary jurisdiction has ordered a distress to be made in default of payment of a penalty, the court may order, in default of the said sum being paid as directed, that the person liable to pay the same shall be imprisoned for a period not exceeding six months in cases where the penalty amounts to 50*l.* B. was convicted before justices for selling beer without a licence, and fined 50*l.* He confessed himself unable to pay, and was forthwith committed by the justices to prison for six months without any distress having been made:—Held, that the justices had exceeded their jurisdiction, inasmuch as the issue of a warrant of distress was necessary in all cases to make s. 51 applicable. *Brown, Ex parte*, 47 L. J., M. C., 108; 3 Q. B. D. 545; 38 L. T. 682; 26 W. R. 757.

Distress Warrant, Form of.]—It is no objection to the warrant of distress that it ordered the money levied to be paid to the justices, in order that they might dispose of the same as directed by the conviction. *Wray* v. *Toke*, 12 Q. B. 492; 3 New Sess. Cas. 290; 17 L. J., M. C. 183; 12 Jur. 936.

3. Forfeiture.

Of Licence.]—The justices are not warranted in adjudicating a forfeiture of the licence without legal proof of a former conviction; a mere reference to the records of the petty sessions where former convictions were entered, will not suffice. *Cross* v. *Watts*, 13 C. B. (N.S.) 239; 32 L. J., M. C. 73; 9 Jur. (N.S.) 776; 7 L. T. 463; 11 W. R. 210.

—— **Indorsement on Licence.**]—A., being the owner of a licensed public-house, was on the 3rd of June, 1879, convicted of an offence against the licensing acts, which conviction was directed to be endorsed on his licence, and again, on the 18th of October, 1881, he was convicted of a similar offence, and the conviction was ordered to be recorded on his licence. A., in the usual manner, received a renewal of his licence on the 10th of October, 1882, and the renewal being always in the form of a new licence, and the old licence being given up, there were no convictions actually recorded on the licence he then received. On the 17th of October, 1882, A. was again convicted of an offence against the Licensing Act, but the magistrates did not direct the conviction to be indorsed on the licence after this last conviction. A. continued his business as a publican, and the police issued a summons against him for selling intoxicating liquors without a licence, and the magistrates convicted him on the ground that the conviction of the 17th of October, 1882, had caused a forfeiture of the licence. On an application by A. for a certiorari:—Held, that, in order to work a forfeiture of a licence, it was not necessary that the justices should direct the third conviction to be recorded on the licence, nor that the three convictions should be made within the same licensing year. *Reg.* v. *Cork JJ.*, 12 L. R., Ir. 167.

Of Liquors kept for Illegal Purposes.]—Where liquors kept for unlawful sale have been seized under 33 & 34 Vict. c. 29, s. 15 (repealed), the justices cannot order them to be sold without giving the person, upon whose premises they are seized, an opportunity of being heard, and of shewing that the seizure was wrong, and that the sale ought not to take place. *Gill* v. *Bright*, 41 L. J., M. C. 22; 25 L. T. 591; 20 W. R. 248.

4. Appeals.

Conviction of Tenant—Forfeiture of Licence—Application by Owner for Licence—Refusal—Right of Appeal.]—The appeal clauses of 9 Geo. 4, c. 61 (the Intoxicating Liquors Licensing Act, 1828), are incorporated in 37 & 38 Vict. c. 49 (the Licensing Act, 1874), s. 15, and therefore when the licence of a public-house keeper is forfeited by conviction under 35 & 36 Vict. c. 94, s. 9, and the owner of the premises duly applies under 37 & 38 Vict. c. 49, s. 15, to special sessions for a licence and it is refused, he has a right of appeal to quarter sessions. *Reg.* or *Newton* v. *West Riding JJ.*, 52 L. J., M. C. 99; 11 Q. B. D. 417; 48 J. P. 149.

—— **Appeal by Owner—"Person aggrieved"—Record of Conviction on Licence.**]—Where a licensed person is convicted of an offence under the Licensing Acts, 1872–74, and the justices direct the conviction to be recorded on his licence, the owner of the licensed premises, who was not and could not have been a party to the proceedings before the justices, is not a "person aggrieved" within s. 52 of the act of 1872, and has no right of appeal against the order. *Reg.* v. *Andover JJ.*, 55 L. J., M. C. 143; 16 Q. B. D. 711; 55 L. T. 23; 34 W. R. 456; 50 J. P. 549.

Notice of—To whom.]—On an appeal against a conviction of two justices under 9 Geo. 4, c. 61, notice must be given to both the justices who appear to have made the conviction. *Reg.* v. *Cheshire JJ.*, 3 P. & D. 23, n.; 11 A. & E. 139; 9 L. J., M. C. 89.

—— **Sufficiency of.**]—C. was convicted by justices of the Cinque Ports, sitting at Ramsgate, for being found drunk, under the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 12. Five days afterwards he served upon the clerk to the justices, sitting at Ramsgate, a notice of appeal, purporting to be in accordance with s. 52, sub-s. 2, but addressed generally to the justices of the Cinque Ports, and the respondent. Neither of the justices who heard the complaint received any notice of appeal. The recorder at quarter sessions held the notice bad, and did not proceed on the merits. He granted a case, however, as to the sufficiency of the notice of appeal:—Held, that this was not notice to the court of summary jurisdiction of the appellant's intention to appeal within the words of sub-s. 2 of s. 52, and that the recorder was not bound to hear the case on the merits, if he considered he had no jurisdiction. *Curtis* v. *Buss*, 47 L. J., M. C. 35; 3 Q. B. D. 13; 37 L. T. 533; 26 W. R. 210.

Recognizances.]—By the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 52, any person aggrieved by any order or conviction made by a court of summary jurisdiction may appeal therefrom, subject to the conditions and regulations following:—(2) The appellant shall within seven days after the cause of appeal has arisen, give notice to the other party and to the court of summary jurisdiction of his intention to appeal and of the ground thereof. (3) The appellant immediately after such notice shall enter into a recognizance before a justice with two sureties, conditioned personally to bring such appeal, &c.—At the hearing of an appeal under the above section it appeared that notice of appeal was given on Monday, March 10th, and that the recognizance was entered into on Friday, March 14th. No explanation of the delay being offered, the quarter sessions dismissed the appeal:—Held, upon application for a mandamus for the sessions to hear the appeal, the affidavits accounting for the delay ought not to be considered, and that the sessions upon the evidence before them were warranted in finding that the recognizance had not been entered into "immediately" after the notice. *Reg.* v. *Berkshire JJ.*, 48 L. J., M. C. 137; 4 Q. B. D. 469; 27 W. R. 798.

New Objections.]—A. was convicted of knowingly permitting persons of bad character to assemble in his public-house. It was objected on his behalf that the persons assembled were there only for the purposes of refreshment. The justices being of opinion that there was no evidence to that effect, convicted him. A case was stated for the opinion of the court whether, upon the facts, the conviction was right or wrong. On appeal, it was contended that there was no evidence that A. knowingly admitted persons to assemble:—Held, that this objection, not having been raised before the justices, could not be raised upon appeal. *Purkis* v. *Huxtable*, 1 El. & El. 780; 28 L. J., M. C. 221; 5 Jur. (N.S.) 790.

Costs.]—By 11 & 12 Vict. c. 43, s. 27, if, upon appeal from any conviction or order, the quarter sessions shall order either party to pay costs, such order shall direct such costs to be paid to the clerk of the peace, to be by him paid over to the party entitled to the same, and shall state within what time such costs shall be paid; and, if the same shall not be paid, any justice may enforce payment by warrant of distress; and, in default of distress, may commit the party for three months. Sect. 36 repealed all acts and parts of acts inconsistent with the provisions of that act:—Held, that s. 27 of 11 & 12 Vict. c. 43, applied to all summary convictions and orders of justices (except those specified in s. 35), and orders of quarter sessions made on appeal from them, and that s. 29 of 9 Geo. 4, c. 61, which was inconsistent with it, was repealed by it and by s. 36. *Reg.* v. *Hellier*, 17 Q. B. 229; 21 L. J., M. C. 3; 15 Jur. 901.

A conviction under 9 Geo. 4, c. 61, was affirmed on appeal at the October quarter sessions, 1850, and the defendant was ordered to pay costs to the justices, amounting to 20*l.* In November he paid 10*l.* on account. On the 8th February, 1851, the justices removed the order into the Queen's Bench under 12 & 13 Vict. c. 45, s. 18, for the purpose of enforcing payment of the residue. On the 21st February the defendant applied to a judge at chambers to stay proceedings on the order, which was refused; and on the 1st March a fi. fa. was issued upon the order. In Easter term the defendant obtained a rule for setting aside the order and the fi. fa.:—Held, first, that there had not been acquiescence to the order, nor laches in objecting to it by the defendant, inasmuch as by s. 34 of 9 Geo. 4, c. 61, he could not remove the order by certiorari. *Ib.*

Held, secondly, that the order being removed for the purpose of being enforced, it was competent to the defendant to object to it for illegality, though he could not have removed it by certiorari; and the court ordered the money levied under the fi. fa. to be returned. *Ib.*

G. COVENANTS AND AGREEMENTS RESPECTING LICENSED HOUSES.

1. Sale or Lease.

Sale—Time, Essence of Contract.]—Upon a sale of a public-house as a going concern time is of the essence of the contract. *Cowles* v. *Gale*, 41 L. J., Ch. 14; L. R. 7 Ch. 12; 25 L. T. 524; 20 W. R. 70. And see *Day* v. *Luhke*, infra.

When, therefore, upon the day for the completion of the contract the vendors were not in a position to transfer the licence under 9 Geo. 4, c. 71, s. 11, the purchaser was held entitled to repudiate the contract. *Ib.*

In an agreement by a tenant at will of a public-house for the sale of possession, trade and goodwill of the house at a fixed sum, and of the stock and furniture at a valuation; one of the terms being that possession should be taken, and the money paid on a given day, time is of the essence of the contract; and a purchaser who was not in a condition to fulfil his part of the contract on that day cannot compel a specific performance, though he was ready on the following day to have proceeded to complete the purchase. *Coslake* v. *Till*, 1 Russ. 376.

Time held to be of the essence of the contract between vendor and purchaser, partly by reason of the nature of the trade — viz. that of a publican—carried on upon the property offered

for sale, and partly upon the construction of the conditions of sale. *Seaton* v. *Mapp*, 2 Coll. 556.

—— **Title by Executors.**]—The executors of the owner of a public-house renewed the licence in the name of the deceased owner:—Held, that the licence was absolutely void, and that the executors could not make a good title to the public-house. *Cowles* v. *Gale*, supra.

By an agreement entered into with the executors for the purchase of a leasehold public-house, and the goodwill and licences connected with it, the household furniture, stock in trade, and other effects upon the premises, were to be taken by the purchaser at a valuation, and possession was to be delivered up to him on the 29th September, 1821. The valuation was made, but on the 29th of September the purchaser, alleging that there was a defect in the title to the leasehold, refused to perform his contract; the executors filed a bill for specific performance, but in the meantime remained in possession of the house, and carried on the business:—Held, that though the executors were entitled to a decree for specific performance, and though the purchaser had done wrong in refusing to perform the contract, he could not be made answerable for the trade which had been carried on in the premises since September, 1821; that he could not be compelled to take that portion of the stock in trade on the premises at the time of the decree, which was not there at the date of the agreement, but had been substituted for such parts of the old stock as had been consumed in the usual course of the business; that the purchaser ought to be charged with rent and taxes, and other outgoings paid by the executors since September, 1821; and with interest on the same so paid by them; that the purchaser was not entitled to any occupation rent, or other allowance for the use of the house and furniture by the executors during the period that elapsed after the 29th of September, 1821. *Dakin* v. *Cope*, 2 Russ. 170.

—— **Transfer of Licence.**]—Upon the sale of a public-house as a going concern time is of the essence of the contract; and, in the absence of an express stipulation to the contrary, the licence of the house must be transferred under 9 Geo. 4, c. 61, s. 11, and not under s. 14. *Day* v. *Luhke*, 37 L. J., Ch. 330; L. R. 5 Eq. 336; 16 W. R. 719.

Mortgagees of a public-house are not assigns of the licensee within 9 Geo. 4, c. 61, s. 11. *Ib.*

—— **Inability to complete.**]—The vendor of a public-house contracted with the purchaser to make a good and a proper assignment of the victualler's and other licences. It turned out that the only licence under 9 Geo. 4, c. 61, was to his son, who was not the owner of the house, had only acted as servant, and had gone away and could not be found:—Held, that the vendor was unable to fulfil the contract, and was liable to refund the deposit money and recoup the purchaser in damages. *Claydon* v. *Green*, 37 L. J., C. P. 226; L. R. 3 C. P. 511; 18 L. T. 607; 16 W. R. 1126.

A. agreed to take a lease of a public-house provided a retail licence should be obtained. The magistrates afterwards granted a written licence to sell excisable liquors, and to permit them to be consumed on the premises, but they insisted on a verbal promise that no excisable liquors should be sold for consumption upon the premises:—Held, that he was not bound to take the lease. *Modlen* v. *Snowball*, 4 De G. F. & J. 143; 31 L. J., Ch. 44; 7 Jur. (N.S.) 1260; 5 L. T. 299; 10 W. R. 24.

Assignment of Licence—Bankruptcy—Rights of Assignee.]—Under a writ of fi. fa. against G., certain chattels and his interest in licensed premises were seized, advertised for sale, and sold on the 31st January, 1885, by the sheriff. No reference to the licence was made either in the advertisement, conditions of sale, or deed of assignment, which was dated the 10th February, 1885, except that in the latter the premises were described as "licensed," as occupied by G. as a licensed publican, and the deed did not purport to assign the licence. The sheriff was not possessed of the licence, but it was subsequently endorsed and delivered by G. to the purchaser. On the 4th April, 1885, G. was adjudicated a bankrupt. The purchaser, however, obtained an ad interim transfer of the licence on the 14th April, and an absolute transfer at the October sessions. In August the hearing of a charge and discharge, raising a question as to the property in the licence, was adjourned by consent to November, on the terms that the position of the parties should be considered at the hearing as if unaltered:—Held, that the licence did not pass under the sheriff's assignment; that the subsequent endorsement, delivery and transfer of it by G. to the purchaser were void as against the assignees in bankruptcy of G., and that the licence formed part of the estate and effects of G. in the bankruptcy matter; but having regard to the proceedings at the licensing sessions, the court declined, for the time being, to make any order for the transfer of the licence to the assignee in bankruptcy, or to award damages against the purchaser for withholding the licence. *Gilmer, In re*, 17 L. R., Ir. 1.

—— **Permit for Removal of Spirits—Validity of.**]—Where G., the licensed keeper of a public-house, sold the lease of it to N., who entered into the occupation of it, the licence still remaining in the name of G.; and a quantity of spirits which required a permit for its removal, under 2 Will. 4, c. 16, was supplied by a distiller on the order of N., and delivered on the premises in question:—Held, that a permit made out in the name of G. was a valid permit under the statute. *Nicholson* v. *Hood*, 9 M. & W. 365; 12 L. J., Ex. 114; 6 Jur. 64.

Proceeds of Sale—Licence attached to Freehold Premises—Real or Personal Estate.]—The proceeds of sale of a deceased publican's retail spirit licence constitute personal estate, although such licence is attached to premises of freehold tenure. *Brennan* v. *Dorney*, 21 L. R., Ir. 353—C. A.

Property in Licence—Freehold—Heir—Death of Owner Intestate.]—Where the owner and licence-holder of a public-house dies intestate, there is no property in the licence or goodwill, apart from the ownership of the premises to which the licence is attached. *Kelly* v. *Montague*, 29 L. R., Ir. 429—C. A.

—— **Bankruptcy of Lessee.**]—A lease of a public-house contained a covenant by the lessee on

the expiration or sooner determination of the term to assign the licence held by him to the lessor, and also a proviso for re-entry by the lessor in the event of the bankruptcy of the lessee. On the bankruptcy of the lessee during the term :—Held, that the licence was not "property" of the bankrupt which would pass to the trustee ; and that under the covenant the lessor was entitled to have the licence delivered up to him, though it was not by its nature assignable. *Britnor, In re, Royle, Ex parte*, 46 L. J., Bk. 85 ; 25 W. R. 560.

Sale of Goodwill—Value, how ascertained.]—A lease for years of an alehouse granted to the plaintiff provided that, "at the expiration or other sooner determination of the term hereby created, all such sum and sums of money as shall or can be procured for the goodwill of the business of a licensed victualler, in respect of the premises, from an incoming tenant, shall be received by and belong to" the plaintiff. The term having expired, the owner of the reversion and executrix of the lessor let the house upon lease to a fresh tenant, by whom she was paid 1,300*l.* as premium ; she received nothing for goodwill from the new lessee, and she was willing that the plaintiff should get from him compensation for the goodwill. The plaintiff sued her to recover 1,300*l.* :—Held, that an action was maintainable under the proviso, but that the sum of 1,300*l.* was not to be taken as the amount payable by virtue thereof to the plaintiff ; that the value of the goodwill of the alehouse was to be fixed by ascertaining what sum would be paid by an incoming to an outgoing tenant in respect thereof. *Llewellyn* v. *Rutherford*, 44 L. J., C. P. 281 ; L. R. 10 C. P. 456 ; 32 L. T. 610.

Lease — Implied Agreement — Forfeiture of Licences.]—Upon the letting by parol of a public-house there is no implied agreement or covenant that the tenant shall do no act whereby the licence shall become forfeited. *Maw* v. *Hindmarsh*, 28 L. T. 644.

A. took by parol a licensed public-house of B., but having been three times convicted of offences connected with the management of such house, the magistrates refused to renew the licence. Upon an action by B. against A. upon his implied covenant not to suffer the premises to be used in a manner calculated to produce a forfeiture of the licence :—Held, that no such covenant could be implied, and that the action could not be maintained. *Ib.*

Fixtures put up by previous Tenant—Signboard of Inn.]—At the Royal Oak Inn, Bettws-y-Coed, there was, in 1847, a signboard affixed to the wall of the house by staples. The inn was then held by E. R. as tenant from year to year. In the same year, David Cox, who was a friend of E. R., went up a ladder and painted on the old signboard a picture of an oak tree with horsemen riding underneath. The picture so painted remained as the sign of the house. In 1849 Cox retouched and varnished the picture. In 1866, owing to alterations in the house, the picture was taken down and placed, first in a sitting-room and afterwards (being framed and glazed) in the hall of the inn, where it was affixed to the wall. In 1861 E. R. died, and was succeeded in the tenancy of the house by his son R. R., who took a lease of the house from Lord W. D. for twenty-one years, containing a covenant to surrender the house and fixtures at the end of the term. In 1863 R. R. died, having devised all his property to his wife, who subsequently married D. X. In August, 1871, D. X. surrendered the lease to Lady W. D., who on the same day granted him a lease for fifty-eight years containing a like covenant to surrender. D. X. died in 1876, and his widow thereupon conveyed all her interest in the inn (expressly reserving the signboard) to M. A. T., who by arrangement, retained the signboard at the inn for two years. At the end of the two years Mrs. D. X. sent for the signboard, but Lady W. D.'s agent forbade its removal, and it remained in the hall of the inn till the filing of a petition for liquidation by M. A. T. :—Held, that M. A. T. had no right of property in the signboard ; that it was not a chattel of which reputed ownership could be predicated, and that, as against M. A. T. and her trustee in liquidation, Lady W. D. had a clear right of preventing the removal of the fixture. *Willoughby D'Eresby* (*Baroness*) or *Sheen, Ex parte, Thomas, In re*, 44 L. T. 781 ; 29 W. R. 527—C. A.

2. Mortgage.

Mortgage of Licence.]—Query whether licences are subject to assignment by way of mortgage. *Manifold* v. *Morris*, 8 L. J., C. P. 218.

Mortgage of Premises—Priority—Notice.]—The lessee of a public-house in London executed at the public-house, and at the time of entering into possession, a mortgage of his lease in favour of the brewer by whom the house was supplied with beer, to secure a sum already advanced and future advances, not to exceed in the whole a given sum. At the same time and place he charged the lease "subject to the security already given" to the brewer, with the repayment to the distiller who supplied the house with spirits of an advance made by him. The mortgage and charge were both executed in the presence of the solicitors of the brewer and distiller, and the latter there and then gave to the former a formal notice of the charge in favour of his client. Afterwards the publican became indebted to the brewer for the price of beer supplied to the house. The lease having been sold by the brewer under a power of sale in his mortgage :—Held, that in the absence of any express agreement, the distiller was entitled to be repaid his advance out of the purchase-money in priority to the debt which had been incurred to the brewer subsequently to the time when notice was given to him of the distiller's charge ; and that this priority was not affected by a custom of trade alleged to exist between publicans, brewers and distillers in London. *Menzies* v. *Lightfoot*, 40 L. J., Ch. 561 ; L. R. 11 Eq. 459 ; 24 L. T. 695 ; 19 W. R. 578.

Where the creditor of a publican in London took from the latter a legal mortgage of copyhold premises as a security for an antecedent debt, and at the time of taking this security, knew that the publican was indebted to his brewers, and likewise was aware of the ordinary practice in London of publicans depositing their leases with their brewers by way of mortgage :—Held, that the creditor had such notice of the transactions between his debtor and the brewers, as would have put a prudent man on further inquiry ; and that, having omitted to make such further inquiry, the equitable security of the

brewers had priority over his legal security. *Whitbread* v. *Jordan*, 1 Y. & Coll. 303; 4 L. J., Ex. Eq. 38.

—— **Custom of Trade.**]—A company of brewers took a mortgage of a public-house and other premises, as security for a debt then due to them from the publican, and for future advances to be made and beer to be supplied by them to him. Subsequently, a firm of distillers took a second mortgage of the same premises as a security for a debt then due to them from the publican, and for future advances and goods to be supplied by them, and they gave to the brewers' company notice of their mortgage:—Held, after the notice to the brewers' company of the distillers' mortgage, that the priorities between them must be regulated by the respective dates of the advances being made and goods supplied by them respectively. *Daun* v. *City of London Brewery Co.*, 38 L. J., Ch. 454; L. R. 8 Eq. 155; 20 L. T. 601.

There is not, as between brewers and distillers, any custom of trade affecting their priorities as mortgagees in a manner different from the rule of law decided in *Hopkinson* v. *Rolt*, 9 H. L. Cas. 514; 34 L. J., Ch. 468; 7 Jur. (N.S.) 1209; 5 L. T. 90; 9 W. R. 900.

A first mortgagee for present and future advances is not, as against a second mortgagee, entitled to priority in respect of advances by him after notice of the second mortgage. *Ib.*

Two Properties—Power of Consolidation.]—A brewery company were first mortgagees for 1,000*l.*, and the plaintiff was third mortgagee of a public-house, A. The company afterwards took a mortgage of a public-house, B.; A. and B. both belonging to the same mortgagor. The lease of A. was nearly out, and by arrangement between all parties the company advanced 1,000*l.* for a new lease which was granted to the mortgagor, and was then mortgaged by him, first to the brewery company to secure 2,000*l.* and advances, and subject thereto to the plaintiff. By a memorandum given at the same time the plaintiff declared that the company was to have priority for their 2,000*l.* and advances, not to exceed in the whole 2,300*l.* The brewery company afterwards transferred both mortgages to the defendant. The plaintiff claimed to redeem A., to which the defendant objected unless the plaintiff also redeemed B.:—Held, that though the new mortgage of A. to the plaintiff was in date subsequent to the mortgage of B., the intention of the parties was merely to give priority to the company for their 2,300*l.*, and not to give the company a right to consolidate the mortgage on A. and the mortgage on B.; and as the whole was equitable, the company could not be held to have obtained any such right; nor could their assignee be in any better position. *Bird* v. *Wenn*, 55 L. J., Ch. 722; 33 Ch. D. 215; 54 L. T. 933; 34 W. R. 652.

Receiver.]—The defendant mortgaged, by demise, a leasehold public-house, with the goodwill of the business carried on there, to the plaintiff. The deed contained a covenant for further assurance. Default was made, and the plaintiff in a foreclosure action obtained a receiver:—Held, that the defendant was bound under the terms of the mortgage to assign his licence to the receiver. *Rutter* v. *Daniel*, 30 W. R. 801—C. A. Affirming 46 L. T. 684; 30 W. R. 724.

Equitable Mortgage.]—An equitable mortgage of a licensed public-house, created by deposit of the title deeds, confers upon the owner of the mortgage the right to the licence, as against the assignee in bankruptcy of the licensed owner of the public-house. *Rutter* v. *Daniel* (30 W. R. 724) followed. *O'Brien, In re*, 11 L. R., Ir. 213.

An equitable mortgage was made to a firm of brewers, to secure money lent and porter to be supplied by them. Several changes occurred in the composition of the firm, the business and debts being on each occasion assigned, the deeds deposited by way of equitable mortgage being transferred to the new partners, and the trading being carried on under the name of the original firm. Porter was continuously supplied to the mortgagor on the security, and payments were made by him on account:—Held, following *Oates, Ex parte* (2 Mont. D. & D. 234), that the benefit of the equitable mortgage passed to the persons for the time being constituting the firm, and extended to goods supplied by them as well as to the goods which were supplied by the original members of the firm. *Ib.*

The decision of the Vice-Chancellor of England, recognising a lien on a brewer's lease created by deposit simultaneously with the creation of the lease, further carried out by making the injunction perpetual. *Meux* v. *Smith*, 2 Mont. D. & D. 789; 11 Sim. 410; 12 L. J., Ch. 209; 7 Jur. 821.

G., a publican, agreed to sell his public-house (which M. & Co. supplied with beer) to A.; A. being unable to pay the whole of the purchase-money, M. & Co., at his request, agreed to pay to G. 1,000*l.* as part of it. At a meeting of the parties for completing the purchase, M. & Co. paid the 1,000*l.* to G. G. then executed the conveyance of the house, and immediately afterwards delivered it to M. & Co., and A. signed a memorandum expressing that he had deposited the deed with M. & Co., for securing by way of equitable mortgage, the payment to them of the 1,000*l.*; shortly afterwards M. & Co. discovered that A. was an uncertificated bankrupt:—Held, nevertheless, that they had as against A.'s assignees, a lien on the deed for the 1,000*l.* *Ib.*

Goodwill in Mortgaged Premises.]—The goodwill of a mortgaged public-house is not a personal goodwill, but belongs to the mortgagor's trustee in liquidation as against the mortgagee. *Punnett, Ex parte, Kitchin, In re*, 50 L. J., Ch. 212; 16 Ch. D. 226; 44 L. T. 226; 29 W. R. 129—C. A.

Delivery up of Spirit Licence—Order for.]—In an action by a mortgagee, claiming possession of licensed premises, and a delivery up of a licence attached thereto, the court has power to order such licence to be delivered up to the plaintiff. *Crowley* v. *Fenry*, 22 L. R., Ir. 96.

Mortgagees in Possession, Lease by—Clause binding Tenant to take Beer, &c., from them—Account—Interest.]—A leasehold public-house was mortgaged to brewers, who entered into possession, and after carrying on the business for some time, leased the public-house to tenants, with agreements binding the tenants to take their beer, &c., from them, under which they derived a large profit from the sale of beer, &c. They afterwards sold the public-house under the power of sale in the mortgage:—Held, in an action by the mortgagor for an account, that the mortgagees were not entitled to interest on

the cost of beer supplied while they were carrying on the business; that they were not bound to account for the profits derived from the sale of beer, &c., to the tenants of the public-house; but that they were chargeable with the increased rent they might have obtained if the tenants had been under no restriction as to purchasing their beer. *White* v. *City of London Brewery Co.*, 58 L. J., Ch. 98; 39 Ch. D. 559; 60 L. T. 19; 36 W. R. 881—North, J. Affirmed, 58 L. J., Ch. 855; 42 Ch. D. 237; 38 W. R. 82—C. A.

3. Covenants.

Vintners—Who are.]—The term "vintner" signifies one who sells wine generally, and is not restricted to one who sells wine to be consumed on the premises. *Wells* v. *Attenborough*, 24 L. T. 312; 19 W. R. 465.

Porter, Ale, or Spirit Merchant—Not to Travel for.]—The traveller for a porter, ale, and spirit merchant, bound himself by a bond not to "travel for any porter, ale, or spirit merchant, as agent, collector, or otherwise," within a certain distance of the town where the merchant carried on his business. The traveller travelled within the distance as agent and collector for a firm of brewers in the same town, who brewed and sold only beer, ale, and porter, and sold no liquor but of their own manufacture:—Held, that the brewers were not porter, ale, or spirit merchants within the meaning of the bond. *Josselyn* v. *Parson*, 41 L. J., Ex. 60; L. R. 7 Ex. 127; 25 L. T. 912; 20 W. R. 316.

Not to use Premises as a Public-house, Tavern, or Beershop—Sale of Beer to be consumed off the Premises.]—A deed contained a covenant by the grantee of a piece of land that no building to be erected on the land should be used as a public-house, tavern or beershop. A lessee of the grantee obtained an off-licence, authorising him to sell at his shop, on the land, beer not to be drunk on the premises, and sold beer there accordingly:—Held, that this was a breach of the covenant. *St. Albans (Bishop)* v. *Battersby* (3 Q. B. D. 359) approved. *London and Suburban Land and Building Co.* v. *Field*, 50 L. J., Ch. 549; 16 Ch. D. 645; 44 L. T. 444—C. A.

A covenant not to use a house as "a beerhouse, inn or public-house for the sale of spirituous liquors," is not infringed by the sale of beer by retail to be drunk off the premises. *L. & N. W. Ry.* v. *Garnett*, 39 L. J., Ch. 25; L. R. 9 Eq. 26; 21 L. T. 352; 18 W. R. 246.

A covenant not to use a house "as an inn, public-house or tap-room, or for the sale of spirituous liquors, ale or beer," is broken by the sale therein of spirits or beer in bottles, though the house is not used as a public-house, and the liquors are not sold by retail, or to be drunk on the premises. *Fielden* v. *Slater*, 38 L. J., Ch. 379; L. R. 7 Eq. 523; 20 L. T. 485; 17 W. R. 485.

—— **Sale as Grocer.**]—A person who had entered into a covenant not to use a house as a public-house, tavern, or beerhouse, opened a grocer's shop there, at which he carried on the sale of beer to be drunk off the premises as an ancillary business to his grocer's business:—Held, that this was no infringement of the covenant. *Holt* v. *Collyer*, 50 L. J., Ch. 311; 16 Ch. D. 718; 44 L. T. 214; 29 W. R. 502; 45 J. P. 456.

A lease contained a covenant by the lessees not to permit any house that might have been erected on the land demised to be used as a beer-shop or public-house, or any theatre or public show, or exhibition. The assignee of the lease carried on the business of a grocer and baker at a shop erected on the land demised. He obtained an excise retail beer licence for the sale of beer to be consumed off the premises, and sold beer in pursuance thereof in his shop:—Held, a breach of the covenant. *St. Albans (Bishop)* v. *Battersby*, 47 L. J., Q. B. 571; 3 Q. B. D. 359; 38 L. T. 685; 26 W. R. 678.

—— **Taking out ordinary Excise Licence.**]—A covenant not to use a house as a public-house for the sale of beer, wine, malt liquors, or spirits is not broken by the covenantor taking out an ordinary excise licence for the sale of beer (not spirits) not to be drunk on the premises. *Pease* v. *Coates*, 36 L. J., Ch. 57; L. R. 2 Eq. 688; 12 Jur. (N.S.) 684; 14 L. T. 886; 14 W. R. 1021.

Not to Carry on the trade of an Innkeeper, Victualler, or Retailer of Wine, Spirits, or Beer.]—The lessee of a theatre bought an adjoining piece of ground, which was subject to a covenant of which he had notice, that the trade of an innkeeper, victualler, or retailer of wine, spirits, or beer should not be carried on there. He erected on the piece of ground a building the object of which was to furnish convenient egress from the theatre, but on each floor he set up a counter for selling wine, spirits, and beer, which could not be approached directly from the outside, but at which any person who paid for admittance to the theatre when open for theatrical performances could purchase refreshments:—Held, that the lessee was carrying on the trade of a retailer of wine, spirits, and beer, and must be restrained from doing so. *Buckle* v. *Fredericks*, 44 Ch. D. 244; 62 L. T. 884; 38 W. R. 742—C. A.

—— **Sale as Grocer.**]—A covenant by deed executed in 1854, not to carry on upon premises the "trade or calling of a hotel or tavern keeper, publican or beershop keeper, or seller by retail of wine, beer, spirits or spirituous liquors," is not violated by a grocer selling wines and spirits across the counter by retail, in bottles only, and not to be consumed on the premises, under a licence granted under 24 & 25 Vict. c. 21, s. 2, on the ground that at the date when the covenant was entered into, this would not have been a selling by retail. *Jones* v. *Bone*, 39 L. J., Ch. 405; L. R. 9 Eq. 674; 23 L. T. 304; 18 W. R. 489.

—— **Breach by Sub-Tenant without Notice.**]—A sub-tenant is liable to a restrictive covenant entered into by the purchaser of the freehold for himself and his assigns, though neither the sub-tenant nor his lessor has actual notice of it, and in spite of the provision of s. 2 of the Vendor and Purchaser Act, 1874, preventing the examination of the title to the freehold. In the conveyance in 1875 to F. of part of a building estate purchased by him, F. covenanted for himself, his heirs, executors, administrators, and assigns, with the owner or owners for the time being of the remainder of the property, not to carry on the trade of retailer of wine, spirits, or beer, on the land purchased. F. leased to D., who sub-leased to J., neither D. nor J. having actual notice of the restriction. J. opened a shop for the sale of wine and beer to be consumed off the premises.

Upon a motion for an injunction by T., the purchaser of another part of the building estate :—Held, that J. was liable for breach of the covenant. *Thornewell* v. *Johnson*, 50 L. J., Ch. 641 ; 44 L. T. 768 ; 29 W. R. 677.

Covenant to take Beer from Lessors—Proviso for Reduction of Rent on Performance of Covenant—Penalty.]—The lease of a public-house contained a covenant that the lessee and his assigns would, during the term, purchase all beer required for the business from the lessors, a proviso for re-entry on nonpayment of rent, or nonperformance of the covenants, and a provision for reduction of the rent so long as the lessee should purchase beer from the lessors :—Held, that the covenant to purchase beer was an absolute one, and that the lessee had not the alternative of dealing with a rival brewer and paying the unreduced rent. *Hanbury* v. *Cundy*, 38 L. T. 155.

—— **Breach of—Purchase from Agent.**]—A covenant by the tenant of a public-house to purchase of his landlord all beer to be sold or consumed in or upon the premises is not broken by the tenant buying through an agent, without the knowledge of the landlord, beer made by the landlord. *Edwick* v. *Hawkes*, or *Edridge* v. *Hawker*, 50 L. J., Ch. 577 ; 18 Ch. D. 199 ; 45 L. T. 168 ; 29 W. R. 914.

—— **Validity of.**]—On the occasion of a conveyance by the plaintiff (who was a brewer) of land to trustees in fee of a building society, of which the defendant (also a brewer) was a member, the trustees (the purchasers) covenanted with the plaintiff, that "he, his heirs and assigns, should have the exclusive right of supplying all ale, beer and porter which might be consumed in every house or other building which might be erected on the piece of land, and which should be opened or used as an inn, public-house or beer-shop." The defendant, with notice of the covenant, opened a public-house on the land, and supplied it with ale, &c., of his own brewing. The plaintiff then filed a bill against the defendant alone for an injunction to restrain the breach of the covenant :—Held, that the covenant was not invalid on the ground either of uncertainty, want of mutuality, or as being in restraint of trade. *Catt* v. *Tourle*, 38 L. J., Ch. 401 ; 20 L. T. 551 ; 17 W. R. 662. Affirmed, 38 L. J., Ch. 665 ; L. R. 4 Ch. 654 ; 17 W. R. 939.

—— **Mortgagees in Possession—Account.**]—See *White* v. *City of London Brewery Co.*, supra, col. 477.

Effect on Assignee.]—The lease of a public-house granted by a brewer to a publican contained a covenant by the latter for himself, his executors, administrators, and assigns, to purchase from the brewer all the beer consumed at that public-house, and also at another public-house of which the publican held a lease under a different landlord :—Held, that the covenant was binding in equity upon an assignee of the second public-house who had notice of the covenant. *Luker* v. *Dennis*, 47 L. J., Ch. 174 ; 7 Ch. D. 227 ; 37 L. T. 827 ; 26 W. R. 167.

Covenant Not to Imperil Licence.]—By a lease of a public-house made after the Licensing Act, 1874 (35 & 36 Vict. c. 94), came into operation, the lessee covenanted not to "do, omit or permit, or suffer to be done or omitted, any act, matter or thing whatsoever that can or may affect, lessen or make void either or any of the licences for the time being granted to the public-house." The lease contained a clause for forfeiture on breach of covenant. The lessee having committed on the same day three offences against the Licensing Acts of 1872 and 1874, was convicted of two of them by justices, who directed, under the act of 1874, s. 13, that the conviction should not be recorded on any of the lessee's licences. The lessor having brought an action against the lessee to recover possession of the public-house on the ground of forfeiture, and for damages for breach of covenant :—Held, that the licences were not affected within the meaning of the covenant, and that there was no breach of covenant. *Wooler* v. *Knott*, 45 L. J., Ex. 313 ; 1 Ex. D. 124 ; 34 L. T. 362 ; 24 W. R. 615. Affirmed on appeal, 45 L. J., Ex. 884 ; 1 Ex. D. 265 ; 35 L. T. 121 ; 24 W. R. 1004—C. A.

A married woman living apart from her husband had accumulated enough of her separate earnings to purchase the goodwill and stock of a beerhouse, which was taken for her by S., to whom the licence was transferred, and who agreed with the landlord not to do anything to imperil the licence, on pain of forfeiting the tenancy and the fixtures. S. executed a declaration of trust in favour of plaintiff, and handed it to her with the licence indorsed in blank, and she carried on the business. S. having gone away to sea, the defendant, the landlord, served a notice at the house, requiring him to remove his goods by the following day, and on the following day entered and took possession, turning plaintiff and her furniture out of the house :—Held, on action brought to recover damages for the expulsion, that, in the absence of evidence that the house had been improperly conducted, the absence of S., the licensed person, did not cause the licence to be imperilled so as to create a forfeiture, and justify the entry by defendant. *Moore* v. *Robinson*, 48 L. J., Q. B. 156 ; 40 L. T. 99 ; 28 W. R. 312.

In the lease of a public-house the lessee covenanted that he would "conduct and manage the business of an inn, tavern or beerhouse keeper in such proper and orderly manner as to afford no ground or pretext whatever whereby the licence or licences should or might be suspended, discontinued, forfeited, or be in any danger of being suspended, discontinued or forfeited." The lease contained a clause of re-entry for breach of covenant. A person who occupied by leave of the lessee was convicted of selling drink within prohibited hours, but the conviction was not indorsed on the licence. The assignee of the reversion on the lease having brought an action to enforce the right of re-entry on the ground of a breach of covenant :—Held, that in the circumstances there had been no breach of the covenant. *Fleetwood* v. *Hull*, 58 L. J., Q. B. 341 ; 23 Q. B. D. 35 ; 60 L. T. 790 ; 37 W. R. 714 ; 54 J. P. 229.

The lessee of a public-house covenanted not "to do or suffer to be done on the premises any act whereby the licences necessary for using the said premises as an inn, tavern or public-house may be forfeited, or the renewal thereof withheld." He was twice convicted of offences as such tenant and the convictions were indorsed on his licence. He assigned his lease, and a

subsequent occupant of the premises obtained a renewal of the licence:—Held, that he had committed a breach of the covenant. *Harmann* v. *Powell*, 60 L. J., Q. B. 628.

Covenant to Keep up Licence—New Lease—Right to Covenant.]—The lease of a public-house contained usual covenants to keep up licences, &c. The lessor and lessee entered into an agreement for a new lease to contain covenants similar to those in the former lease. Under this agreement the lessee retained possession of the public-house for several years, and in the interim forfeited the licence, which was not renewed. Specific performance of the agreement was decreed against the lessee, but no inquiry was directed as to damages occasioned by breach of the covenant to keep up the licences. The lessor having insisted that he was entitled to insert in the new lease a covenant by the lessee to keep up the licences similar to that in the former lease:—Held, that he was not entitled to such a covenant, but only to a covenant that the lessee would use his best endeavours to obtain a licence, and would, if he obtained it, then keep up the same in the terms of the old covenant. *Shepheard* v. *Walker*, 34 L. T. 30.

Covenant not to Build Public-house.]—On a sale of an estate as building land in 309 plots, each purchaser executed a covenant with trustees to observe certain conditions as to the user of the land. The conditions stated that certain plots were reserved for two taverns; that "no houses, other than detached or semi-detached," were to be erected, except on the portion on which shops were permitted to be built; and that shops would be allowed to be built on sixty specified plots. A purchaser of one of the plots set apart for shops was restrained from building a public-house on it. *Hall* v. *Box*, 18 W. R. 820.

Right of Person entitled in Equity to Sue for Breach—Notice.]—The vendors of an estate sold part of it in 1863 to C., as a site for a public-house, and entered into a covenant with him that they would not sell any other portion of it without requiring the purchaser to enter into a covenant with them "not to erect thereon, or use, or permit to be used, any building erected thereon as a tavern, public-house or beer-shop." C. erected a public-house on his part, which he demised to N. In 1869 other portions of the estate were sold to a company, who afterwards sold to P., his conveyance containing a covenant with his vendors in the above terms. P. erected a house on one plot and leased it to F., who obtained a retail licence for the sale of beer off the premises:—Held, that from the date of the sale to C., the rest of the property was subject to the restrictive covenant; that F. must be taken to have had constructive notice of it; that a beershop was a shop where beer was sold, independently of any other circumstance; that F. had broken the covenant; and that N. was entitled to sue in respect of such breach. *Nicoll* v. *Fenning*, 51 L. J., Ch. 166; 19 Ch. D. 258; 45 L. T. 738; 30 W. R. 95.

—— **Notice to Assignee.**]—The purchaser of a plot of ground agreed that no building erected on it should be used as a public-house during twelve years and a half. The agreement did not appear on the conveyance. The purchaser's assignee built a public-house on the plot, and let it to a yearly tenant. The assignee had notice, but the tenant had not. On a bill against the assignee and his tenant, an injunction was granted to restrain the assignee from allowing the premises to be used as a public-house; the injunction to be suspended during the existing tenancy. *Carter* v. *Williams*, 39 L. J., Ch. 560; L. R. 9 Eq. 678; 23 L. T. 183; 18 W. R. 593.

Usual Covenants—Meaning of.]—By a contract for the sale of a public-house, the vendor agreed to assign, and the purchaser agreed to take the lease, "subject to the yearly rent of 90*l.* and the performance of the covenants thereby reserved and contained, such covenants being common and usual in leases of public-houses." Upon investigating the title, the purchaser found that the lease under which the premises were held contained this clause: "Provided always, and these presents are upon this express condition, that all and every underlease, deed of assignment, &c., which shall be made and executed during the term, shall be left with the solicitor of the ground landlord within two months of its date, for the purpose of registration, and a fee of one guinea paid for such registration," and a power of re-entry in case of "breach or non-performance of any of the covenants or other stipulations hereinbefore contained or referred to." The purchaser refused to complete, on the ground that this was not a common and usual covenant; and the jury so found:—Held, that whether the proviso in the head lease was a covenant in the strict sense or not, it was at all events a covenant within the contemplation of the agreement, and therefore the purchaser was not bound to complete. *Brookes* v. *Drysdale*, 3 C. P. D. 52; 37 L. T. 467; 26 W. R. 331.

An agreement for the lease of a public-house contained no reference as to the covenants to be inserted in the lease. The lessor insisted upon covenants by the lessee—(1) To reside on the premises and personally conduct the business; (2) Not to assign without consent; and that the proviso for re-entry should extend to the breach of any covenant:—Held, that they could not be insisted upon as usual covenants. *Lander and Bagley's Contract, In re*, [1892] 3 Ch. 41.

See also sub tit. LANDLORD AND TENANT.

Implied Covenant on part of the Tenant.]—Upon the letting by parol of a public-house there is no implied agreement or covenant that the tenant shall do no act whereby the licence shall become forfeited. *Maw* v. *Hindmarsh*, 28 L. T. 644.

Implied Covenant on part of Seller.]—Semble, that where such a covenant is entered into by a tenant there is, in the absence of express stipulation, an implied obligation on the part of the landlord to supply the tenant with such kinds of beer as he requires, and if this obligation is not fulfilled, the tenant is at liberty to buy the beer which he requires elsewhere. *Edwick* v. *Hawkes*, supra, col. 479.

The lease of one public-house contained a covenant by the brewer that he would supply the publican with all the beer required for consumption at that public-house and another, such beer to be of a specified quality and price:—Held,

that the obligation of the lessee's covenant was conditional upon the performance by the lessor of his covenant. *Luker* v. *Dennis*, 47 L. J., Ch. 174; 7 Ch. D. 227; 37 L. T. 827; 26 W. R. 167.

The assignee of the lease of the second public-house borrowed money of the brewer upon the security of a mortgage of that lease, and in the mortgage deed he covenanted with the brewer to buy of him all the beer consumed at that public-house:—Held, that this covenant was subject to an implied obligation on the part of the brewer to supply good marketable beer. *Ib.*

4. REMEDY FOR BREACH OF.

Measure of Damages.]—An agreement for the sale of the trade fixtures, &c., of a public-house by W. to L. at a fair valuation, contained the following stipulations: That, in addition to the amount of the valuation, L. agreed to pay W. 50*l.* goodwill; that L. was to be allowed to take, in the event of him leaving, the 50*l.*; that L. should pay to W. 100*l.* for painting, &c.; that the rent was to be 75*l.* yearly; that six months' notice to quit should be given by either party; and that, "by way of making this agreement binding, each of the contracting parties has deposited in the hands of H. 40*l.*; and either party failing to complete this agreement shall forfeit to the other his deposit-money as and for liquidated damages." In an action by L. against W. for refusing to sell pursuant to the agreement, "whereby the plaintiff had lost the advantage which would have accrued to him from the performance of the agreement by the defendant, and had lost the use of the money paid by him as such deposit as aforesaid":—Held, that the plaintiff's remedy for the breach was confined to the recovery of the 40*l.* deposited with H. *Lea* v. *Whitaker*, L. R. 8 C. P. 70; 27 L. T. 676; 21 W. R. 230.

A plea, that the plaintiff sued H. for the two sums of 40*l.* deposited with him as and for liquidated damages in respect of the breaches, and recovered judgment in respect thereof, was no answer to the action. *Ib.*

Rights of Covenantee.]—When a covenant had been entered into not to sell wines and spirits on certain premises:—Held, that the covenantee, by not interfering with the sale of British wines to a limited extent, did not lose his right to an injunction to restrain a more extensive breach. *Richards* v. *Revett*, 47 L. J., Ch. 472; 7 Ch. D. 224; 37 L. T. 632; 26 W. R. 166.

Where there are mutual covenants by owners of land, their heirs and assigns, with the owners of adjoining land, their heirs and assigns, to comply with certain stipulations, the subsequent lessee of one of the owners is entitled to the benefit of the covenants as an assign, and can sue to restrain a breach. *Taite* v. *Gosling*, 48 L. J., Ch. 397; 11 Ch. D. 273; 40 L. T. 251; 27 W. R. 394.

See also COVENANT — VENDOR AND PURCHASER.

T. H. W.

INTRUSION.

See CROWN.

INVENTION.

See PATENT.

INVESTMENT.

Of Wasting Property.]—*See* ESTATE.

On Compulsory Purchases.] — *See* LANDS CLAUSES ACT.

Of Trust Funds.]—*See* TRUST.

See also INFANT—LUNATIC—VENDOR AND PURCHASER.

I. O. U.

See BILLS OF EXCHANGE—MONEY COUNTS.

IRELAND.

Operation of English Laws and Statutes.]—The legislature, by the 6th article of the Act of Union between Great Britain and Ireland (39 & 40 Geo. 3, c. 67), with reference to the treaty on which it was founded, intended to place both countries on an equal footing with respect to articles of the manufacture and trade of either, when exported from one into the other; and such intention is sufficiently expressed in the words of that statute to enable a court of law to give effect to it; and the statute must be construed as having established a perfect reciprocity of advantages and consolidation of interests in respect of the commercial intercourse of the two countries, and to have placed them both on a level as to the mutual traffic and dealing, by the effect of the imposition of countervailing duties, and by the virtual re-enactment of the previous statutes regulating the trade in British produce. *Att.-Gen.* v. *M'Kenzie*, 11 Price, 284.

ISLE OF MAN.

1. *Jurisdiction of English Laws and Courts*, 484.
2. *Legislature, Laws and Customs*, 485.
3. *Courts and Officers*, 488.

1. JURISDICTION OF ENGLISH LAWS AND COURTS.

Bankruptcy.]—The Isle of Man is not within the United Kingdom, and therefore a person residing there at the time of an adjudication against him has three months within which he may contest the validity of a petition for adjudication under 5 & 6 Vict. c. 122, s. 24, or 12 & 13 Vict. c. 106, s. 233. *Davison* v. *Farmer*, 6 Ex. 242; 20 L. J., Ex. 177.

Habeas Corpus.]—The Isle of Man is not a foreign dominion of the crown, and therefore a writ of habeas corpus ad subjiciendum issues to it notwithstanding the 25 & 26 Vict. c. 20, s. 1. *Brown, Ex parte*, 5 B. & S. 280 ; 33 L. J., Q. B. 193 ; 10 Jur. (N.S.) 945 ; 10 L. T. 458 ; 12 W. R. 821. S. P., *Crawford, Ex parte*, 13 Q. B. 613 ; 18 L. J., Q. B. 225 ; 13 Jur. 955.

Wills.]—The Statutes of Wills, et de donis conditionalibus, do not extend to the Isle of Man. That island made unalienable by a private act of parliament against heirs general on failure of issue male. *Sodor and Man (Bishop)* v. *Derby (Earl)*, 2 Ves. 337.

Title to Land.]—A question concerning the right and title to the Isle of Man might have been determined in the English courts. *Derby* v. *Athol*, 1 Ves. 204.

2. Legislature, Laws and Customs.

House of Keys.]—The House of Keys, as a legislative body, has no inherent power to commit for contempt ; and the Manx Act of 1817 does not give such power to it when acting in its legislative capacity. *Brown, Ex parte*, 5 B. & S. 280 ; 33 L. J., Q. B. 193 ; 10 Jur. (N.S.) 945 ; 10 L. T. 458 ; 12 W. R. 821.

Bankers and Notes.]—A licensed banker in the Isle of Man executed a security in the nature of a mortgage deed, bond and security of customary freehold lands belonging to him, to certain government officers conditioned to secure payment by him and his partners (members of the banking firm) of notes to a special amount to be issued in the island under the licence of the government. Two of the partners died subsequently at different periods, and fresh licences were renewed in the names of the survivors for further issues, but under the original deed of security. The effect of such security on the notes so issued and in circulation, and the respective deaths of the partners upon failure of the bank, considered and ascertained. *Boardman* v. *Quayle*, 11 Moore, P. C. 223 ; 5 W. R. 799.

A promissory note of the Douglas and Isle of Man Bank, in the following form : "We promise to pay the bearer on demand, one pound British in bank notes or bills on London," is a negotiable note within the Manx Banking Act of 1817. *Ib.*

Husband and Wife—Dower.]—By the common law of the Isle of Man, confirmed by an ordinance published in 1687, a widow is entitled to dower only dum sola et casta vixerit ; the birth, therefore, and affiliation of an illegitimate child creates a forfeiture of the dower. *Cain* v. *Cain*, 2 Moore, P. C. 222.

—— **Equity to a Settlement.**]—The doctrine of a wife's equity to a settlement is unknown to Manx law. *Marsland, In re*, 55 L. J., Ch. 581 ; 54 L. T. 635 ; 34 W. R. 540.

Insolvency.]—When a debtor possessed of lands liable to be sold for debt is in prison he cannot, by the law of the Isle of Man, be discharged, until he has made a mortgage of his lands in favour of his creditors. *Corbett* v. *Radcliffe*, 14 Moore, P. C. 121.

According to the general law prevailing, as well in the Isle of Man as in England, a deed is void against creditors when the debtor is in a state of insolvency, or when the effect of the deed is to leave the debtor without the means of paying his present debts. *Ib.*

Lands.]—Exposition of the tenure of quarter lands and intacks in the Isle of Man of the nature of copyhold. *Birnie* v. *Caystole*, 9 Moore, P. C. 303.

There can be no foreclosure of a mortgage of copyholds of the tenure of quarter lands since the act to amend the law relating to mortgages passed in the Isle of Man in 1835. *Ib.*

After the passing of the Manx Act of Settlement, 4th of February, 1703, the Act of Tynwald of the 24th of June, 1645, which rendered the consent of the Lord Mayor of the Isle of Man necessary to alienation by a tenant, was, although not expressly repealed, no longer in force in the island ; and, under the provisions of the Act of Settlement, a tenant of the manor became entitled, upon payment of the proper fine, to alienate lands without the consent of the lord. *Boardman* v. *Quayle*, 11 Moore, P. C. 223 ; 5 W. R. 799.

A grant by a tenant of customary land and premises is not invalid by reason of the grant being made in favour of two or more persons. *Ib.*

The customary law of the Isle of Man respecting legitimation by subsequent marriage of the parents was proclaimed at a Tynwald as follows : If a man get a maid or young woman with child before marriage, and within a year or two after doth marry her, if she was never slandered or defamed with any other before, that child begotten before marriage shall have his father's corbe and his farm according to the custom of this Isle. This custom was propounded for the resolution of all doubts therein to the two deemsters and twenty-four keys of the island, and was by them confirmed and answered as follows : If a man get a maid or young woman with child, and then within a year or two afterwards doth marry her, we judge them to be illegitimate by our laws :—Held, first, that such custom was not a rule of descent to lands of inheritance descending from father to son, but embraced the case of a female entitled as a purchaser under the trusts of a will. *Quane* v. *Quane*, 8 Moore, P. C. 63.

Held, secondly, that the custom applied to a case where more than one child had been born before marriage. *Ib.*

Held, thirdly, that a child was legitimate, although more than two years had elapsed between the time the woman was gotten with child and the marriage of the parents. *Ib.*

Limitations, Statute of—Effect on Debts.]—The Manx Statute of Limitations, which enacts that actions of debt upon any trading contract or demand without specialty shall be commenced within three years next after the cause of action, only bars the remedy, and does not extinguish the debt. *Harris* v. *Quine*, 10 B. & S. 644 ; 38 L. J., Q. B. 331 ; L. R. 4 Q. B. 653 ; 20 L. T. 947 ; 17 W. R. 967.

——**Land—Mortgage.**]—The equity of redemption of lands in the Isle of Man is barred by the Act of Settlement passed in the island in 1703-4, after the lapse of twenty-one years from the date of the mortgage. *Christian* v. *Goldie*, 2 Moore, P. C. 226.

—— **Mines—Grant and Working of.**]—By an act of Tynwald, of the Isle of Man, a reservation was made to the lord of the isle, of all such mines and minerals as then were, or at any time theretofore had been, vested in the lords of the isle. The Queen, as lady of the isle, being thus possessed of the mines as of her own original title in the soil, has the right to the use of all waters found thereon and percolating by natural processes into the mines when opened. *Ballacorkish Silver Mining Co.* v. *Dumbell*, 43 L. J., P. C. 19; L. R. 5 P. C. 49; 29 L. T. 658; 22 W. R. 277.

The holder of a mining lease from the crown is not liable to make compensation for the withdrawal by percolation into his mine of water which would otherwise have flowed into, or having flowed into, would have been retained in the wells and springs of the superjacent land. *Ib.*

The Court of Chancery of the Isle of Man granted an injunction restraining A. from proceeding with his mining operations on the lands of B. until he should give security, in the specified form, to meet such damages as B. might, on the hearing of the cause, be decreed entitled to recover for injuries done, or that might be done, to B.'s lands. A. gave security accordingly, but the court ordered the injunction to be continued till the hearing of the cause:—Held, that the order for injunction was not justified by the practice of the court. *Ib.*

—— **Non-user.**]—Non-user for twenty-one years does not deprive the tenants or farmers of the Isle of Man of the right to dig for and raise limestone and other stones in the quarry of a tenant, provided the stones, &c., are for the use of the party obtaining them, or to be employed by him for the improvement of his own or neighbour's estate. By the supplemental Act of Settlement (6th June, 1704), a discretionary power is vested in the governor to allow the exercise of this right. *Christian* v. *Gibson*, 3 Moore, P. C. 351.

—— **Custom to dig Clay and Sand.**]—The Act of Settlement of the Isle of Man, 1703, confirmed to the tenants their customary estates of inheritance, "saving always all mines and minerals, of what kind and nature soever, quarries and delfs of flag slate or stone":—Held, that a custom by the tenants to dig for clay and sand did not contravene the saving clause, and that such tenants were entitled to dig for clay and sand. *Att.-Gen. (Isle of Man)* v. *Mylchreest*, 48 L. J., P. C. 36; 4 App. Cas. 294; 40 L. T. 764.

Partnership.]—There is no difference between the Manx law and the law of England in respect to the principles applicable to the law of partnership. *Labouchere* v. *Tupper*, 11 Moore, P. C. 198; 5 W. R. 797.

Prescription.]—By the law of the Isle of Man, user for twenty-one years creates a prescriptive right. *Cowin* v. *Moore*, 14 Moore, P. C. 354.

Rating—Rent-charges.]—An act for the commutation of tithes in the Isle of Man (1839) provided that there shall be paid annually, in lieu of tithes, a certain aggregate sum, to be apportioned by way of rent-charge amongst those entitled thereto. An act to provide an asylum for lunatics and insane persons, after directing a valuation "at their net annual value, of all lands and all real estate," provided that "as soon as the valuation is complete" the Tynwald Court shall lay a rate on the proprietors of all lands and real estate according to valuation:—Held, that a rent-charge under the act of 1839 was not liable to be included in such valuation, or ratable under the act of 1860. *Ingram* v. *Drinkwater*, 44 L. J., P. C. 83; 32 L. T. 746.

Rights of Water.]—A grant of the use of a stream of water from an artificial flow over the grantor's land for working a "mill or otherwise an instrument wherewith to plate iron, and likewise a smithy," the grantor engaging to keep up a full dam of water for that purpose, in the absence of any objection by the grantor, or those claiming under him, to the use of the water during fifty years, for other purposes than those limited by the grant, confers by the law of the Isle of Man, on the grantee, a prescriptive right in the water granted. *Tobin* v. *Stowell*, 9 Moore, P. C. 71.

3. Courts and Officers.

The Court of Exchequer in the Isle of Man has power to summon a jury to decide a question of fact. *Att.-Gen. (Isle of Man)* v. *Cowley*, 12 Moore, P. C. 27; 7 W. R. 713.

This power extends to an information for intrusion and trespass by the attorney-general of the island, on behalf of the crown. *Ib.*

The attorney-general, as the chief law officer of the crown in the island, bringing an appeal to the Queen in council, is not required to enter into a recognizance to answer costs of appeal. *Ib.*

The Ecclesiastical Court has jurisdiction to try the validity of an alleged donatio mortis causâ. *Cosnahan* v. *Grice*, 15 Moore, P. C. 215.

J. M.

ISSUE.

Limitations to.]—*See* Settlement—Will.

JAMAICA.

See Colony.

JERSEY.

See Colony.

JOINT STOCK COMPANY.

See Banker—Company—Mines.

JOINT-TENANCY.

Partition of.]—*See* PARTITION.

Creation of, by Will.]—*See* WILL.

In other Cases.]—*See* ESTATE.

JOINTURE.

A. INCIDENTS, 489.

B. AGREEMENTS FOR JOINTURE, 490.

C. PROPERTY OUT OF WHICH JOINTURE PAYABLE, 493.

D. PAYMENT OF JOINTURE.

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4. *Postponement of Payment*, 503.

E. INCUMBRANCES, 503.

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A. INCIDENTS.

Period of Payment—Rent-charge during Life of Husband.]—Primâ facie a "jointure" is a provision for the wife after the death of her husband. Under a jointuring power in common form, except that the words "by way of jointure" are omitted, which power is referred to in the following sentence of the will as "the said power of jointuring," the donee of the power cannot create a rent-charge payable to his wife during his own life. *Jamieson* v. *Trevelyan* (23 L. J., Ex. 281; 10 Ex. 269) distinguished. *De Hoghton, In re, De Hoghton* v. *De Hoghton*, 65 L. J., Ch. 667; [1896] 2 Ch. 385; 74 L. T. 613; 44 W. R. 635.

Marriage Contracts.]—In marriage contracts, a jointure for the wife is almost universally the first care. *M'Guire* v. *Scully*, Beat. 379; 2 Hog. 113.

Forfeiture for Adultery.]—The husband does not forfeit his estate by the curtesy, nor the wife her jointure by adultery. *Walker, In re*, Ll. & G. t. Sugd. 326.

Jointure is not forfeited at law by elopement or adultery; the same rule in equity, where jointure secured by articles. *Buchanan* v. *Buchanan*, 1 Ball & B. 206; 12 R. R. 16. S. P., *Sidney* v. *Sidney*, 3 P. Wms. 275.

Forfeiture by Wife suffering a Recovery.]—A., on his marriage, made a settlement whereby he was tenant for life to lands to 400*l.* per annum, remainder to his wife in special tail, remainder to his own right heirs. A. and his wife joined in barring the settlement, and made a new one to S. and his heirs in trust as to lands of 150*l.* per annum, for the wife, and the heirs of her body, and for want of such issue, in trust for A. and his heirs. A. died without issue: his wife suffered a recovery, and devising the lands for payment of debts, died without issue. Upon a bill by the heir of A. against the wife's creditors, it was held that the wife's recovery was a forfeiture within 11 Hen. 7. *Symson* v. *Turner*, 1 Eq. Ca. Abr. 220, pl. 1; 14 Vin. Abr. 555, pl. 25.

Emblements.]—Dower is an excrescence or continuance of the husband's estate, which jointure is not; therefore, a dowress shall have emblements but not a jointress. *Fisher* v. *Forbes*, 9 Vin. Abr. 373, pl. 82.

Rent-charge settled and afterwards Land devised.]—A., on marriage, settled a rent-charge on his wife for her jointure, and afterwards devised to her part of the land charged. This rent-charge shall not be apportioned. *Knight* v. *Calthorpe*, 1 Vern. 347; 1 Eq. Ca. Abr. 33, pl. 6.

If a testator by will before marriage gives 2,000*l.* per annum to any woman he may marry, and afterwards, by codicil, gives his wife the same jointure, she cannot take both. *Osborne* v. *Leeds (Duke)*, 5 Ves. 582; 5 R. R. 74.

Equity of Redemption.]—A. settled an equity of redemption for a jointure, and became bankrupt; the jointress is bound by the account settled by the assignees with the mortgagee, unless she can shew particular errors. *Knight* v. *Bampfeild*, 1 Vern. 179.

Bill for Account and Receiver.]—A. J. being entitled to a certain jointure, by articles of November, 1799, assigned the same to her son G. C. J., in consideration of his covenanting to pay the head-rents of the lands of Shane, &c., and also of his giving A. J. a right of distress on the lands of Blarney, in case of any default on his part in the payment of the said head-rents:—Held, that notwithstanding the remedy at law thus provided by the articles, a bill for an account on foot of the payments made by A. J. in respect of the head rents, and for a receiver, was maintainable. *Goodwin* v. *Jeffreys*, 1 Dr. & Wal. 375.

Setting Aside Jointure.]—A settlement or jointure on a marriage, though made very unequally, and in favour of the wife, will not be set aside in equity; as that cannot put the wife in statu quo. *North* v. *Ansell*, 2 P. Wms. 619.

Irish Bankers' Act.]—Semble, that the case of a jointure settled upon the wife of a son on his marriage, is not within s. 3 of the Irish Bankers Act. *Spearing* v. *Delacour*, 1 Dr. & Wal. 591.

When a Bar to Dower.]—See HUSBAND AND WIFE.

When a Bar to Share under Statute of Distributions.]—See EXECUTOR AND ADMINISTRATOR.

Exercise of Powers of Jointuring.]—See POWER.

Liability of Jointress for Waste.]—See WASTE. See also SETTLEMENT; TRUST and TRUSTEE.

B. AGREEMENTS FOR JOINTURE.

Rule in Equity.]—In equity, agreement to make jointure is equal to a jointure. *Seys* v. *Price*, 9 Mod. 219.

One covenanting to leave his wife 1,000*l.* within three months after his death, cannot be enforced in equity to amend the security. *Collins*

v. *Plummer*, 1 P. Wms. 107; *Bosvil* v. *Brander*, *Ib.*, 460.

A., being indebted in 700*l.*, agrees on his marriage to settle lands of 100*l.* per annum on himself for life, then to his wife for her jointure, remainder to their issue in tail:—Decreed, the lands to be sold, and after payment of the 700*l.* the surplus to be laid out, and settled on the wife or the issue; but the decree was reversed on a bill of review. *Carpenter* v. *Bennet*, 1 Vern. 203.

A tenant for life, with power to make a jointure, remainder over, covenanted to make a jointure on his wife in consideration of marriage by virtue of his power or otherwise, of 500*l.* per annum, and died before it was done; equity will make it good. *Coventry* v. *Coventry*, 2 P. Wms. 222; Gilb. 160; Comyn, 312; 9 Mod. 12; 10 Mod. 463; 1 Str. 596.

Agreement for Jointure in consideration of portion never paid.]—Agreement to settle a jointure in consideration of a portion by the father, though the portion was never paid, yet the wife shall have her jointure. *Perkins* v. *Thornton*, Amb. 502.

Evidence.]—Bill to have jointure made up 400*l.* per annum, according to the parol agreement on the marriage. The defendant pleads a jointure made and accepted eighteen years since:—Held, the jointure-deed is evidence that all the precedent treaties and agreements were resolved into that. *Bellasis* v. *Benson*, 1 Vern. 369.

Articles during Coverture—Entry of Wife.]—When a provision is made for a wife, in lieu of her jointure, by articles during coverture; if the wife after her husband's death enters but upon part of the lands, she shall perform the whole articles. *Moseley's Case*, cited in *Cecil* v. *Salisbury*, 2 Vern. 224.

Purchaser of Lands charged, making Jointress his Executrix.]—A. covenants that, in consideration of 1,200*l.*, he and all claiming under him will convey to B., or pay back the money. A conveyance is made, and then B. is evicted by a jointress, who claimed under a settlement made by her husband, the former owner to the estate: B. makes the jointress his executrix, and dies; A. shall pay back the money, and the executrix of B. shall have it and her jointure too. *Jason* v. *Jervis*, 1 Vern. 284.

Jointress Administratrix.]—Where there was an agreement on marriage to settle a jointure in consideration of 50*l.* portion; and the husband dies before portion paid or jointure settled, and the wife takes an administration to her husband:—Held, she shall not have the portion as administratrix, and the jointure also. Sed quære. *Meredeth* v. *Jones*, 1 Vern. 463; 1 Eq. Ca. Abr. 220, pl. 4.

Covenant as to Value of Jointure Lands omitted in Settlement.]—A settlement for a jointure is made in pursuance of articles, wherein was a covenant that the jointure lands were of such a value, but this covenant is omitted in the settlement. The covenant is subsisting. *Speake* v. *Speake*, 1 Vern. 217; 1 Eq. Ca. Abr. 220, pl. 7.

First Settlement set aside as against Second Wife.]—If A. in the lifetime of his first wife settles lands to the use of himself for life, remainder to his first and other sons in tail, and the wife dies without issue, and A., on his second marriage, agrees, in consideration of a portion paid, to settle part of lands as a jointure on his second wife, the court will set aside the first settlement as fraudulent against the second wife, who is a purchaser. *Douglas* v. *Ward*, 1 Ca. Ch. 100; 1 Eq. Ca. Abr. 220, pl. 10.

Grant of Rent-charge to Infant.]—Grant of rent-charge out of particular lands to an infant for her jointure, though grantor be evicted, being in equity a general agreement to grant rent-charge of that amount out of some lands, will bind infant if her guardian or parents assent to it. *Corbett* v. *Corbett*, 1 Sim. & S. 621; 2 L. J. (O.S.) Ch. 108. Affirmed 5 Russ. 254; 7 L. J. (O.S.) Ch. 9.

Articles on Marriage of Female Infant.]—By articles on marriage of an infant, in consideration of her portion, a suitable jointure was to be made on her when of age, in bar of dower, and she was to convey her lands to be limited to the husband in fee. The jointure was settled, and the wife, when of age, was a party to the deed, but she never conveyed her own estate, nor was she ever required so to do by her husband, though her dower exceeded her jointure. The husband died, and the wife entered upon the settled lands:—Held, she was not bound by the articles, nor by her acceptance of the jointure; she therefore kept her own estate and jointure also. *Lucy* v. *Moore*, Moseley, 59; 4 Bro. P. C. 343.

Covenant by Tenant for Life—To make additional Jointure.]—Tenant for life, with power to make a jointure of 100*l.* per annum for every 100*l.* which he has with his wife, covenants, on marriage, to make a jointure accordingly, and also to make an additional jointure on receiving, or becoming entitled to, any further money in right of the wife; after the death of the husband the wife becomes entitled to an additional fortune; she shall not compel the remainderman to make an additional jointure on her on this account; but on the other hand, the husband's creditors shall not take from the wife this additional fortune. *Holt* v. *Holt*, 2 P. Wms. 648.

—— **To Jointure when in Possession—Incapacity to exercise Power.**]—Devise of real estate to tenants for life in succession, with remainders over, with power to the tenants for life, when and as they should severally and successively be in possession, to appoint, by way of rent-charge, a jointure of a certain amount to any woman or women with whom they might intermarry. One of the tenants for life covenanted, on the occasion of his marriage, that, if he should come into the possession of the estates, he would execute the power of jointuring in favour of his wife. After this, and before coming into possession of the estates under the devise, he became of unsound mind, and continued so until his death, before which, however, he had become entitled to the possession of the estates:—Held, that his widow was entitled to have the rent-charge enforced by way of jointure against the estates, under the covenant made by her deceased husband on his marriage with her. *Affleck* v. *Affleck*, 26 L. J., Ch. 358; 3 Jur. (N.S.) 326; 5 W. R. 425.

—— **Death without making Jointure.**]—A., tenant for life, remainder to his first and other

sons in tail, remainder to B. for life, remainder to his first and other sons in tail, remainder to C., with a power to B. after A.'s death without issue, to make a jointure; B. married in the life of A., and before marriage covenanted to make a jointure, and to execute his power when in possession. A. died without issue, and B. survived, but died without making a jointure. B.'s widow brought a bill against C. to have a jointure made, because B., surviving A., might have executed his power, and might have covenanted so to do; decreed. *Alford* v. *Alford*, Gilb. 167. And see *Hervey* v. *Hervey*, 1 Atk. 561.

Covenant by Tenant in Tail.]—Tenant in tail covenants to settle a jointure and dies. Issue in tail not bound by the covenant. *Clifford (Lord)* v. *Burlington (Earl)*, 2 Vern. 371.

Father being tenant for life, and son tenant in tail in remainder of an estate, a settlement was made, wherein was a power for the son, when in possession, to make a jointure. Father and son enter into a general covenant (without reciting or referring to the power), that the son within twelve months shall make a jointure on a then intended wife; the father dies within twelve months, and the son takes possession, and dies without making any settlement; the estate is bound in the hands of the remainderman. *Jackson* v. *Jackson*, 4 Bro. C. C. 462.

Tenant in tail, with power to make a jointure in consideration of marriage, articled to make one, but died without doing it, and without issue; then his wife died, and her administratrix brought a bill for an account of the profits and lands articled to be settled. Bill dismissed, the power remaining unexecuted. *Elliot* v. *Hele*, 1 Vern. 406.

Marriage Settlement—Grant of Rent-charge—Incorrect Recital that Settlor was seised in Fee.]—A. became a party to a settlement, executed on the marriage of his nephew, and granted to the intended wife an annuity, to commence after his death, charged on lands of which he declared himself entitled at law or in equity to an estate in fee simple. He gave her a power of distraining on these lands for the annuity (subject, however, to any charge on them which he had created or might create for his own wife), and he also created a term of years in the same lands, which he assigned to trustees to hold for the purpose of satisfying the annuity by entry and distress subject as aforesaid. On A.'s death proceedings were instituted by other parties in chancery, and a decree was pronounced declaring that he was only entitled to a life estate in the lands which he had charged. The annuity fell into arrear:—Held, that the settlement gave the annuitant a right to proceed against the personal estate of the grantor for satisfaction of the annuity. *Monypenny* v. *Monypenny*, 9 H. L. Cas. 114; 31 L. J., Ch. 269.

C. PROPERTY OUT OF WHICH JOINTURE PAYABLE.

Rent-charge on Estates—Devise of part of Estate to Wife for Life.]—A., on his marriage, grants a rent-charge to his wife out of his estates for her jointure, which he secures by a term limited to trustees. By his will he gives his mansion-house and park to his wife for life, and the rest of his estates to B., and directs that the repairs, painting, &c., of his mansion-house shall be paid for by sale of timber on the premises devised to B., and then he confirms the settlement:—Held, that the jointure is wholly raisable out of those premises. *Powell* v. *Grigby*, 3 Cl. & F. 103; 9 Bligh (N.S.) 646. And see *Knight* v. *Calthorpe*, 1 Vern. 347; 1 Eq. Ca. Abr. 33, pl. 6.

Real and Personal Estate—Real Estate Charged.]—A., on marriage with M., settled a jointure on her, with the approbation of B., his father, who witnessed the deed. A. died, leaving a large personal estate, and made M. executrix. Afterwards B. discovered that A. was only tenant for life, with remainder to himself in fee, and he recovered at law. Per cur., it is plain that the father thought the son had the fee, and that he knew of the settlement: considering, therefore, the near relationship of father and son, the widow shall not be compelled to resort to the son's covenant, and compel the jointure to be made good out of his personal estate. *Teasdale* v. *Teasdale*, Select Ca. Ch. 59.

By a settlement in contemplation of marriage, reciting that the intended husband being entitled to certain real estate it was agreed, on the treaty for the marriage, that he should secure to the intended wife, in case she should survive him, a certain annuity by way of jointure, "in manner thereinafter expressed," the husband demised certain real estate to trustees for a long term of years upon the trusts thereinafter declared, and then covenanted that his heirs, executors, administrators, or assigns should pay the jointure to his wife surviving him upon certain specified days; and the covenant was followed by a declaration that the demised lands were to be held upon trust for the settlor until some default in making any of the payments of the jointure; and in case of non-payment of any part for forty days next after any day of payment, then upon trust to secure the same:—Held, that as between the real and personal representatives of the settlor, the land was the primary fund for payment of the jointure, because the jointure was not in satisfaction of any debt due from the settlor at the time of executing the settlement, nor had his personal estate been augmented by any consideration given for it; and therefore the presumption was that a primary charge upon the land was intended; and that presumption was not rebutted by anything in the recitals or in the form of the deed of settlement. *Loosemore* v. *Knapman*, Kay, 123; 2 Eq. R. 710; 23 L. J., Ch. 174; 2 W. R. 664.

By articles of separation, dated in June, 1834, the defendant agreed that he would, on or before the 1st of February, 1835, effectually, by a charge on freehold estates, or by investment of an adequate sum of money, or by the best means which might then be in his power, secure to the plaintiff, his wife, an annuity of 1,000*l*. In December, 1834, a deed of arrangement was executed between the defendant and his son, by which certain family estates were conveyed to trustees to raise money for the payment of various incumbrances, afterwards to such uses as the defendant and his son should appoint, and in default of appointment to the defendant for life, and then to his son absolutely, with a power for the defendant to jointure his then present or any future wife to the extent of 1,000*l*. per annum:—Held, that the plaintiff was entitled

to have her jointure raised out of the estates, as against the defendant and his son. *Mornington (Countess)* v. *Mornington (Earl)*, 17 Sim. 59; 18 L. J., Ch. 442.

Estates liable to Contribute Ratably.]—The owner of estates in the counties of Oxford and Berks covenanted on his marriage to convey such part of them to trustees as should be of the annual value of 900*l.*, to the use of himself for life, with remainder to the use and intent that his intended wife should yearly receive for her jointure 800*l.*, to be charged upon the same hereditaments. The settlor, not having made any settlement in pursuance of the covenant by his will confirming the settlement, devised his estates in the counties of Oxford and Berkshire to his wife for life. He afterwards by deed revoked his will as to the estates in Oxfordshire, which consequently on his death descended to his heir-at-law. The jointress insisted that she was entitled to the Berkshire estate for her life, free from any contribution towards her jointure, and that the Oxfordshire estates were exclusively liable to satisfy the covenant:—Held, that as no intention to benefit the jointress to the extent for which she contended appeared on the face of the will, the two estates were liable to contribute ratably to the satisfaction of the covenant. *Eyre* v. *Green*, 2 Coll. C. C. 527; 10 Jur. 384.

Charge of Jointure on Estate in Possession, and also on Estate in Remainder.]—G. S., being seised in fee in possession of X., and of a remainder in fee expectant on the death of J. in Z., upon his marriage charged X. and Z. with a jointure; and it was provided that during the life of Q. the jointure should be borne by X., and that if J. should die in the lifetime of the wife (which happened), the jointure should issue out of Z., and no part of it out of X. X. was settled on the issue of the marriage, and Z. was limited to G. S. and his heirs. And it was provided that upon G. S. charging other lands of his with the jointure, the lands of X. and Z. should be discharged therefrom. And G. S. covenanted to charge 3,000*l.* for children's portions, and that it should be the first charge on all property of which he should die seised or possessed, and have a priority of all other charges thereon:—Held, 1. That as between the lands of X. and Z., the lands of Z. were bound to indemnify the lands of X. against the jointure. 2. That the 3,000*l.* being a charge upon such property only of G. S. as he died seised or possessed of, it became on his decease a charge upon X., and was puisne to the jointure. *Sullivan* v. *Sullivan*, 2 Jo. & Lat. 769; Ir. R. 8 Eq. 685.

Jointure charged on two estates by marriage settlement how to be borne as between the estates. *S. C.*, 1 Jo. & Lat. 678; Ir. R. 7 Eq. 453. And see *Wigsell* v. *Smith*, 1 Sim. & S. 321; 1 L. J. (o.s.) Ch. 121.

Settlement of Real and Personal Property—Arrears of Jointure payable out of Corpus.]—By a marriage settlement real and personal property of the husband, and 3,000*l.*, the wife's fortune, were vested in trustees, to receive the rents and interest, and to pay head-rents, and then to pay the residue of the rents and interest to the husband for life; and after his decease that the wife and her assigns during her life should receive a jointure with a power of distress and entry during her life to the intent that she might be satisfied and paid the jointure and all arrears, and "subject as aforesaid to the jointure," for the issue of the marriage; and, in default of such issue, as to the husband's property, for him, and as to the 3,000*l.*, the wife's property, for such person as she should appoint, and in default of appointment to her executors. There was no issue of the marriage:—Held, that arrears of jointure due at the wife's death were payable out of the corpus of all the property put in settlement as against the persons entitled under the ultimate limitation. *Carter* v. *Salt*, Ir. R. 1 Eq. 97.

The wife, by a deed executed during the husband's lifetime, appointed the 3,000*l.*, after her death, to trustees for scheduled creditors of the husband. By a deed executed after the husband's death, reciting the power and the former appointment, that she had been advised that it was voluntary and inoperative, and that she was still minded to appoint or dispose of the 3,000*l.* so that it should be applied ratably among the scheduled creditors, she revoked the former appointment, and irrevocably appointed 3,000*l.* to the trustees of the former deed, in trust after her death to pay and divide the same ratably among the scheduled creditors, who were parties to the deed:—Held, that the latter did not operate as a release of the 3,000*l.* from the jointure; and that that fund was subject, with the other property in the settlement, to the arrears of the jointure due at the wife's death. *Ib.*

Charge on Plantation and Slaves—Compensation-Money liable for Arrears.]—A jointure was charged upon a plantation and slaves in the Island of St. V., and secured by powers of distress and entry, and by a term vested in trustees, upon the usual trusts to raise the arrears by sale, mortgage, &c. Subject to the jointure, the estate was charged with a large sum for portions. Subsequently to the creation of both charges the slaves were by law manumitted, and a considerable sum paid by way of compensation in respect of them. The jointure having fallen into arrear:—Held, that this compensation-money was applicable for the payment of such arrears, on a suit being instituted for that purpose; but that the persons interested in the portions, and the owner of the estate subject to the jointure and portions, were necessary parties to such suit. *Greatheed* v. *Elliot*, 15 Jur. 986.

Covenant to secure Jointure out of Estates to be afterwards acquired—Estate contracted to be purchased and again sold.]—A wife had a jointure secured on her husband's estate, X. In 1844 the husband contracted to purchase an estate, Y.; and to enable him to sell the estate, X., the wife in 1845 released her jointure, and he then covenanted to secure it out of "estates he should thereafter acquire." Before the estate Y. had been conveyed, the husband contracted to sell it:—Held, that in equity the estate Y. was charged with the jointure. *Warde* v. *Warde*, 16 Beav. 103.

Stock produced by sale of Real Estate under London Dock Act.]—Stock produced by a sale of real estate under the London Dock Act, 39 & 40 Geo. 3, c. 47, subject to jointure, considered as real estate, the original character not having been displaced by a complete conversion. *Shard* v. *Shard*, 14 Ves. 348.

Charge on Life Estate.]—A., upon the occasion of his marriage, in exercise of the usual powers of jointuring, and of charging portions, executed a deed, whereby he limited a jointure to his intended wife, to commence after his own decease, and also a term of years, to commence after the decease of the survivor, to secure portions for younger children. By another deed he affected to charge other estates, of which he was merely tenant for life in remainder, without any power of jointuring or of charging portions, with an additional jointure and portions, and covenanted that he would, as soon as he should be entitled to the possession, convey the estates specified therein, and all other hereditaments to which he then was or thereafter might be entitled for any estate of freehold or inheritance to the same uses, for the purpose of securing the additional jointure and portions, as were contained in the prior settlement for securing the jointure and portions thereby already charged. A. subsequently incumbered his life estate in remainder. Upon its falling into possession :—Held, that the second deed did not create a charge on the life estate, or confer any right to have the rents impounded during the life of A. to satisfy the additional jointure or portions, and that the incumbrancers were entitled to priority over the jointress and younger children. *Ford* v. *Tynte*, 2 De G. J. & S. 557 ; 34 L. J., Ch. 452 ; 11 Jur. (N.S.) 402 ; 12 L. T. 512 ; 13 W. R. 643. And see *Monypenny* v. *Monypenny*, supra, col. 493.

Devise in Strict Settlement.]—Devise, subject as to part to a devise to trustees and their heirs, for debts, in aid of the personal estate, and as to part to mortgages in fee to sons and a daughter, and their respective issue male in strict settlement, &c., with power to the sons respectively, when in possession, to convey and appoint all or any part to trustees on trust, by the rents and profits, to raise a rent-charge as and for a jointure for any wife or wives, for each such wife's natural life only, and also to charge portions by deed and to lease for twenty-one years. Execution of the power by conveyance to trustees and their heirs on trust, by the rents and profits, to raise and pay a jointure during the wife's natural life only, and charging portions with covenant for title, and for quiet enjoyment by the trustees during the natural life only of the wife. As to the estate of the trustees at law, quære ; the Court of King's Bench certifying that they took an estate in fee ; and the Court of Common Pleas, that they took no estate whatsoever. *Wykham* v. *Wykham*, 18 Ves. 395.

The mode of executing such a power is limiting a rent-charge to the wife by way of jointure, secured, if not by the ordinary power of entry and distress, by a trust term for ninety-nine years, with a proviso for cesser on payment of the jointure during her life, and all arrears at her death. *Ib.*

Devise in strict settlement, with power to the tenants for life to jointure, on condition that two-thirds of the portion should, upon such marriage, be settled, one-third upon the eldest son of the marriage, and one other third upon the younger children. Upon the intention that the settlement should be conformable to the limitations of the real estate, a trust for the father for life was established, and the interest of the eldest son was not to be devested, except by his death under twenty-one, without issue male. *Burrell* v. *Crutchley*, 15 Ves. 544.

Testator directed a settlement to be made of his estates, and a power to be inserted in it enabling the tenant for life to jointure any wife or wives, at one or several times, to the extent of one-fifth part of the then ordinary annual rental of the estates :—Held, that the settlement ought to authorise the tenant for life to charge the estates with a clear yearly rent-charge not exceeding one-fifth of the yearly rent of the estates payable at the time of creating the charge. *Trevor* v. *Trevor*, 13 Sim. 108 ; 11 L. J., Ch. 417 ; 6 Jur. 863.

Devisees of Settled Estates—Apportionment—Fluctuating Income—Capital Value.]—A testator, pursuant to a power of appointment, limited certain settled estates as to part to his eldest son in tail, and as to the residue to his younger children as tenants in common in tail, the whole being charged under the settlement with payment of a jointure to his widow. The income of the part appointed to the eldest son was of fluctuating value, being derived mainly from mineral produce ; the income of the residue was derived solely from surface rents :—Held, that the jointure, being a charge on the annual income of the whole, must be apportioned as between the appointees in proportion to the actual income received in each year, and not in proportion to the capitalised value of their respective shares. *Ley* v. *Ley*, 37 L. J., Ch. 328 ; L. R. 6 Eq. 174 ; 18 L. T. 126 ; 16 W. R. 509.

Devise of Real Estate and Bequest of Personal Estate for Purchase of Land subject to Powers—Liability of Devised Estate to Charges.]—Real estate was settled with powers to the tenant for life to charge jointure and portions. On his marriage he in part exercised these powers and charged the settled estate, but not to the full extent authorised. At a subsequent period a testator devised real estate and bequeathed his residuary personal estate to be laid out in the purchase of land, to such of the uses and subject to such of the powers declared of the settled estate as should be subsisting at his death, but not so as to increase or multiply any charges or powers of charging. The tenant for life and the tenant in tail of the settled estate executed, after the testator's death, a disentailing assurance of all the properties subject to the settlement :—Held, that the devised estate and the residuary personal estate were not subject to the charges existing at the date of the testator's death ; that a release of his still-existing powers of charging ought to be executed by the tenant for life ; and that the trustees of the testator's will were thereupon bound to pay the residuary personalty to the tenant for life and tenant in tail on their joint receipt. *Berners, In re, Berners* v. *Calvert*, 3 R. 153 ; 67 L. T. 849 ; 41 W. R. 188.

Priorities—Portions—Jointure.]—Where a sum of money was charged upon land, in exercise of a power exercisable by the donee for his own benefit, and parts of the sum were irrevocably appointed by the same deed to certain persons, the residue being left subject to future appointment :—Held, that the parties entitled to the aliquot parts so appointed had priority over subsequent appointees of the residue. *Creagh's Estate, In re*, 25 L. R., Ir. 128.

—— **Postponement of Jointure in favour of Mortgagee of Portion.**]—Lands were subject to

a jointure, and, as a next charge, to a sum for portions. The second appointee in date of the portion-money mortgaged his share, and the jointress postponed her jointure in favour of the mortgagee:—Held, that the postponement was to be treated as an equitable assignment, and that the jointress had not thereby postponed her jointure to the first appointee's share. Rights and priorities of the parties considered. *Armstrong, In re*, [1895] 1 Ir. R. 87.

D. PAYMENT OF JOINTURE.

1. Deficiency in Value of Property Charged.

When Value Estimated.]—Where lands of a specific annual value are settled in jointure, pursuant to a power, the value is to be estimated at the death of the husband. *Londonderry (Countess)* v. *Wayne*, 2 Eden, 170; Amb. 424.

Clear Yearly Value.]—Power to husband to make jointure not exceeding clear yearly value of 100*l.* for every 1,000*l.* portion; part of the portion is limited, the interest to the husband for life, then to increase younger children's fortune; if none, to survivor of husband or wife: this considered as received by him, as settled fairly for the family and for his benefit, and within interest of the power. "Clear" means, as at the time of making the jointure, and not during its continuance, which would make these powers fluctuating. "Clear" means, free from charges usually allowed between buyer and seller, and by the course of the country borne by tenant, but subject to land-tax, and those borne by landlord. *Tyrconnel (Earl)* v. *Ancaster (Duke)*, 2 Ves. Sen. 500; Amb. 237.

Lands Expressed to be of certain Value.]—Where, in marriage articles, the lands agreed to be limited in jointure are expressed to be of the yearly value of 500*l.* and afterwards proved deficient, this amounts to an agreement that they were of that value, and is a sufficient foundation for making up the deficiency. *Glegg* v. *Glegg*, 4 Bro. P. C. 614.

Where lands are settled in jointure, and covenanted to be of 500*l.* per annum value, but the husband, afterwards discovering a defect in the title, settles other lands as an additional jointure, and declares them to be in recompense of all deficiencies, either in title or value of the lands before settled; the jointress shall have lands of the full value of 500*l.* per annum, over and above the other lands, and all other provisions made for her by her husband's will. *Grove* v. *Hooke*, 4 Bro. P. C. 593.

How Deficiency made up.]—Lands settled on A. for life, for her jointure, are covenanted to be of a certain clear yearly value; after the death of the husband the jointure lands turn out deficient. The jointress is entitled to have the deficiency made good out of other lands, and to come in as a specialty creditor upon the husband's estate for the arrears of the deficiency, with interest. *Parker* v. *Harvey*, 4 Bro. P. C. 604; 14 Vin. Abr. 458, pl. 16.

A. covenanted that lands settled were 400*l.* per annum; the jointure being deficient, decreed, the heir shall make it good in specie. *Speake* v. *Speake*, 1 Vern. 217; 1 Eq. Ca. Abr. 220, pl. 7.

Tenant for life, with power to make a jointure of 1,000*l.* per annum on his marriage, covenanted to make such a jointure on his wife; afterwards he gave a particular of lands, mentioned to be of 1,000*l.* per annum value, which were settled accordingly; but they proved to be worth only 600*l.* per annum:—Decreed, to be made up 1,000*l.* per annum, by the issue in tail. *Clifford (Lady)* v. *Burlington (Lord)*, 2 Vern. 379; 1 Eq. Ca. Abr. 345, pl. 17.

P. L., being seised for his life of Blackacre, with a power of jointuring to the extent of one-third of the clear yearly rents and profits thereof, and being also seised of Whiteacre in fee, by marriage articles reciting that he was seised of Blackacre, but not specifying for what estate, charged Blackacre with a jointure of 400*l.* a year for his intended wife, with the usual power of distress; and the articles further provided, that if such distress on Blackacre should be ineffectual, the jointress should, in the event, enter upon and distrain Whiteacre for the arrear of the jointure. The 500*l.* a year exceeded one-third of the clear yearly value of Blackacre, and the jointure being in arrear, and a distress upon Blackacre proving ineffectual:—Held, that Whiteacre was liable to the difference between one-third of the yearly value of Blackacre, and the 500*l.* per annum. *Locke* v. *Darley*, 2 Dr. & War. 256; 1 Con. & L. 406.

A. devised his estate (subject to debts and legacies) to his daughter, in strict settlement, remainder over; the estate not being sufficient to keep down the interest during the life of a jointress by a prior settlement (who lived two years), though more than sufficient afterwards, an arrear of interest accrued:—Held, that the whole profits during the daughter's estate shall be applied to keep down the interest, and the surplus arising on the death of the jointress, having accrued to the trust estate, shall be applied to answer the former deficiency, so as not to charge the remainder; but the daughter being a child unprovided for, shall have maintenance. *Revel* v. *Watkinson*, 1 Ves. Sen. 93.

A., upon his marriage with B., settles lands of 400*l.* per annum for her jointure, and covenants that, if the particular lands so settled should not yield 400*l.* per annum clear, B. should have so much of the rents of the residue of the settled estate as should make up the said 400*l.* per annum. A. being attainted of high treason, his estate becomes forfeited, and was granted by the crown to S. The particular jointure lands did not amount to 400*l.* per annum:—Held, that the jointress is entitled, as against S., to have the deficiency made good. *Eustace* v. *Keightly*, 4 Bro. P. C. 588.

A fund was vested in trustees during the joint lives of husband and wife, to pay out of the income to the wife 200*l.* a year, and if she survived her husband, then during the rest of her life 500*l.* a year, and subject thereto for the husband. And the husband covenanted that if the income should become less than 500*l.* a year, he would add to the fund, so as to make up the income to that amount. The income during the husband's life was reduced below 500*l.* The husband devised his real estate to his wife for life, and directed his personal estate to be converted and invested in land to be settled to the same uses:—Held, that the widow was entitled to have the annuity fund made up to 500*l.* a year, and then to have the husband's reversionary interest in it sold, and the proceeds invested according to the will. *Harrington (Countess)* v. *Atherton*, 2 De

G. J. & S. 352 ; 4 N. R. 206 ; 10 Jur. (N.S.) 1088 ; 11 L. T. 291 ; 13 W. R. 62.

By a settlement, reciting an agreement to provide a jointure for the intended wife, but not stating the amount, the intended husband covenanted with the trustees to convey to them certain lands, then held in trust for him, upon trust, after his death, to permit the intended wife, during her life, to take out of the land an annuity of 220*l.*, with power of distress and right of entry ; and the settlor covenanted to do all such other acts as should be necessary for the further and better assuring the annuity according to the true intent and meaning of the deed ; the lands having proved, after the husband's death, insufficient to pay the annuity in full :—Held, that there was nothing in the settlement amounting to a covenant for or warranty of the adequacy of the lands for payment of the annuity in full, and that the personal assets of the settlor were not liable to make good the deficiency. *Weldon* v. *Bradshaw*, Ir. R. 7 Eq. 168.

Delay in Enforcing Covenant to make up Deficiency.]—J. made a settlement on his eldest son for life, remainder to his first, &c., sons in tail, remainder over, with power for his son to jointure any wife he should afterwards marry to the extent of 100*l.* per annum. The father died, and the son married a woman to whom, after marriage, he appointed certain lands in trust for her, for a jointure, and he covenanted that, if they were not of the value of 100*l.* per annum, he would make good the deficiency at any time during his life ; he lived several years, but no complaint was ever made of the value of the land, nor was he requested to make good any deficiency. Upon his death without issue, the widow brought her bill to have her jointure made up 100*l.* per annum, and it was so decreed ; a covenant to provide for a wife not being voluntary, and as to her not requiring it before, no laches can be imputed to a feme covert. *Fothergill* v. *Fothergill*, 2 Free. C. C. 256 ; 1 Eq. Ca. Abr. 222, pl. 9.

Part of Lands settled subsequently Aliened.]—A., on his marriage, agreed to settle lands for the benefit of his wife and their issue, and afterwards aliened part of the lands :—Decreed, that the jointress shall have the deficiency of her jointure made good out of the inheritance of the lands remaining unsold. *Carpenter* v. *Carpenter*, 1 Vern. 440 ; 1 Eq. Ca. Abr. 222, pl. 9.

Increase or Decrease in value of Lands settled.]—If, by accident, after the execution of a power, there is an excess in the lands settled on the jointress, she shall have the benefit ; and by parity of reason, if there is a deficiency by inundation or casualty, she must acquiesce under it. *Blandford* v. *Marlborough*, 2 Atk. 544.

2. In what Currency Jointure Paid.

Sterling lawful Money of Ireland.]—Prior to the passing of the act for assimilating the currencies of England and Ireland, an English lady married an Irish gentleman. By their settlement, which was executed at Bath, where the marriage was solemnised, it was recited that the gentleman had agreed to charge certain of his estates in Ireland with the payment of a rent-charge of 1,000*l.* a year to the lady for life, in case she should survive him, but the sum secured to her by the deed was expressed to be 1,000*l.* a year sterling lawful money of Ireland :—Held, nevertheless, that she was entitled to 1,000*l.* a year sterling. *Cope* v. *Cope*, 15 Sim. 118 ; 15 L. J., Ch. 274.

Lawful Money of Great Britain.]—Power in a marriage settlement to grant to a wife any annual sum of money, or yearly rent-charge, to be tax free, and without any deduction, and to be issuing out of and chargeable upon lands in Ireland, so that such rent-charge do not exceed in the whole the yearly sum of 3,000*l.* of lawful money of Great Britain :—Held, that a rent-charge appointed under this power is payable in Ireland in the currency of England ; but that the appointee is not entitled to have the sum transmitted to England free of the charge of conveyance and exchange properly so-called. The lex loci contractus, and the law applicable to cases of money charged as a rent payable out of land, where no provision as to the place of payment is made by the instrument, are inapplicable to a case where the instrument itself furnishes the means of interpretation. In ambiguous contracts the domicile of the parties, the place of execution, the purpose, and the various provisions of the instrument, are material to be considered in the construction. *Lansdowne* v. *Lansdowne*, 2 Bligh, 60 ; 21 R. R. 43.

3. Arrears and Interest.

Non-application of Statute of Limitations.]—A., being entitled to a jointure of 480*l.*, charged on lands producing only 240*l.* a year, went into possession of the lands in 1800. In 1835 the rental was increased, so as to leave a large surplus after paying the jointure, and she continued in possession :—Held, that the Statute of Limitations did not apply, and she was entitled to the entire arrears accumulating from 1800. *Battersby* v. *Rochford*, Ir. R. 10 Eq. 439. And see *Carter* v. *Salt*, and *Greatheed* v. *Elliot*, supra, cols. 495, 496.

Right of Personal Representative to enforce Payment.]—On the death of the husband, the remainderman refused to pay the jointure, and the wife refused to pay an annuity which she had agreed with her husband to pay to a creditor. No attempt was made during her life to enforce payment of either :—Held, that her executrix might sustain a bill for payment of the arrears of the jointure, although the wife had not performed her part of the contract by paying the annuity. *Baldwin* v. *Roche*, Ir. R. 5 Eq. 110.

Rents received by Receiver.]—A receiver over a life estate continued in receipt of the rents after the death of the tenant for life, whose widow subsequently obtained a decree against the remainderman, appointing the same receiver over the lands, for an arrear of jointure :—Held, that the rents received by the receiver between the death of the tenant for life and the decree belonged to the remainderman as bygone rents. *Guinness* v. *Cottingham*, Ir. R. 7 Eq. 109.

—— **Jurisdiction of Court of Chancery in Ireland to appoint Receiver.**]—*Maultby* v. *Maultby*, 2 Ir. Ch. R. 32. *Goodwin* v. *Jeffreys*, 1 Dr. & Wal. 375.

Interest.]—A jointure was made of an estate, let for five years, at 17*l.* per annum, but worth 108*l.* per annum. The husband covenanted, by quarterly payments, to make up the jointure 108*l.* per annum during the five years. This is a personal covenant for payment of a sum in gross, and interest shall be allowed on the quarterly payments, but no taxes. *Lysons* v. *Vernon*, Select Ca. Ch. 25.

Interest not allowed on arrears of jointure except on a very special case indeed. *Anon.*, 2 Sen. Ves. 661.

Interest not given upon arrears of maintenance any more than upon arrears of a jointure. *Mellish* v. *Mellish*, 14 Ves. 516; 9 R. R. 335.

4. Postponement of Payment.

Death of Tenant for Life.] — Fee-simple, freehold and leasehold lands were limited to A. for life, remainder to B. in tail, by a settlement executed on B.'s marriage, and reciting that B. could not obtain A.'s consent to bar his estate tail. B., in order to defeat his estate tail in remainder, and to convey a base fee to the trustees, conveyed these lands, subject to the life estate of A., to the use of himself for life, and after his decease, upon trust that his intended wife, in case she should survive him, should, after his decease, during the remainder of her life, receive a jointure out of the lands; the first payment thereof to be made on such of the gale days as should first happen after the decease of B., with a clause of entry and distress on nonpayment for twenty-one days after any of the days of payment, remainder after the death of B. to trustees for 300 years, to secure portions for younger children, remainder to the first and other sons of the marriage in tail male, remainder over. The wife's fortune was conveyed to the trustees in trust to pay the interest, after the decease of B. in the lifetime of A., to the wife, until she should become entitled to receive the jointure; and in case B. should survive A., or he should obtain A.'s consent to bar the estate tail, in trust for B. absolutely. B. died in the lifetime of A.:—Held, that the jointure did not become payable until after A.'s death. *Leonard* v. *Leonard*, 9 Ir. Ch. R. 388.

E. INCUMBRANCES.

Redemption — Contribution.] — An estate in jointure was subject to a mortgage; the jointress and reversioner must redeem in proportion, the jointress one-third and the reversioner two-thirds. So, if an estate subject to a mortgage is devised to A. for life, remainder to B. in fee, they may redeem in the same proportion. *Flud* v. *Flud*, 2 Free. C. C. 210.

If jointress, who is to hold land free from incumbrances, pays off precedent mortgage, her executors shall hold over till satisfied, for such tenant for life ought to be reimbursed; but if jointress after marriage joins husband in fine, and mortgages land, and husband dies, her land is charged, and she shall contribute to disburden land, and her executors shall not hold till satisfaction made, for she herself concurred in incumbrance. *Cornish* v. *Mew*, 1 Ca. Ch. 271. And see *Brond* v. *Brond*, 2 Ca. Ch. 100.

If a feme covert joins with her husband in a fine and mortgage of her jointure lands, there results a trust for her when the mortgage is paid to have the lands again; so if a jointure is made of lands which are mortgaged, the wife may redeem, and her executors shall hold over till paid with interest. *Bertue* v. *Stile*, 1 Ch. Ca. 271. S. P., *Haymer* v. *Haymer*, 2 Vent. 343.

Where the issue and jointress claim by the same settlement, if there be a prior incumbrance, the jointress shall contribute, and not lay the whole burden on the heir. *Carpenter* v. *Carpenter*, 1 Vern. 440.

Lien.]—A wife has a lien upon the estate of her husband and his father where they are parties to the marriage contract, and the wife's portion is paid to the son. So if the fortune is paid to the father, or to clear incumbrances. *Probert* v. *Morgan*, 1 Atk. 440.

Land charged with Portion.]—A. charges land in D. with a portion for a daughter by a first wife, and then marries and settles part of these lands for the jointure of a second wife, who has no notice of the charge. A. believing the portion would take the place of the jointure, by will, gives other lands in E. in lieu thereof. The wife by combination with the heir, refuses to accept the devise:—Decreed, the daughter should hold the lands in D. till her portion was paid. *Reeve* v. *Reeve*, 1 Vern. 219; 2 Vent. 363; 1 Eq. Ca. Abr. 220, pl. 3.

Parties confirming Jointress's Settlement.]—Parties entitled to an estate, confirming a jointress's settlement, are purchasers of her interest in incumbrances paid off by her fortune, which had been assigned for the better securing her rights under the settlement. *Portsmouth* (*Earl*) v. *Suffolk* (*Lady*), 1 Ves. Sen. 31.

F. DISCOVERY OF DEEDS.

Position of Jointress.] — A jointress is not bound to answer whether her husband had no other title than as assignee of a mortgage. She denying she had any notice of the mortgage, and that her husband told her he was in by descent. *Stephens* v. *Gaule*, 2 Vern. 701; 1 Eq. Ca. Abr. 220, pl. 15.

A jointress is not obliged to bring her deed into court, unless the party requiring it will confirm it. *Petre* v. *Petre*, 3 Atk. 511.

A jointress had her own part of the marriage settlement in her custody, and became possessed of her husband's as his executrix; on motion, she was ordered to produce it to the clerk in court, but not to deliver it up, that being the very end of the bill. *Aston* v. *Aston*, 3 Atk. 302.

A jointress or purchaser ought to produce their deed, to see if the lands they claim are comprised therein. *Ib.*

Though an offer be made to confirm a widow's jointure, she is not obliged to discover the title deeds by her answer, or until the offer is effectuated; she must, however, state the date of her jointure deed, whether it was executed at that time, and the premises therein comprised. *Leech* v. *Trollop*, 2 Ves. Sen. 662.

Primâ facie title deeds are property in the custody of tenant for life, and may be taken from a jointress upon her jointure being confirmed. *Ford* v. *Peering*, 1 Ves. 76.

Right of Heir.]—The heir is not entitled to see any deeds in the hands of the jointress, without confirming her jointure, though the jointure was made after marriage. *Towers* v. *Davys*, 1 Vern. 479; 1 Eq. Ca. Abr. 220, pl. 14.

W. A. G. W.

JUDGE.

See PUBLIC OFFICER.

JUDGMENT.

1. *What is.*
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1. WHAT IS.

a. Decree in Equity.

A final decree upon a sum ascertained, is equal to a judgment; but a mere decree for an account of plaintiff's demand, and of the personal estate come to the hands of defendant, with mere direction for payment out of the result of that account, does not prevent the executor paying a judgment. *Perry* v. *Phelips*, 10 Ves. 33; 7 R. R. 331.

A decree in a suit instituted against an executor by a simple contract creditor of the testator, for payment of his own debt merely, directing the executor to pay out of the assets of the testator, does not give any priority over outstanding specialty creditor, of whose debts the executor has notice. Such a decree is analogous to a judgment at law of assets quando acciderint. *Sandford* v. *Seymour*, 3 Ir. Eq. R. 212.

By a decree to account, made by the court in 1786, in a suit in which the inheritance was represented by the first tenant in tail, a sum was declared to be a charge on certain lands. The tenant in tail afterwards died without issue, and the next tenant in tail in remainder was made a party by a bill of revivor, and there was a report of the sum due, and a final decree for a sale in 1793. In a suit to raise the charge by a sale of the lands:—Held, that the decree to account gave a good title to a charge on the lands, though there was error in the subsequent proceedings, the suit being continued by bill of revivor only. *Bolton* v. *Fairlough*, 15 Ir. Ch. R. 229.

b. Under Judgment Acts.

1 & 2 Vict. c. 110—Decree for Payment of Money—Payment into Court.]—An order of the Court of Chancery, requiring the defendants in a suit to pay a certain sum into the bank, with the privity of the accountant-general, to the credit of the cause, is not an order which has the effect of a judgment. *Gibbs* v. *Pike*, 8 M. & W. 223; 9 D. P. C. 131; 10 L. J., Ex. 309. *S. C.*, 9 M. & W. 351; 1 D. (N.S.) 409; 12 L. J., Ex. 257; 6 Jur. 465.

A decree directing payment to the credit of a cause, does not constitute a plaintiff a judgment creditor of the defendant under the 1 & 2 Vict. c. 110. *Ward* v. *Shakeshaft*, 2 L. T. 203; 8 W. R. 335.

—— **Account and Payment.**]—A party who has obtained a decree for an account of what is due to him, and payment of what shall be found due, cannot, pending the account, obtain a charging order under the 1 & 2 Vict. c. 110, s. 18, on the property of the defendant, such a decree not being a decree for the payment of money within the meaning of that section. *Chadwick* v. *Holt*, 8 De G. M. & G. 584; 26 L. J., Ch. 76; 2 Jur. (N.S.) 918; 4 W. R. 791.

By a decree the lands of the defendant were declared chargeable with 40*l.* a year, and the master was directed to take an account of the arrears, and the defendant was ordered to pay what was found due:—Held, that the defendant was not, under the 1 & 2 Vict. c. 110, ss. 17 and 18, liable to pay interest on the amount found due from the date of the decree to the date of the master's certificate. *Att.-Gen.* v. *Carrington* (*Lord*), 6 Beav. 454; 12 L. J., Ch. 453.

—— **Master's Certificate.**]—A certificate of the chief clerk finding money due is not "an order for payment" within the 18th section of the 1 & 2 Vict. c. 110. *Mansfield* (*Earl*) v. *Ogle*, 4 De G. & J. 38; 28 L. J., Ch. 422; 5 Jur. (N.S.) 419; 7 W. R. 423.

—— **Order against defaulting Executors or Trustees.**]—As to the form of orders for payment against defaulting trustees when it is desired to register them as judgments. *Wand* v. *Docker*, 5 Jur. (N.S.) 1287; 2 L. T. 82.

A decree in the court of equity, registered in the Court of Common Pleas, under the 1 & 2 Vict. c. 110, declared that the executor of a testator was liable to make good to the testator's estate a certain sum of money, and that the executor should be charged with the amount in his account of the personal estate:—Held, that this decree did not constitute a judgment debt. *Garner* v. *Briggs*, 27 L. J., Ch. 483; 4 Jur. (N.S.) 230; 6 W. R. 378.

In a suit to administer the estate of the deceased executor, a decree registered under the 1 & 2 Vict. c. 110, directed that an account should be taken of what was due to the estate, and that the plaintiff should go in and prove as a creditor for the amount certified to be so due:—Held, that the plaintiff could not claim as a judgment creditor, and was not entitled to any priority over specialty and simple contract creditors. *Ib.*

—— **Judgment given to secure Annuity.**]—A judgment given for securing an annuity carries interest. *Knight* v. *Bowyer*, 4 De G. & J. 619.

—— **Costs.**]—A rule for taxation of costs, and an allocatur thereon, do not amount to a rule or order within the meaning of the 1 & 2 Vict. c. 110, s. 18, so as to be capable of being registered as a judgment. The rule absolute for payment of the costs does not come within the enactment. *Shaw* v. *Neale*, 6 H. L. Cas. 581; 27 L. J., Ch. 444; 4 Jur. (N.S.) 695; 6 W. R. 635—H. L. (E.)

Under the 1 & 2 Vict. c. 110, s. 18, an order for payment of costs operates only as against purchasers, mortgagees, and creditors, from the registration of the certificate of taxation. *Hargrave* v. *Hargrave*, 23 Beav. 484.

A decree ordering payment of costs of suit is not binding on a subsequent purchaser, with notice of the suit, where the purchase has been completed prior to taxation or registration of the decree. *Norteliffe* v. *Warburton*, 31 L. J., Ch. 777; 8 Jur. (N.S.) 854; 6 L. T. 708; 10 W. R. 635.

The 1 & 2 Vict. c. 110, s. 17, applies as well to judgments for costs as for the subject-matter of the action. *Pitcher* v. *Roberts*, 2 D. (N.S.) 394; 12 L. J., Q. B. 178; 7 Jur. 466.

Interest may be recovered on a judgment for the costs of a nonsuit. *Newton* v. *Conyngham (Lord)*, 17 L. J., C. P. 288—Ex. Ch. Affirming 5 C. B. 749; 17 L. J., C. P. 200; 12 Jur. 556.

Under the statute interest is recoverable on costs which one party is ordered to pay to another, but not on costs directed to be raised out of an estate. *Att.-Gen.* v. *Nethercote*, 11 Sim. 529; 10 L. J., Ch. 162.

—— **Order in Lunacy.**]—An order in lunacy directing the taxation of the costs, charges, and expenses incurred by the solicitors employed in prosecuting the commission in lunacy, and subsequently as the solicitors of the committees, and directing an inquiry whether it would be fit and proper to raise these costs, &c., by sale or mortgage of the lunatic's real estate, did not constitute them a judgment debt, nor make them a charge in equity upon such real estate; but such costs, &c., were considered as a simple contract debt due by the lunatic for necessaries. The lapse of six years during the lunatic's life will not bar a debt of this description, for the Court of Chancery will take judicial notice in a suit to obtain payment out of his assets after his death, that any action against the lunatic for the recovery of the claim would have been restrained by the Lord Chancellor on petition in lunacy. *Stedman* v. *Hart*, 1 Kay, 607; 2 Eq. R. 816; 23 L. J., Ch. 908; 18 Jur. 744; 2 W. R. 462.

—— **Order of Court of Probate.**]—A registered order of the Court of Probate does not create a charge on lands. *Bull* v. *Hutchens*, 32 Beav. 615.

An order of the Court of Probate directing the payment of a sum of money, does not, by being registered with the senior master of the Court of Common Pleas at Westminster, constitute a valid charge on land within the meaning of the 1 & 2 Vict. c. 110, s. 18. *Pratt* v. *Bull*, 1 De G. J. & S. 141; 32 L. J., Ch. 144; 9 Jur. (N.S.) 239; 7 L. T. 702; 11 W. R. 294.

3 & 4 Vict. c. 105—Costs.]—An order dismissing a bill with costs, for want of prosecution, is an order within the meaning of the 27th section of the 3 & 4 Vict. c. 105. *Madden* v. *Davis*, Fl. & K. 475.

The rule to change an attorney on payment of costs, is not an order under 3 & 4 Vict. c. 105, s. 29. *Emmett* v. *Marnane*, 8 Ir. Eq. R. 522.

23 & 24 Vict. c. 38—County Court—Judgment.]—The 23 & 24 Vict. c. 38, s. 3, applies equally to judgments of county courts as to other judgments. *Turner, In re, Walter* v. *Turner*, 33 L. J., Ch. 232; 10 Jur. (N.S.) 147; 9 L. T. 756; 12 W. R. 337.

2. CHARGE ON LANDS AND HEREDITAMENTS.

a. In What Cases.

What Judgments.]—Where a party dies after verdict and before judgment, his lands are bound in the hands of his heir, by a judgment entered up within two terms after verdict. *Saunders* v. *M'Gowran*, 12 M. & W. 221; 1 D. & L. 405; 13 L. J., Ex. 12.

Since 27 & 28 Vict. c. 112.]—The mere registration of a judgment upon which no writ of execution has issued constitutes no lien upon the debtor's lands. 27 & 28 Vict. c. 112, has in effect repealed 1 & 2 Vict. c. 110, s. 13. *Bailey's Trusts, In re*, 38 L. J., Ch. 237; 20 L. T. 168; 17 W. R. 393.

Since 27 & 28 Vict. c. 112, a judgment creditor is not entitled to redeem, unless he issues execution and gets the return to the writ before the expiration of the six months allowed for redemption. *Mildred* v. *Austin*, L. R. 8 Eq. 220; 20 L. T. 939; 17 W. R. 638.

The return of the sheriff to an elegit constitutes actual delivery of the land in execution within the 27 & 28 Vict. c. 112. *Champneys* v. *Burland*, 23 L. T. 584; 19 W. R. 148.

The registration of the writ prior to the date of the return of the sheriff is not in disaccordance with the terms of s. 3. *Ib.*

A mortgagee, although without notice of any writ of elegit having been issued, is not entitled to tack a subsequent charge to his first mortgage on redemption by the tenant by elegit. *Ib.*

Lands have been "actually delivered in execution," within the meaning of the 27 & 28 Vict. c. 112, ss. 1 and 4, when sequestrators are in receipt of the rents and profits. *Rush, In re*, L. R. 10 Eq. 442; 39 L. J., Ch. 759.

And see *Johnson* v. *Burgess*, 42 L. J., Ch. 400; L. R. 15 Eq. 398; 28 L. T. 188; 21 W. R. 453.

A judgment creditor has no lien until he has got a return from the sheriff, though he may, after putting the writ in the hands of the sheriff, and before the return, have a right to file a bill to remove a legal impediment; and priorities of judgment creditors against lands are determined by the date at which the writs issued upon their judgments are placed in the hands of the sheriff. *Guest* v. *Cowbridge Ry.*, 37 L. J., Ch. 909; L. R. 6 Eq. 619; 18 L. T. 871; 17 W. R. 7.

Equitable interests in lands are within the 1st section of the 27 & 28 Vict. c. 112. Therefore, if a judgment creditor who has sued out an elegit is unable to obtain delivery by the sheriff of his debtor's lands by reason of the legal estate being outstanding, he must apply to the Court of Chancery to remove the impediment, and the order of the court will be a delivery in execution within the statute. *Hatton* v. *Haywood*, 43 L. J., Ch. 372; L. R. 9 Ch. 229; 30 L. T. 279; 22 W. R. 356.

What Interest.]—By 1 & 2 Vict. c. 110, s. 13, the legislature meant that a judgment was to operate on all lands and interest in lands over which the debtor might have a disposing power, for his own benefit, without committing a breach of duty, that is over which he had a right, at law or in equity, to consider himself the beneficial owner. *Kinderley* v. *Jervis*, 22

Beav. 1; 25 L. J., Ch. 538; 2 Jur. (N.S.) 602; 4 W. R. 579.

Semble, the Mesne Process Acts (1 & 2 Vict. c. 110, 2 & 3 Vict. c. 11, and 3 & 4 Vict. c. 82) only give effect to the judgment where the debtor is the owner of the land, and not where, prior to the judgment, the land had passed from the hands of the debtor. *Simmons* v. *Pettit*, 8 Jur. 209.

By the act 1 & 2 Vict. c. 110, it was the intention of the legislature to make property of a judgment debtor, which is in such a position that the creditor cannot lay hold of it, liable to the judgment. *Watts* v. *Jefferyes*, 3 Mac. & G. 422; 15 Jur. 435.

Where there is in the possession of any officer of the court property which proves to be liable to a creditor, or to be held for the sole benefit of any person, it is improper to seize it without an order of the court. *Ib.*

The right of a judgment creditor in possession under elegit is not analogous to that of a purchaser for value without notice, so as to give him a preference over a prior equitable claimant, the judgment only affecting that which was properly the estate of his debtor. *Whitworth* v. *Gaugain*, 1 Ph. 728; 15 L. J., Ch. 433; 10 Jur. 531.

The assignee of an insolvent is not a purchaser within the meaning of the acts for redocketing or registering judgments. *Baylee* v. *Browne*, 10 Ir. Eq. R. 180.

A judgment signed on a warrant of attorney, and duly registered:—Held, a charge on an annuity out of real estate, notwithstanding execution was not to issue until default made in payment of the sum secured at a future day, and with a defeasance altogether in the event of the defendant dying before the day of payment; but that such charge did not affect growing payments accruing due before the judgment debt became payable. *Younghusband* v. *Gisborne*, 1 De G. & Sm. 209; 10 Jur. 834.

A. was entitled to an annuity, which was secured by a covenant, and by an assignment of leaseholds, to her in trust to sell:—Held, that her interest under the deed might be made available under 1 & 2 Vict. c. 110, s. 13, for payment of a judgment debt due from her. *Harris* v. *Davidson*, 15 Sim. 128; 15 L. J., Ch. 255; 10 Jur. 257.

A., by articles of agreement, covenanted to pay B. 5,000*l.*, and it was thereby agreed and declared that the 5,000*l.* and interest should be and was thereby charged on land:—Held, that by virtue of the act 1 & 2 Vict. c. 110, s. 13, a judgment creditor of B. had a charge upon such land, and was a proper party to a suit for foreclosure. *Russell* v. *M'Culloch*, 1 Kay & J. 313; 1 Jur. (N.S.) 157; 3 W. R. 280.

A debtor, having real estate, gave a judgment and warrant of attorney under the 1 & 2 Vict. c. 110. Afterwards he became insolvent; the estate was sold:—Held, that the judgment creditor had an equitable interest in the money in priority over the assignees. *Robinson* v. *Hedger*, 17 Sim. 183; 19 L. J., Ch. 463; 14 Jur. 784.

Where, under a power to invest on real or government securities, a trust fund is invested on mortgages, a judgment creditor of one of the cestuis que trustent is entitled to a charge on his interest, to the extent of all moneys which may be payable to him out of the rents and profits of the mortgaged property or otherwise, by virtue of such mortgage. But the share of the judgment debtor in the interest paid to the trustees by the mortgagor, and not taken out of the rents and profits, is not subject to a charge under s. 13 of the 1 & 2 Vict. c. 110, the covenant to pay being a security which falls under s. 12. *Avison* v. *Holmes*, 1 John. & H. 530; 30 L. J., Ch. 564; 7 Jur. (N.S.) 722; 4 L. T. 617; 9 W. R. 550.

Under the 1 & 2 Vict. c. 110, s. 13, a judgment debt against a legatee is a charge upon property mortgaged to the testator, to the extent of the legatee's interest therein. *Ib.*

The interest of a person entitled to a share of the proceeds of real and leasehold estate, devised to trustees on an absolute trust (after the determination of a life-estate) for sale and conversion, has not such an interest in the lands (although not sold at the date of the judgment) as will be affected by a judgment registered in the Common Pleas, so as to give the judgment creditor priority over subsequent incumbrancers who have obtained charging orders on the fund arising from the sale. *Thomas* v. *Cross*, 2 Dr. & Sm. 423; 6 N. R. 18; 34 L. J., Ch. 580; 11 Jur. (N.S.) 384; 12 L. T. 293; 13 W. R. 647.

In November, 1809, W. conveyed reversion in fee to A., by way of mortgage. In January, 1810, E., on part of Duke of N., entered into written agreement with W. for purchase of reversion. In August, 1810, A., the mortgagee, who was paid off by E., joined with W. in conveying estate to E., and part of mortgage money then unpaid was secured to W. on mortgage term, created by that deed. In October, 1809, W. was indebted to F., upon bond of that date, and a warrant of attorney of same date was given by W., upon which judgment was entered up and docketed in February, 1810, and an inquisition was had same month. In April, 1810, notice was given by F. of his judgment, the money secured to W. by the mortgage term being then unpaid:—Held, that F. had no lien upon the term in hands of W., and consequently no lien on terms in hands of assignee. *Forth* v. *Norfolk* (*Duke*), 4 Madd. 503.

Vendors contracted to sell land, and the purchasers paid part of the purchase-money, and were let into possession, but were unable, from insolvency, to complete the contract. The vendors filed a bill for specific performance, and, in default, for resale. There were at that time registered judgments against the purchasers, but they were not made parties to the suit. The vendors obtained a decree for sale, and the land was sold by auction. A. bought one lot, and required that the judgment creditors should release their interests, as they were not parties to the suit:—Held, that the original purchasers, by entering into possession, had accepted the title, and had become owners in equity of the property, and that the judgment debts of their creditors attached, under the 13th section of the 1 & 2 Vict. c. 110. *Grey Coat Hospital* (*Governors*) v. *Westminster Improvement Commissioners*, 1 De G. & J. 531; 26 L. J., Ch. 843; 3 Jur. (N.S.) 188; 6 W. R. 120.

The statute 23 & 24 Vict. c. 38, applies to lands in which the judgment debtor has an equitable interest. *Wallis* v. *Morris*, 10 Jur. (N.S.) 741; 10 L. T. 709; 12 W. R. 997.

A judgment will not affect an equity of redemption as against a purchaser, unless a writ of execution is issued before completion of the purchase. *Ib.*

The 13th section of the act 1 & 2 Vict. c. 110,

does not confer on a judgment creditor any right against a person claiming under a voluntary settlement previously made by the judgment debtor. *Beavan* v. *Oxford* (*Earl*), 6 De G. M. & G. 507; 25 L. J., Ch. 299; 2 Jur. (N.S.) 121; 4 W. R. 275.

If a mortgagor sells the mortgaged estate, and pays off the mortgagee after the passing of the 18 & 19 Vict. c. 15, s. 11, the estate in the hands of the purchaser ceases to be affected by a judgment which had been registered against the mortgagee, whether the mortgage be prior to or subsequent to the passing of the 18 Vict. c. 15. *Greaves* v. *Wilson*, 25 Beav. 434; 28 L. J., Ch. 103; 4 Jur. (N.S.) 802; 6 W. R. 482.

A judgment against a person having an equitable estate of lands of freehold, does not bind the lands in the hands of a person subsequently getting the legal estate, though the conusor of the judgment was a granting party in the conveyance of the legal estate. *Hamilton* v. *Smith*, 2 Moll. 482.

Although the purchaser before the conveyance has neither a legal nor an equitable right against the seller till he pays the purchase-money, yet for all purposes of disposition the equitable estate he obtains under the contract is subject to his control, and judgments obtained against him are a lien on it. *Baldwin* v. *Belcher*, 1 Jo. & Lat. 18; 6 Ir. Eq. R. 424.

The dominion of a tenant in tail in possession, over the estates of those in remainder and reversion, enabling him of his own will, and by his own act, without the assent of any other person, to extinguish those estates and acquire the fee simple for his own benefit, is not "a disposing power," within the meaning of the 19th section of the 3 & 4 Vict. c. 105. The 22nd section of that act, making a judgment binding, not only as against the debtor, but "also against the issue of his body, and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion, or other interest," creates an equitable charge only, which cannot be enforced otherwise than by a suit in equity. *Fletcher* v. *Steele*, 6 Ir. Eq. R. 376.

Judgments recovered against a lessee for lives renewable for ever, after the death of the lives named in the lease, will, on renewal, bind the land in the possession of a purchaser who has obtained a renewal with notice. *Johns* v. *French*, 1 Hog. 450. S. P., *Langhorne* v. *Harland*, 2 Jur. (N.S.) 872; 4 W. R. 696.

A covenant for perpetual renewal binds the land itself, and is to be regarded as an equitable contract for a perpetual interest in the land. *Ib.*

—— **Proceeds of Sale.**]—A father conveyed real estates to trustees, upon trust to sell, and repurchase annuities granted by his son, and pay the son's debts at their discretion, and subject thereto, upon trust for the father for life, with remainder to his son in fee. An annuitant mentioned in a schedule to the deed, and stated to have entered up and docketed a judgment upon a warrant of attorney which accompanied his security, has no lien by virtue of his judgment, upon the produce of the trust estates, when sold. *Foster* v. *Blackstone*, 1 Myl. & K. 297; 2 L. J., Ch. 84.

After verdict, and before judgment had been entered up, the defendant sold his leaseholds by auction:—Held, that under the 1 & 2 Vict. c. 110, the plaintiff could not levy execution on the purchase-money. *Brown* v. *Perrott*, 4 Beav. 585.

A creditor having sued out execution on a judgment at law, and finding the interest of his debtor in a term of years to be an equitable interest, has a lien upon it in equity, without the aid of the 1 & 2 Vict. c. 110, s. 13, and where, after such execution, the leasehold estate of the debtor had been sold:—Held, that the execution creditor had a lien on the proceeds of the sale. *Gore* v. *Bowser*, 3 Sm. & G. 1; 24 L. J., Ch. 316; 1 Jur. (N.S.) 392. Affirmed on appeal, 3 Eq. R. 561; 24 L. J., Ch. 440; 3 W. R. 430—L.JJ.

—— **Power of Appointment.**]—Where an estate is settled to the usual uses to bar dower, and then a judgment is entered up against the owner of the estate, and before execution is taken out, the owner of the estate appoints it to a purchaser, the judgment creditor's lien is defeated. *Tunstall* v. *Trappes*, *Lawson's Case*, 3 Sim. 300.

Notice to a purchaser of judgments against the vendor, whose estate is limited to uses to bar dower, does not prevent the purchaser from taking the estate free from the judgments, under an exercise of the power reserved to the vendor. *Eaton* v. *Sanxter*, 6 Sim. 517; 3 L. J., Ch. 197.

A mortgagee of lands in Middlesex, and who took under the exercise of a power of appointment by the mortgagor, held not to be bound by a judgment previously recovered against the mortgagor, and duly docketed and registered, although he had notice of the judgment, and part of the mortgage money was deposited with his solicitor as an indemnity against it. *Skeeles* v. *Shearly*, 3 Myl. & C. 112; 7 L. J., Ch. 3; 1 Jur. 888.

By Contract.]—By marriage settlement of the 13th of July, 1810, between Philip B. of the first part, Margaret B., his sister, of the second part, T. A. of the third part, and trustees of the fourth part, after reciting various unsettled demands which Margaret B. had upon her brother Philip, and that he had agreed to secure for her marriage portion the sum of 5,000*l.*, and that Margaret B. had, in consideration thereof, agreed to release Philip B. from her claims upon him, and that in pursuance thereof, Philip B. had given his bond and warrant in the sum of 10,000*l.* to the trustees of the settlement, the sum of 5,000*l.* was settled on certain trusts, and Margaret B. released Philip B. from the claims she had on him. This settlement contained an agreement "that any judgment to be entered on the bond should not affect or be a charge on the lands of K., part of the estate of Philip B., which said lands Philip B. intends to convey to trustees in strict settlement for family purposes. And it was thereupon agreed that the trustees should not enter judgment on the bond before the next Michaelmas Term." By settlement on the marriage of Philip B., dated the 26th of July, 1819, he conveyed the lands of K. to trustees in strict settlement, reserving the ultimate reversion to himself in fee. In Easter Term, 1814, judgment was entered upon the bond for 10,000*l.*; and in September, 1831, Philip B. died intestate and without issue, and indebted to a very large amount by judgments on bonds with warrants. His wife had died in his lifetime:—Held, that the judgment of Easter Term, 1814, was charged upon the reversion in fee of the lands of K. *Houston* v. *Barry*, 5 Ir. Eq. R. 294.

Ecclesiastical Property.]—A registered judgment against a clergyman does not create a charge upon his benefice, entitling the judgment to the appointment of a receiver under the 1 & 2 Vict. c. 110, s. 13. *Hawkins* v. *Gathercole*, 6 De G. M. & G. 1; 3 Eq. R. 348; 24 L. J., Ch. 332; 1 Jur. (N.S.) 481; 3 W. R. 194. *Bates* v. *Brothers*, 2 Sm. & G. 507; 2 Eq. R. 803; 23 L. J., Ch. 782; 18 Jur. 715; 2 W. R. 636.

A judgment is not per se a charge upon a benefice, but it becomes such from the time that a sequestration is issued. *Wise* v. *Beresford*, 2 Con. & L. 282; 3 Dr. & War. 276; 5 Ir. Eq. R. 207.

Corporate Property.]—A. had a bond executed to him in 1828 by a corporation for the due payment of interest on certain sums advanced by him, and for which he also held other securities. In 1835 the 5 & 6 Will. 4, c. 76, passed, which abolished the right of corporations to mortgage, or to alien for more than thirty-one years at a rack-rent, except with the consent of three lords of the treasury. Two subsequent amendment acts were passed to save the rights of previous creditors. In 1852 the bond was put in force, and judgment entered up thereon:—Held, that A. was entitled to the benefit of the 1 & 2 Vict. c. 110, s. 13, giving him the same rights as if the debtors had agreed in writing to charge their lands; and a receiver was accordingly appointed over all their real property, including some which was acquired in 1851. *Arnold* v. *Gravesend Corporation*, 25 L. J., Ch. 530; 2 Jur. (N.S.) 703; 4 W. R. 478, 763. See *S. C.*, 2 K. & J. 574; 25 L. J., Ch. 776.

Priorities — Against Prior Purchasers.]—A papist, by articles on his marriage, in 1764, agrees "to convey to trustees in strict settlement, in case he should, at any time thereafter, during his life, be qualified by law so to do." In 1778 he becomes qualified by law to carry these articles into execution. The lands held not to be specifically bound by these articles until 1778, and therefore judgments subsequent to 1764, but before 1778, were prior liens. *Kennedy* v. *Daly*, 1 Sch. & Lef. 355.

A. B. being seised in fee of four estates, mortgaged two of them, and subsequently settled the mortgaged estates and one of the others on himself for life, with remainder to his son in tail, and covenanted against incumbrances; but the settlement did not recite that there were any incumbrances. He afterwards mortgaged the fourth estate, and took the benefit of the Insolvent Debtors Act. After this a creditor on certain bills of exchange became a registered judgment creditor, and then filed a bill against the tenant in tail, and the assignee under the insolvency, and the other incumbrancers, praying a sale in satisfaction of the judgment debt, and what might be paid by the plaintiff in discharge of prior incumbrances, subject to the estate and interest of the tenant in tail under the settlement:—Held, reversing a decree of foreclosure against the tenant in tail, that the settled estates must be regarded as exonerated from incumbrances, as between A. B., the settlor, and the tenant in tail, and that the plaintiff was subject to the same equities as the settlor; and that, as the judgment debt was itself subsequent to the settlement, the tenant in tail could not be affected by the judgment. *Hughes* v. *Williams*, 3 Mac. & G. 683; 16 Jur. 415. And see *Chappell* v. *Rees*, 1 De G. M. & G. 393; 16 Jur. 415.

Where a judgment affects several denominations of lands, a prior purchaser of one of those denominations is entitled to throw the judgment from his own upon the lands of any puisne purchaser, and so on in succession with each purchaser until the judgment falls upon the lands in the hands of the last purchaser. *Aicken* v. *Macklin*, 1 Dr. & Wal. 621.

—— **Against Prior Incumbrancer.**]—Judgment conferred after bill of foreclosure is ineffectual against plaintiff. *Metcalfe* v. *Pulvertoft*, 2 Ves. & B. 207.

A judgment is not such a charge upon land (except it be within the 1 & 2 Vict. c. 110) as to give it precedence over an unregistered mortgage. *Cathrow* v. *Eade*, 1 Sm. & G. 423.

The conusor of a judgment being seised only of an equity of redemption upon a mortgage in fee:—Held, upon demurrer, that the mortgagee was not a necessary party to a bill filed by the judgment creditor for the purpose of raising the amount of his judgment. *Handley* v. *Langford* (*Lord*), 2 Jones, 421.

Prior incumbrancers are not necessary parties to a bill by an elegit creditor. *Rundell* v. *Donegal* (*Marquis*), 1 Hog. 122.

Mortgagor compelled under the covenant for further assurance, to supply a defect in a mortgage against judgment creditors. *Burgh* v. *Francis*, 3 Swan. 536; 19 R. R. 275.

Rector entitled to an annual stipend in lieu of tithes, assigns it by way of mortgage; afterwards a creditor of the rector obtains judgment, and in the regular course sequestration of the stipend:—Held, the mortgagee should be preferred; without prejudice to sums received by judgment creditor, before he had notice of the mortgage. *Errington* v. *Howard*, Ambl. 485.

A judgment creditor has not any specific lien on the land, and in general cannot have any relief against a mortgagee who is a specific incumbrancer. *Averall* v. *Wade*, Ll. & G. t. Sugd. 262.

A suit for foreclosure and sale having been instituted in 1833, a judgment was recovered against the owner of the equity of redemption, previously to a decree in the cause, which was ultimately made in 1842. The judgment creditor, who was no party to the suit in 1844, obtained, on petition, a receiver, on foot of his judgment, over part of the mortgaged estates:—Held, that the plaintiff had a right to have the receiver extended to the cause; as the judgment, being recovered pendente lite, gave the conusee no right against the mortgagee, the plaintiff. *Trye* v. *Aldborough* (*Earl*), 1 Ir. Ch. R. 666.

When the estate is in mortgage prior to a judgment, or when the judgment is obtained, or if the legal estate is in any manner out of the debtor, so that the creditor could not recover under an elegit, equity, in order to protect a purchaser, will not permit the creditor to redeem. *Barrett* v. *Blake*, 2 Ball & B. 357.

The devisee of a leasehold estate for lives having suffered an arrear of rent to become due, the landlord brought an ejectment. A third person, at the request of the devisee, advanced money for the purpose of paying the rent, and it was applied accordingly, and the devisee mortgaged the lands to secure the repayment of it. The mortgagee is not entitled to priority over the

judgment creditors of the devisor. *Angell* v. *Bryan*, 2 Jo. & Lat. 763.

—— **Since Judgments Act.**]—A registered judgment under 3 & 4 Vict. c. 105 (Ir.) and 13 & 14 Vict. c. 29 (Ir.), only affects such property as the debtor at the time of the judgment lawfully possessed as of his own right, and over which he had the power of disposition, and therefore does not displace the interest of a previous equitable mortgagee. *Eyre* v. *M'Dowell*, 9 H. L. Cas. 619.

Notwithstanding the statute 1 & 2 Vict. c. 110, which gives to a judgment the effect of an equitable charge upon the land of the debtor, an equitable mortgagee retains his right in equity to enforce his security against the title of a creditor under a subsequent judgment, although the latter may have acquired the legal seisin and possession of the land under an elegit, without notice of the mortgage. *Whitworth* v. *Gaugain*, 1 Ph. 728; 15 L. J., Ch. 433; 10 Jur. 531. Affirming 3 Hare, 416; 13 L. J., Ch. 288; 8 Jur. 374. *And see* Cr. & Ph. 325; 10 L. J., Ch. 317; 5 Jur. 523.

—— **Under 27 & 28 Vict. c. 112.**]—A judgment creditor has no lien upon the land of his debtor until he has got a return from the sheriff, though he may, after putting the writ in the hands of the sheriff and before the return, have a right to file a bill to remove a legal impediment; and priorities of judgment creditors against lands are determined by the date at which the writs issued upon their judgments are placed in the hands of the sheriff. *Guest* v. *Cowbridge Ry.*, 37 L. J., Ch. 909; L. R. 6 Eq. 619; 18 L. T. 871; 17 W. R. 7.

Therefore a judgment creditor subsequent in point of date, but who was the first to place his writ in the hands of the sheriff, and get the lands of the debtor extended under such writ, was held entitled in priority to a prior judgment creditor whose writ was subsequently placed in the sheriff's hands before the lands were extended. *Ib.*

—— **Subsequent Purchaser.**]—By a decree A. was ordered to pay the defendant's costs of a suit. After the decree, but before taxation or registry, A. sold his real estate, which was the whole of his property, to C., who had notice of the suit. The purchase-money was received by B., who was A.'s solicitor, and who retained a considerable part of it to pay his costs in the suit. On a bill by the defendant in the former suit against A., B. and C., to set aside the sale and to charge the costs on the estate:—Held, that the sale was not fraudulent within the 13 Eliz. c. 5, and that the decree not having been entered pursuant to the provisions of the 1 & 2 Vict. c. 110, s. 19, till after the sale, the court had no jurisdiction to make the costs of the former suit a lien on the estate. *Nortcliffe* v. *Warburton*, 4 De G. F. & J. 449; 31 L. J., Ch. 777; 8 Jur. (N.S.) 854; 6 L. T. 768; 10 W. R. 635.

Where a judgment affects several denominations of lands a prior purchaser of one of these denominations is entitled to throw the judgment from his own upon the lands of any puisne purchaser, and so on in succession with each purchaser, until the judgment falls upon the lands in the hands of the last purchaser. *Aicken* v. *Macklin*, 1 Dr. & Wal. 621.

Where a judgment is entered up, against the owner of lands, of which the legal estate is outstanding in a trustee or mortgagee, a purchaser who has notice of the judgment will be bound by it, although the creditor may not have taken out execution on his judgment. *Tunstall* v. *Trappes*, *Lawson's Case*, 3 Sim. 286.

—— **Subsequent Incumbrancer.**]—A husband having by purchase with his own money obtained a conveyance to himself of freehold lands to which his wife had an incomplete equitable title, deposited the title deeds to secure a loan to himself, and died, having, by his will, given all his real and personal estate to his wife, who, after his death, purchased a judgment debt against her husband's estate, prior in date to the deposit by way of mortgage on a bill by the mortgagee:—Held, that his title was paramount to that of the wife, both in her own right and as judgment creditor. *Chesshyre* v. *Biss*, 2 Giff. 287; 6 Jur. (N.S.) 599; 2 L. T. 404.

An assignee of a judgment held, under the circumstances, to be postponed to subsequent mortgagees. *Cannock* v. *Jauncey*, 27 L. J., Ch. 57; 5 W. R. 764.

In May, 1835, a lease (to commence in December, 1833, and to continue for twenty-one years and thirty-three days) of lead-mines in Yorkshire was granted by the crown to four lessees, of whom M. was one. In June, 1848, M. conveyed and assigned to H. the property of which he was possessed for any term of years, upon the trusts mentioned; and in July, 1848, M. granted and assigned to H. all his personal estate, and the surplus, if any, which might arise on the sale of his freehold and leasehold estates, upon trusts, after paying costs, for the benefit of creditors, as therein mentioned. The plaintiffs, who were creditors of M., executed the deed in 1849, but no other creditor executed the deed until 1855. H. did not dispose of M.'s share in the mines. In May, 1854, the crown granted a lease of the lead-mines to seven lessees, two of whom were M. and H., for a term of twenty-one years, to commence on the 5th January, 1855. M. died intestate in August, 1854. B., in August, 1848, recovered a judgment on two bonds against M., which was duly entered up; and in July, 1848, C. and others also recovered judgment against M., which was duly entered up in August following. Subsequently these judgments were assigned to S., and were duly registered in the county of York, and in the Common Pleas, which was afterwards renewed:—Held, first, that the plaintiffs had, by virtue of the assignment of June, 1848, and of the declaration of trust of July, 1848, they having executed the latter deed in 1849, acquired a beneficial interest in the renewed lease; and, secondly, that the judgments registered before the plaintiffs executed the latter deed were entitled to be considered as equitable charges upon the old lease and upon the new lease, in priority to the claims of the creditors, who did not become cestuis que trustent until after the registration of the judgments. *Langhorne* v. *Harland*, 2 Jur. (N.S.) 872; 4 W. R. 696.

b. Registration.

4 & 5 Will. & M. c. 20.]—A docket of the issue was not a docket of the judgment within 4 & 5 Will. & M. c. 20, so as to give precedence to the judgment creditor over other subsequent charges of the land. *Doe* d. *Barron* v. *Purchas*, 2 H. & W. 50; 5 L. J., K. B. 148. S. P., *Braithwaite*

v. *Watts*, 2 C. & J. 318; 2 Tyr. 390; 1 L. J., Ex. 97.

It was the duty of the plaintiff's attorney to see that the judgment was properly docketed. *Ib.*

An outstanding docketed judgment, not registered pursuant to 1 & 2 Vict. c. 110, s. 19, and 2 & 3 Vict. c. 11, ss. 2, 3, is not a valid objection to the title of a vendor on the sale of realty. *Bedford* v. *Forbes*, 1 Car. & K. 33.

A judgment obtained against an executor (before 2 & 3 Vict. c. 11) is entitled to preference in the administration of the testator's estate over simple contract debts, though not docketed pursuant to 4 & 5 Will. & M. c. 20. *Gaunt* v. *Taylor*, 3 Man. & G. 886; 3 Scott (N.R.) 700; 11 L. J., C. P. 68.

Where a docket of a judgment did not set forth the number roll, but this appeared on the entry of the issue in the same book:—Held, that the judgment did not, within 4 & 5 Will. & M. c. 20, affect a purchaser, and that he was not precluded from disputing its validity by the circumstance of a conveyance under which he claimed title, and which was a trust deed for the benefit of creditors, and was executed after the judgment was entered up, being expressed to be made subject to the incumbrances affecting the estate conveyed. *Brandling* v. *Plummer*, 8 De G. M. & G. 747; 26 L. J., Ch. 326; 3 Jur. (N.S.) 401; 5 W. R. 391.

An old judgment not docketed, but duly registered under 1 & 2 Vict. c. 110, is good under 2 & 3 Vict. c. 11, s. 5, against purchasers and mortgagees without notice, to the extent which a judgment duly docketed under the old law would have had against them. *Dodswell* v. *Reece*, 11 Jur. (N.S.) 764; 13 L. T. 156.

Purchaser bound by notice of a judgment, though not docketed. *Davis* v. *Strathmore* (*Earl*), 16 Ves. 419.

1 & 2 Vict. c. 110, &c.]—Under the 1 & 2 Vict. c. 110, a judgment has no retrospective operation as against purchasers, mortgagees and creditors, upon a minute being left with the Master of the Common Pleas. *Hargrave* v. *Hargrave*, 23 Beav. 484.

When a judgment has been registered, and a search has been made for such a judgment, the person searching must be considered to have notice of the judgment. *Procter* v. *Cooper*, 3 Eq. R. 364; 1 Jur. (N.S.) 149; 3 W. R. 224.

An estate was mortgaged to A., and afterwards to the defendant. The plaintiff subsequently obtained a registered judgment against the mortgagor. The defendant then purchased the equity of redemption without searching for judgments. On a bill to charge the equity of redemption with the judgment:—Held, that the defence of "purchase for valuable consideration without notice" was available; secondly, that on the evidence no notice was proved; and thirdly, that it was not incumbent on a purchaser to search for judgments. *Lane* v. *Jackson*, 20 Beav. 535.

An old judgment not docketed, but duly registered under 1 & 2 Vict. c. 110, is good under 2 & 3 Vict. c. 11, s. 5, against purchasers and mortgagees without notice, to the extent which a judgment duly docketed under the old law would have had against them. *Dodswell* v. *Reece*, 11 Jur. (N.S.) 764; 13 L. T. 156.

Therefore, if a creditor on such a judgment, duly registered, files a bill for redemption and foreclosure, or for a sale against a first mortgagee and a puisne mortgagee, he is entitled as against the puisne mortgagee, though without notice, to be paid the full amount of the judgment debt. *Ib.*

Judgment was obtained in an action in which the defendant was sued in a wrong christian name, but the judgment was registered against the debtor in his true christian name, adding the title of the cause with the wrong christian name:—Held, that this registration complied with 1 & 2 Vict. c. 110, s. 19, and that the judgment was good against the debtor, and valid against his other creditors. *Beavan* v. *Oxford* (*Earl*), 3 Sm. & G. 11; 3 Eq. R. 445; 24 L. J., Ch. 311; 1 Jur. (N.S.) 154; 3 W. R. 154.

A judgment was recovered by B. against Alfred Lord H., described in the writ of summons, and in the judgment, as Edward Lord H. Alfred Lord H. appeared, and the judgment was registered, and complied with the requisites of the 1 & 2 Vict. c. 110, ss. 13, 19:—Held, the registration being correct, that sufficient notice was given to creditors and purchasers, and that the judgment was valid. *Ib.*

In Register Counties.]—Notwithstanding the West Riding Register Act directs that no judgments shall affect lands, but only from the time when the judgment shall be registered, a purchaser, with notice of an unregistered judgment, will be bound by it. *Gosling's Case*, 3 Sim. 301.

A judgment creditor, whose judgment was registered pursuant both to the Registry Act for the West Riding of Yorkshire, 5 & 6 Anne, c. 18, and the 1 & 2 Vict. c. 110, filed a bill to redeem a prior mortgagee of lands in the West Riding, and to foreclose the mortgagor. The mortgagor had confessed other judgments, and the conusees had registered them pursuant to the 1 & 2 Vict. c. 110, but not under the West Riding Act:—Held, that those conusees were not necessary parties to the suit. *Johnson* v. *Holdsworth*, 1 Sim. (N.S.) 106; 20 L. J., Ch. 63; 15 Jur. 31.

A judgment registered under 1 & 2 Vict. c. 110, s. 19, will not be a charge on lands in Middlesex, when it has not been registered in the county, under 7 Anne, c. 20, s. 18. *Alward*, *Ex parte*, 1 Fonbl. 217.

A judgment is not such a charge upon land (except it be within the 1 & 2 Vict. c. 110), as to give it precedence over an unregistered mortgage. *Cuthrow* v. *Eade*, 1 Sm. & G. 423.

A judgment registered under the Yorkshire Registry Act, 5 Anne, c. 18, and not under 1 & 2 Vict. c. 110, will retain its priority over a judgment subsequently obtained, and registered both in the county and under 1 & 2 Vict. c. 110. *Neve* v. *Flood*, 33 Beav. 666; 4 N. R. 207; 34 L. J., Ch. 89; 10 Jur. (N.S.) 607; 10 L. T. 520; 12 W. R. 897.

The priority as against lands in Middlesex of a judgment registered in the Middlesex registry over a judgment, which though earlier in date, is later in order of registration on the Middlesex registry, is not lost by reason of the judgment creditor having notice of such earlier judgment at the time when his judgment is entered up. *Benham* v. *Keane*, 3 De G. F. & J. 318; 31 L. J., Ch. 129; 8 Jur. (N.S.) 604; 5 L. T. 439; 10 W. R. 67. And see *Robinson* v. *Woodward*, 4 De G. & Sm. 562.

A judgment is a charge binding lands in Middlesex only from the time of its registration in the local registry. *Ib.*

A., being possessed of a term for years in land in Middlesex, mortgaged the term to the plaintiff on the 19th of June, 1852, which mortgage was registered in Middlesex on the 28th of June. The defendant obtained a judgment in the Queen's Bench against A. on the 5th of June, which was on the same day registered in the Common Pleas, but was never registered in Middlesex, and which was unknown to the plaintiff at the time of the mortgage. On the 8th September, 1852, the defendant issued out an elegit, and the lands were thereunder delivered to him :—Held, that by virtue of the 1 & 2 Vict. c. 110, s. 13, the judgment was a charge on the lands, but that by 2 & 3 Vict. c. 11, s. 5, it had no further effect against a bonâ fide purchaser for value and without notice than a judgment duly docketed would have had before the 1 & 2 Vict. c. 110, and that therefore it did not bind the term of years until execution under it, and consequently that the plaintiff was entitled, as a purchaser for value and without notice, to the lands, as against the defendant, the judgment creditor. *Westbrook* v. *Blythe*, 3 El. & Bl. 737 ; 2 C. L. R. 1660 ; 23 L. J., Q. B. 386 ; 1 Jur. (N.S.) 85 ; 2 W. R. 490.

Held, also, that the lands being in Middlesex, the judgment did not bind them until a memorial was registered in Middlesex, under 7 Anne, c. 20, s. 19. *Ib.*

S. recovered judgment against L., which he registered in the Common Pleas under 1 & 2 Vict. c. 110, s. 19. Afterwards H. registered his judgment in the Common Pleas, and the land being in Middlesex, he registered it also in Middlesex, under 7 Anne, c. 20, s. 18. Afterwards S. was registered in Middlesex :—Held, that H.'s judgment had priority over S.'s judgment. *Hughes* v. *Lumley*, 4 El. & Bl. 274 ; 3 C. L. R. 242 ; 24 L. J., Q. B. 57 ; 1 Jur. (N.S.) 422 ; 3 W. R. 109.

A decree in equity for the payment by the defendant to the plaintiff of a sum of money on or before a certain day:—Held, in reference to the provisions of act 1 & 2 Vict. c. 110, not to confer any priority as against a deed executed by the defendant, conveying his freehold estate in a register county to trustees for the benefit of his creditors, or as against a vesting order, made in the defendant's insolvency, the deed having been executed, and the vesting order having been made previously to the registration of the decree. *Lee* v. *Green*, 6 De G. M. & G. 155 ; 25 L. J., Ch. 269 ; 2 Jur. (N.S.) 170 ; 4 W. R. 270.

A decree for payment of money gives no right as against the land before registration. *Ib.*

Held, also, that the non-registration of the deed, and of the vesting order until after the registration of the decree was immaterial, it being proved that the plaintiff had notice of the deed and of the vesting order when he registered the decree. *Ib.*

Notice.]—A., on the 9th and 24th July, 1847, on the occasion of advancing his client's money to B. upon the security of judgments entered up against B., according to the usual practice in his office, sent the clerk to whom that duty was allotted to search for prior judgments against B. It did not appear whether the clerk found any such judgments against B., but he did not venture to swear that he did not, nor that he did not, according to the practice of A.'s office, communicate the result of his search to A. In fact, there was a prior judgment against B., and A. afterwards, in October, 1847, took a mortgage of B.'s property affected by such judgment :—Held, that the evidence was sufficient to affect A. with notice of the prior judgment against B. at the date of his mortgage, so as also to affect a subsequent purchaser of the mortgaged property from A. *Procter* v. *Cooper*, 3 Eq. R. 364 ; 1 Jur. (N.S.) 149 ; 3 W. R. 224—L.JJ. Affirming 2 Drew. 1 ; 18 Jur. 444.

Irish Cases—Priority.]—A deed not registered under 6 Anne, c. 2 (Ir.), retains its priority over a judgment subsequently confessed, if there be no subsequent deed conflicting with the first deed. *Browne* v. *Blake*, 1 Moll. 620. S. P., *Burke* v. *O'Malley*, Beat. 96. *Crymble* v. *Adair*, Beat. 122.

Where there is an unregistered deed, and a subsequent registered deed, with judgments intervening between them, the Registry Act gives priority to the latter deed over the former ; and it carries on the judgments prior to it, so as to take precedence of the unregistered instrument also. *Sparrow* v. *Cooper*, 1 Jones, 72.

Semble, if a person claiming under a registered deed does not insist on his priority over the unregistered deed, the latter will take precedence of the judgments. *Ib.*

A mortgagee is prevented by the operation of the Registry Act, 6 Anne, c. 2, from tacking, so as to gain a priority against mesne registered incumbrances. And for the purpose of adjusting the priorities between deeds under this act, judgments also obtain priorities, although not generally within the contemplation of the act. *Latouche* v. *Dunsany* (*Lord*), 1 Sch. & Lef. 137.

The 5th section of the Registry Act applies not to judgments generally. Judgment creditors have no priority by the Registry Act, except where priority between deeds is to be adjusted. *Ib.*, 160, 161. But see as to this latter position. *D'Arcy* v. *Chambers*, *Ib.* (App.), 467.

Where there is a conflict between an unregistered and a registered deed, judgments intermediate do not obtain absolute priority to the unregistered deed, until it is absolutely postponed to the registered deed. *Murtagh* v. *Tisdall*, 3 Ir. Eq. R. 85 ; Fl. & K. 20.

The Docketing Acts, 7 Will. 3, c. 13, and 3 Geo. 2, c. 7, apply only between purchasers and judgment creditors, and give no priority to judgments inter se. *Abbott* v. *Stratten*, 9 Ir. Eq. R. 233 ; 3 Jo. & Lat. 603.

Since the 3 & 4 Vict. c. 105, judgments of the same term entered after the passing of the act have priority inter se as charges on limits, according to the true dates of their entries. But quære as to judgments entered before the passing of the act. *Borough* v. *Williamson*, 11 Ir. Eq. R. 1.

Semble, the registration of a judgment under the 7 & 8 Vict. c. 90, gives no priority as between judgment creditors, except for the protection of heirs, &c., in the administration of assets. *O'Brien* v. *Scott*, 11 Ir. Eq. R. 63. And see *S. C.*, on appeal, *Ib.*, 459.

A. obtained a judgment in T. T. 1845. B. obtained a judgment in T. T. 1846. A. sued out an elegit ; the requisition on which was returned and filed on 20th July, 1846, and went into possession of the lands. B.'s judgment was registered in September, 1864, A.'s in January, 1847. The latter has priority. *Ib.*

In the administration of assets judgments rank inter se, according to the time of their

entry upon the roll under the statute 3 Geo. 2, c. 7 (Ir.). *Burke* v. *Killikelly*, 1 Ir. Ch. R. 1.

All judgments of the same term and ensuing vacation, recovered prior to the statute 3 & 4 Vict. c. 105, have equal priority inter se. *Smith* v. *Chichester*, 12 Ir. Eq. R. 519.

The rule that judgments of the same terms are in equal priority inter se, applies to the judgments in the exchequer and other courts alike. The principles of the foregoing doctrines considered and the cases upon them reviewed. *Ib.*

An estate having been sold under a decree of the court of exchequer for 12,000*l.*, the purchaser lodged in court 5,000*l.* of his own moneys; and applied to the plaintiffs in the present suit to lend him the remaining 7,000*l.*, on the terms of securing that sum as the first incumbrance on the lands; subsequently to an agreement with the plaintiffs for this loan, but previously to its having been carried out, the purchaser confessed a judgment for valuable consideration. The plaintiffs, though having notice of the judgment, advanced 8,000*l.*, of which 7,000*l.* was paid into court, as the residue of the purchase-money, and 1,000*l.* to the purchaser. By consent, which was made an order of the court, the conveyance of the lands was made to a trustee for the purchaser and the plaintiffs. The trustee, subsequently, in consideration of the 8,000*l.* mortgaged the lands to the plaintiffs:—Held, that the judgment was prior to the mortgage, as a charge on the lands. *Wallcott* v. *Lynch*, 13 Ir. Eq. R. 199.

—— **Notice.**]—The inrolment of the assignment of a judgment does not operate as notice, any more than the registry of a deed. *Ferrall* v. *Boyle*, 1 Ir. Eq. R. 403.

—— **In what Name.**]—A recognizance was acknowledged and registered, under 7 & 8 Vict. c. 90, s. 11 (Ir.), in the name of John Donovan Barron. The conusee had been baptised by the name of John Barron, but had been known in his family as John Donovan Barron, under which name he executed other instruments. He had acquired and sold real estate by the name of John Lawrence Barron, to a purchaser who had no notice of the recognizance:—Held, that it was not a charge on the real estate, as against the purchaser. *Staunton* v. *Staunton*, 15 Ir. Ch. R. 464.

In order to bind the purchaser the recognizance should have been registered as acknowledged by John Donovan Barron, and under the head of "persons whose estates are sought to be affected," the name of John Lawrence Barron should have been entered. *Ib.*

c. Re-registration.

Priority.]—Under 2 & 3 Vict. c. 11, if A. has a judgment registered under the 1 & 2 Vict. c. 110, such registration will protect him against all who become mortgagees, creditors, or purchasers during the currency of the five years, and such protection will continue as to them under a re-registration, even though he should have omitted to re-register within five years; but as to persons becoming mortgagees, creditors, or purchasers between the period when his first registration ceased and when his re-registration began, he will not be protected, but they will have priority over him. *Shaw* v. *Neale*, 6 H. L. Cas. 581; 27 L. J., Ch. 444; 4 Jur. (N.S.) 695; 6 W. R. 635—H. L. (E.)

A., B. and C. were judgment creditors of D., A. and B. having priority to C. A. and B. subsequently omitted to register their judgments within five years from their previous registration; C. duly registered within the five years:—Held, that A. and B. did not thereby lose their priority to C. *Beavan* v. *Oxford* (*Earl*), 6 De G. M. & G. 492; 25 L. J., Ch. 299; 2 Jur. (N.S.) 121; 4 W. R. 112.

The effect of the provisions of the 4th section of the 2 & 3 Vict. c. 11, is to deprive the judgment creditor who omits to register within five years of protection against subsequent purchasers, mortgagees, and creditors, but not to alter his position as to previous purchasers, mortgagees, and creditors. *Ib.*

The circumstance that a re-registration is not within five years from the previous registration does not make it ineffectual as against subsequent purchasers, mortgagees, and creditors. *Ib.*

A., B. and C. were judgment creditors of D. A. registered his judgment on the 12th of March, 1840, but never registered. B. registered his judgment in April, 1842, and re-registered in March, 1848. C. registered his judgment on the 18th of March, 1845, and re-registered on the 16th of March, 1850. Questions having arisen as to the priorities of the several judgment creditors, the fund in court being insufficient for payment in full:—Held, that on the construction of the statutes 1 & 2 Vict. c. 110, s. 19, 2 & 3 Vict. c. 11, s. 4, and 3 & 4 Vict. c. 82, s. 2, and upon the principle laid down in *Beavan* v. *Oxford* (*Earl*) (6 De G. M. & G. 492), C. was first entitled to take out of the fund the sum found due on A.'s judgment, and then that B. was entitled to be paid the full amount of his judgment, before C. took anything more in respect of his judgment. *Kensington* (*Lord*), *In re*, *Bacon* v. *Ford*, 54 L. J., Ch. 1085; 29 Ch. D. 527; 53 L. T. 19; 33 W. R. 689.

The provision of the 2 & 3 Vict. c. 11, s. 4, that all judgments shall, after the expiration of five years from the entry thereof, be null and void against lands, tenements, and other hereditaments as to creditors, unless re-registered within five years before the right of such creditors accrued, refers only to creditors who have some right or interest in such lands, tenements, or hereditaments, as, for example, by virtue of a creditor's decree, directing a sale of such property. *Simpson* v. *Morley*, 2 Kay & J. 71; 1 Jur. (N.S.) 1158.

In 1848 B. obtained and registered judgments against M. M. died in 1854; and in the same year, after M.'s death, the registration, which had expired, was renewed. A creditor's claim was afterwards filed, and a decree obtained, which was set up against the present bill, brought by S., the assignee of B.'s judgments, for foreclosure:—Held, that the registration before decree gave S. priority. *Ib.*

Creditors of a deceased debtor have not on his death a right against his leasehold property in the hands of his executors or administrator within the meaning of the act. *Ib.*

Quære, if they have even after a creditor's decree, any such right in the specific chattels of the deceased debtor, unless the decree directs them to be sold for the benefit of the creditors. *Ib.*

Terrin, In re (2 Dru. & War. 147), distinguished *Ib.*

The provisions as to re-registration in the 2 & 3

Vict. c. 11, s. 4, are operative for the benefit of all persons deriving title, mediately or immediately, from a judgment debtor, and not merely for that of immediate purchasers, mortgagees, and creditors of the debtor himself. *Benham* v. *Keane*, 1 Johns. & H. 685; 7 Jur. (N.S.) 1096. Affirmed, on appeal, 3 De G. F. & J. 318; 31 L. J., Ch. 129; 8 Jur. (N.S.) 604; 5 L. T. 439; 10 W. R. 67.

A purchaser from a mortgagee of the judgment debtor, taking with notice of a judgment which has not been registered or re-registered in the Common Pleas registry within five years, and having the legal estate, is not affected by such judgment. *Ib.*

—— **Heirs, Executors, or Administrators.**]—23 & 24 Vict. c. 38, s. 4, is not retrospective; so that where a debtor died before the passing of the act, a judgment, which had not been re-registered within five years before his death, retained its priority in the administration of his assets. *Evans* v. *Williams*, 2 Drew. & Sm. 324; 34 L. J., Ch. 661; 11 Jur. (N.S.) 256; 12 L. T. 762; 13 W. R. 423.

Where the executor of a deceased conusee of a judgment sought to register the judgment as a mortgage, an entry was on his application, made in the margin of the summary of the judgment that the proceedings were continued in his name as executor. Form of order in such cases. *Lawless* v. *Doake*, 12 L. R., Ir. 68.

Lands in Middlesex.]—The priority as against lands in Middlesex of a judgment registered in the Middlesex registry over a judgment, which, though earlier in date, is later in order of registration on the Middlesex registry, is not lost by reason of the judgment creditor having notice of such earlier judgment at the time when his judgment is entered up. *Benham* v. *Keane*, 3 De G. F. & J. 318; 31 L. J., Ch. 129; 8 Jur. (N.S.) 604; 5 L. T. 439; 10 W. R. 67.

Irish Cases.]—A judgment entered up within twenty years before the passing of the 9 Geo. 4, c. 35, and not revived or redocketed within twenty years before the execution of a deed of conveyance to a purchaser, or within five years after the passing of the act, is, after the expiration of twenty years from its entry, void against a purchaser, whose deed of conveyance was executed after the passing of the act, and within twenty years from the entry of the judgment. *Knox* v. *Kelly*, 1 Dr. & Wal. 542; Sau. & Sc. 512, n.; 1 Ir. Eq. R. 87, n. S. P., *Blake* v. *Darcy*, Sau. & Sc. 493; 1 Dr. & Wal. 559, n.; 1 Ir. Eq. R. 84. *Hickson* v. *Collis*, 1 Jo. & Lat. 94; 6 Ir. Eq. R. 524.

A "judgment recovered and entered" within the meaning of the 9 Geo. 4, c. 35, is one which may be revived or redocketed, i.e. an original judgment. *Stewart* v. *Cottingham*, 6 Ir. Eq. R. 248.

A., having obtained a judgment in 1789 against B., in 1792 died, and by his will devised one nomination to C. and another to D. C., in 1796, married, and thereupon settled the estate devised to him. The executors of A., in 1828, revived the judgment of 1789 against C., the heir, and certain terre-tenants, and thereupon issued an elegit, and obtained a finding thereunder prior to the passing of the 9 Geo. 4, c. 35, but were prevented from getting into possession by the proceedings of a prior creditor. The judgment was not revived or redocketed within five years from the passing of that act, according to the provisions of the 3rd section. On a bill filed within twenty years from the revival of 1828 against E., claiming under the settlement of 1796, and D. and other parties:—Held, that notwithstanding the revival of 1828, elegit and other proceedings thereunder, no possession having been obtained, the plaintiff was barred as against E. by the 3rd section of the 9 Geo. 4, c. 35:—Held, also, that the judgment creditor (having a legal right and proceeding against the legal estate of his debtor) by his omission to redocket, thereby exonerating one denomination of land originally liable and casting the entire debt upon the other, without affording a right of contribution to that other, did not thereby lose his right to go against that other for the whole amount, and that no equity existed to restrain such creditor to the amount to which that denomination was originally liable. *Ryan* v. *Cambie*, 9 Ir. Eq. R. 376.

The pendency of a suit when statute 9 Geo. 4, c. 35, passed, does not dispense with the necessity for redocketing or reviving a judgment under s. 3 of that act. *Joyce* v. *Joyce*, 10 Ir. Eq. R. 128.

A judgment creditor bequeathed certain legacies, and appointed the debtor executor:—Held, that as the judgment though extinguished at law was subsisting in equity, it was capable of being redocketed, and was within the provisions of the 9 Geo. 4, c. 35. *Huthwaite, In re*, 2 Ir. Ch. R. 54.

Notice of an unredocketed judgment will not make it binding against a purchaser. *Ib.*

An unredocketed judgment is not only null and void as against a subsequent purchaser for valuable consideration, but also, in order more effectually to work out the object of the said act, necessarily null and void as against an intervening redocketed judgment. *Ib.*

An assignee of an insolvent is not a purchaser within the meaning of the acts for redocketing or registering judgments. *Baylee* v. *Browne*, 10 Ir. Eq. R. 180.

A purchaser, who buys expressly subject to a judgment, will be bound by it, although it has not been redocketed within the time required by 9 Geo. 4, c. 35. *Garnett* v. *Armstrong*, 2 Con. & L. 449; 5 Ir. Eq. R. 533; 4 Dr. & War. 182.

Notice to a purchaser, for value, of a judgment not revived or redocketed pursuant to the 9 Geo. 4, c. 35, will not take it out of the operation of that statute. *Beere* v. *Head*, 3 Jo. & Lat. 340; 9 Ir. Eq. R. 76. Reversing on this point 8 Ir. Eq. R. 647.

In 1776 a commission of bankruptcy issued against A., and the assignee entered into possession of A.'s estate. Afterwards, in 1793, A. became indebted by judgment to C., and afterwards devised all his real and freehold estates to B. and his heirs, upon certain trusts, and charged with his debts and legacies. The defendant, who was heir-at-law of the assignee, had continued in the possession of the lands, and after the institution of a suit against him by the devisees of A., to recover possession of those estates, purchased them from the persons beneficially entitled under A.'s will, subject to the incumbrances affecting them, and obtained a conveyance of them in 1825. The judgment of 1793 had not been revived or redocketed within five years after the passing of the Redocketing Act:—Held, that the trust for the payment of

debts prevented the judgment being barred under the Redocketing Act. *Cockburn* v. *Warner*, 1 Longf. & T. 443.

In 1793 C. C. executed his bond with warrant of attorney, and in 1799 made his will, whereby he devised his real estates to trustees in trust to sell and pay his debts, and subject thereto to his co-heiresses and their heirs. He died in February, 1804, and in March, 1804, the obligee in the bond caused judgment to be entered on it as of the preceding term. In 1826 the co-heiresses of C. C., for a valuable consideration, conveyed his real estates, subject to his debts, to W. and his heirs. The judgment of 1804 was not revived or redocketed pursuant to the 9 Geo. 4, c. 35 :—Held, nevertheless, that it was a valid charge affecting the real estates of C. C. in the hands of W. E. E. *Cockburn* v. *Wright*, 6 Ir. Eq. R. 1.

3. Action on Judgment, Order or Decree.

When Maintainable.]—An action on a judgment of a superior court is not to be favoured, as there is another remedy for enforcing it. *Biddleson* v. *Whitel*, 1 W. Bl. 507.

Practice.]—In an action on a judgment, the plaintiff may indorse the particulars of his claim on the writ of summons, and, on non-appearance, sign judgment. *Hodsoll* v. *Baxter*, El. Bl. & El. 884 ; 28 L. J., Q. B. 61 ; 4 Jur. (N.S.) 506 ; 6 W. R. 686—Ex. Ch.

Matter which affords ground for a writ of error cannot be pleaded in bar to an action on a judgment. *Dick* v. *Tolhausen*, 4 H. & N. 695.

Proof.]—Proof of a writ of summons is not necessary in an action on a judgment in a superior court. *Coleman* v. *Rawlinson*, 1 F. & F. 330.

Costs.]—43 Geo. 3, c. 46, s. 4, does not extend to an action brought to recover the costs of a judgment of nonsuit. *Bennett* v. *Neale*, 14 East, 343.

Nor does it entitle a defendant to stay the proceedings on payment of the debt without costs, where there is probable ground for the plaintiff's also claiming interest on part of the debt. *Wood* v. *Silleto*, 1 Chit. 473.

A defendant against whom judgment had been obtained sued out a writ of error, and to an action on the judgment pleaded nul tiel record ; the court allowed the plaintiff his costs of the action upon the judgment. *Garnwell* v. *Barker*, 5 Taunt. 264.

A plaintiff having recovered judgment for 15*l.* against a clerk in a public office, who had no assets to satisfy the judgment, but who was in receipt of a salary out of which he had proposed to set aside 60*l.* a year for the payment of his debts, brought an action upon the judgment for the debt and costs (amounting together to upwards of 20*l.*), to which he pleaded nul tiel record :—Held, that the plaintiff was entitled to the costs of the second action, as it sufficiently appeared that without bringing a second action he could not have obtained the fruits of the judgment recovered in the first. *Slater* v. *Mackie*, 7 D. & L. 255 ; 8 C. B. 553 ; 19 L. J., C. P. 88 ; 13 Jur. 1081.

It is no answer to a motion for costs that the original cause of action (in which the defendant had suffered judgment by default) was one for which the plaintiff might have levied a plaint in the county court. *Ib.*

A plaintiff having brought an action on a judgment recovered in an inferior court, instead of removing it to a superior court, and issuing execution, the defendant pleaded nul tiel record. The plaintiff produced the record, and applied for his costs ; but the court refused the application, notwithstanding the defendant had pleaded a false plea. *Hanmer* v. *White*, 12 M. & W. 519 ; 1 D. & L. 653 ; 13 L. J., Ex. 110.

Where a plaintiff sues upon a judgment, and counts upon other and distinct causes of action are added, he is not deprived of his costs. *Jackson* v. *Everett*, 1 B. & S. 857 ; 31 L. J., Q. B. 59 ; 8 Jur. (N.S.) 281 ; 5 L. T. 711 ; 10 W. R. 294.

In an action on a judgment the court will not grant a plaintiff his costs, where, by suing on two judgments, he has recovered sufficient to entitle himself to a ca. sa. against the defendant, which since 7 & 8 Vict. c. 96, s. 57, he could not otherwise have had, and thus, notwithstanding, no fi. fa. could be executed against him for want of assets. *Bell* v. *Waldron*, 9 Jur. 510.

Bringing an action on a judgment under 20*l.* with the object of obtaining a judgment above 20*l.*, and issuing thereon execution against the person, is an evasion of the 7 & 8 Vict. c. 96, s. 57, and the court, in the exercise of its discretion, will not allow to the plaintiff his costs. *Adams* v. *Ready*, 6 H. & N. 261 ; 7 Jur. (N.S.) 267 ; 3 L. T. 892 ; 9 W. R. 438.

Where an action is brought upon a judgment for a sum not exceeding 20*l.* for the purpose of enabling the plaintiff, by adding the costs to the sum recovered by the judgment, to recover a sum exceeding 20*l.*, and so to issue a ca. sa. and defeat the object of the 7 & 8 Vict. c. 96, s. 57, the discretion of the court under 43 Geo. 3, c. 46, s. 4, as to granting costs to the plaintiff, is not taken away by the latter statute, but they will be guided in the exercise of that discretion by its provisions. *Dickinson* v. *Angell*, 3 B. & S. 840 ; 32 L. J., Q. B. 183 ; 8 L. T. 313 ; 11 W. R. 667.

Application for Costs.]—An application for an order to entitle a plaintiff to costs in an action on a judgment, must be made either to the court or to a judge at chambers, and not to a judge at nisi prius. *Jones* v. *Lake*, 8 Car. & P. 395.

An order at chambers ought not to be granted ex parte, and should be made on summons. *Lomax* v. *Berry*, 2 H. & N. 127 ; 26 L. J., Ex. 281 ; 3 Jur. (N.S.) 446 ; 5 W. R. 563.

If the application raises any question of difficulty, the judge may refer it to the court. *Claridge* v. *Wilson*, 26 L. J., Ex. 246.

Upon moving for a rule for costs, in an action upon a judgment, an affidavit shewing the reason for adopting that course is indispensable. *Revel* v. *Wetherell*, 3 C. B. 321.

In an action on a judgment, the defendant pleaded nul tiel record, and a day being given, the plaintiff, having obtained judgment, moved for costs. The court granted only a rule nisi in the first instance. *Fraser* v. *Moses*, 4 Scott (N.R.) 749 ; 1 D. (N.S.) 705.

Where a plaintiff, producing the record, moved for judgment and his costs :—Held, that the costs must be made the subject of a separate motion. *Abbott* v. *Newton*, 6 Jur. (N.S.) 1101 ; 3 L. T. 672.

On Orders for Payment of Costs.]—An action will not lie upon an interlocutory and a collateral order for costs; the mode of enforcing payment is by attachment in the court by whom the order is made. *Sheehy* v. *Professional Life Assurance Co.*, 2 C. B. (N.S.) 211; 26 L. J., C. P. 301; 3 Jur. (N.S.) 748; 5 W. R. 878.

But an action may be maintained on an order by the judicial committee of the privy council for the payment of costs, under 3 & 4 Will. 4, c. 41, and 6 & 7 Vict. c. 38. *Hutchinson* v. *Gillespie*, 11 Ex. 798; 25 L. J., Ex. 103; 2 Jur. (N.S.) 403; 4 W. R. 302.

An action lies on the judgment of the House of Lords ordering the appellant in an unsuccessful appeal to that House to pay the costs of such appeal to the respondent. *Marbella Iron Ore Co.* v. *Allen*, 47 L. J., C. P. 601; 38 L. T. 815.

Costs payable under a judge's order can be recovered by action or counterclaim. *Philpott* v. *Lehain*, 35 L. T. 855.

An action lies to recover the costs in an indictment for libel given by 6 & 7 Vict. c. 96, s. 8. *Richardson* v. *Willis*, 42 L. J., Ex. 68; L. R. 8 Ex. 69; 28 L. T. 871; 12 Cox, C. C. 351.

An action is not maintainable against an attorney for not delivering his bill of costs in obedience to a judge's order. *Dent* v. *Basham*, 9 Ex. 469; 2 C. L. R. 989; 23 L. J., Ex. 161; 18 Jur. 295; 2 W. R. 201.

Nor will an action lie upon an undertaking contained in a judge's order, though the order was made by consent, and the undertaking was founded on a good consideration. *Hookpayton* v. *Bussell*, 10 Ex. 24; 2 C. L. R. 1081; 23 L. J., Ex. 267.

But an action will lie on a judge's order to refer made by consent, the consent being evidence of an agreement to perform the award. *Lievesley* v. *Gilmore*, 35 L. J., C. P. 351; L. R. 1 C. P. 570; 12 Jur. (N.S.) 874; 15 L. T. 386.

On Decrees of Courts of Equity.]—An action is not maintainable on a decree in equity for the payment of interest on purchase-money and the costs of a bill for specific performance. *Carpenter* v. *Thornton*, 3 B. & Ald. 52; 22 R. R. 299.

Nor on a mere interlocutory order. *Fry* v. *Malcolm*, 4 Taunt. 705. S. P., *Biddle* v. *Dowse*, 9 D. & R. 404; 6 B. & C. 255; 5 L. J. (O.S.) K. B. 128; 28 R. R. 574.

4. Assignment of Judgment.

A., who was jointly liable with nine others, having been taken under a ca. sa., paid the entire debt:—Held, that he was entitled, by virtue of 19 & 20 Vict. c. 97, s. 5, to an assignment of the judgment, and that in an action against the judgment creditor to enforce such assignment, a plea that the judgment had been satisfied by payment by A., after he had been taken in execution under it, was no answer. *Batchellor* v. *Lawrence*, 9 C. B. (N.S.) 543; 30 L. J., C. B. 39; 6 Jur. (N.S.) 130; 3 L. T. 508; 9 W. R. 373.

To an action for nonpayment of 45*l.*, a balance due upon an agreement, the defendant pleaded a set-off on a judgment for 40*l.* 2*s.* obtained by him in an action against the plaintiff. The plaintiff replied that, before the recovery of the judgment, he, for a good consideration, assigned the debt to S.; that the defendant, before the recovery of the judgment, had notice of the assignment; and that the plaintiff was suing as trustee for S.:—Held, that the replication was bad, as disclosing no legal answer. *Watkins* v. *Clark*, 12 C. B. (N.S.) 277; 6 L. T. 277.

A judgment creditor having assigned his judgment to the trustees of a creditor's deed, in trust for the benefit of the creditors who had executed the deed (of whom he was himself one), was entitled to sue, on behalf of himself and all such other creditors, for the establishment of their rights in respect of the trust estate and the execution of the trusts. *Squire* v. *Ford*, 9 Hare, 47; 20 L. J., Ch. 308; 15 Jur. 619.

As between conusor and assignee of a judgment, the price paid for the assignment is immaterial. *Hickson* v. *Aylward*, 3 Moll. 1.

Acknowledgment by conusor of judgment in reply to inquiry by intended assignee, that the sum secured by the judgment is justly due to the conusee, shuts out the equitable defence which the conusor may have had against the conusee; subject, however, to inquiry as to the bona fides of the transaction. *Ib.*

The court has authority, under the 5 & 6 Vict. c. 105, to permit the assignee of a judgment creditor to continue in his own name the proceedings of his assignor under the Judgment Creditors Act. *Daly* v. *Blake*, 10 Ir. Eq. R. 36.

A judgment debtor conveyed lands to the plaintiff, covenanting against incumbrances. The judgment creditor afterwards sued out elegits on which ejectments were brought against the purchaser, who, by an arrangement, paid part of the debt, and offered to pay the rest if the creditor would assign the judgment to him, which he refused to do, but offered to satisfy it:—Held, the plaintiff, paying the judgment, was entitled to an assignment of it. *Rotheram* v. *Flynn*, Beat. 555.

5. Satisfaction of Judgment.

Entry of Satisfaction—In what Cases Ordered.]—The court or a judge will compel a plaintiff, who has received satisfaction of his judgment, to execute the proper satisfaction process, in order to have the entries of it on the registers duly vacated. And when the judgment is vacated, the entries of it are in effect vacated. *Fish* v. *Tindal*, 10 W. R. 801.

The court will not order satisfaction to be entered on the roll in a case where four only of five plaintiffs have given their consent, although the fifth plaintiff is resident abroad and cannot be found. *Davis* v. *Jones*, 5 D. P. C. 503; 4 Scott 202; 1 Jur. 42.

The duty of the solicitor of one of several co-plaintiffs ends when judgment is signed, and he has no general authority to consent, on behalf of his client, to the entry of satisfaction. *Ib.*

—— **Delay.**]—Where the lessor of the plaintiff, after obtaining a verdict and judgment, delayed to tax his costs (although apparently for the purpose of recovering the extra costs in an action for mesne profits), a judge has no authority to order that the defendant shall be at liberty to enter satisfaction on the record, unless the lessor of the plaintiff taxes his costs within a limited time. *Doe* d. *Drax* v. *Filliter*, 11 M. & W. 80; 12 L. J., Ex. 188.

—— **Death of Conusee without Legal Personal Representative.**]—Where a plaintiff obtained judgment against the defendant in 1802, which was satisfied in 1805, and the plaintiff died

intestate in 1821, the court would not allow satisfaction to be entered on the roll on an affidavit of the defendant's attorney, that the plaintiff had received from the defendant a certain sum in full satisfaction of his demand, it appearing that administration had not been taken out of the plaintiff's effects. *Speach* v. *Slade*, 8 Moore, 461.

Where both conusor and conusee of a judgment entered on a bond in 1854 were deceased several years, and there was no personal representative of the conusee, and the devisee of lands, against which the judgment had been registered as a statutable mortgage, deposed, of her own personal knowledge, to payment of the debt by the conusor in the year 1858, and that no claim had since been made on foot of the judgment, and held in her possession the bond which she swore she had delivered to the conusor on payment, a conditional order was made for the entry of satisfaction, unless cause should be shewn by the eldest son and only surviving male member of the family of the conusee. *Scott* v. *Wood*, 10 L. R., Ir. 355.

—— **Ca. Sa.**]—The taking a debtor in execution was an election binding upon the creditor to pursue that remedy and none other against his debtor, but was not an absolute extinguishment of the debt. *Thompson* v. *Parish*, 5 C. B. (N.S.) 685; 28 L. J., C. P. 153; 5 Jur. (N.S.) 986; 7 W. R. 210.

Where a judgment debtor, taken in execution, was, after a month's imprisonment, released from prison by the judgment creditor, who, three years afterwards, registered the judgment pursuant to 1 & 2 Vict. c. 110, and 2 & 3 Vict. c. 11, the court made absolute a rule to enter up satisfaction of the judgment, or to strike out the registration, the debtor paying the expenses of whichever alternative he adopted. *Lambert* v. *Parnell*, 15 L. J., Q. B. 55; 10 Jur. 31.

A plaintiff having recovered judgment against two, issued two concurrent writs of ca. sa. thereon, and the defendants were taken in execution, but were discharged by the plaintiff's attorney upon their making an arrangement for the payment of the debts. The plaintiff afterwards issued a fi. fa. for the balance of the original debt, and the goods of one of the defendants were seized, but, upon payment of a sum under protest, the goods were released. A rule nisi was afterwards obtained by him to procure a return of this money, on the ground that the original debt was barred by his discharge out of custody, as having been made either by the authority of, or as having been ratified by the plaintiff. The court referred the matter to the master to report thereon to the court, and he found that the discharge of the defendants had been ratified by the plaintiff, and therefore the court made the rule absolute to set aside the execution. The plaintiff then brought an action upon the original judgment. The court, under the preceding circumstances, refused to order satisfaction to be entered up on the judgment-roll in the action. *Ward* v. *Broomhead*, 7 Ex. 726; 21 L. J., Ex. 216.

Where a judgment creditor has discharged his debtor out of custody after he had been taken in execution on such judgment, although the discharge was given only upon a condition which the debtor failed to perform, yet if it was obtained without fraud, the debt is satisfied, and the court is bound to order satisfaction to be entered on the judgment-roll. *Catlin* v. *Kernott*, 3 C. B. (N.S.) 796; 27 L. J., C. P. 186; 4 Jur. (N.S.) 281; 6 W. R. 291.

—— **Decree of Divorce Court.**]—The court will not strike out from the register an entry made of a decree of the Court of Divorce. *Holden, Ex parte*, 13 C. B. (N.S.) 641; 1 N. R. 361; 32 L. J., C. P. 111; 9 Jur. (N.S.) 948; 7 L. T. 791; 11 W. R. 437.

—— **Principal and Surety.**]—A., and B., as his surety, having given a joint and several promissory note to C., the latter brought separate actions against A. and B. upon the note, and recovered judgment in both actions: C. afterwards issued execution upon the judgment obtained against B., whereby B. was compelled to pay the whole debt and costs. Upon a bill filed by the administratrix of B., for the purpose of obtaining an assignment of the judgment which had been recovered against A., the principal debtor:—Held, that such judgment not being available at law in the hands of the creditor, was not available in equity in the hands of the surety, and consequently that the court would not compel an assignment, as sought by the bill. *Dowbiggen* v. *Bourne*, 2 Y. & C. 462; 6 L. J., Ex. Eq. 82; 1 Jur. 102.

A creditor sued his principal debtor, and recovered a judgment against him and the bail in the action. The surety thereupon "paid and satisfied" to the creditor the amount of the judgment, &c., and took an assignment thereof:—Held, on demurrer, that he could not assume that the judgment was still subsisting. *Armitage* v. *Baldwin*, 5 Beav. 278.

—— **Heir.**]—A judgment creditor who has proved his demand under the decree to account, and who has been paid the sum decreed to be due to him, is bound to execute a warrant of attorney to satisfy the judgment tendered to him on behalf of the inheritor of the estate decreed to be sold. *Eyre* v. *Lynch*, 3 Ir. Eq. R. 194.

—— **Contract—Judgment to stand Security for larger Debt.**]—A purchaser of lands with notice of a judgment against the vendor, entered before 1 & 2 Vict. c. 110, and of an agreement between him and the judgment creditor that such judgment should stand as a security for payment of a sum larger than that for which the judgment was entered, is not entitled to have satisfaction entered up on the judgment-roll, upon payment to the judgment creditor of the amount for which judgment was entered and costs of suit and interest from the time of the commencement of the 1 & 2 Vict. c. 110. *Crafts* v. *Wilkinson*, 4 Q. B. 74; 3 G. & D. 280; 12 L. J., Q. B. 153; 7 Jur. 105.

Tenant by Elegit—Acquisition of Fee Simple.]—In a suit for enforcing securities, it is the duty of the creditor to prove that his security is existing, and he is answerable for his acts, neglects, and omissions; and a creditor, by elegit, having taken from a trustee for sale a conveyance in fee of a part of the lands of which he was in possession under extents issued upon two elegits, his tenancy under them held to be extinguished in the remainder of the estate, and the judgments on which they were issued were held to be satisfied. *Hele* v. *Bexley* (*Lord*), 22 L. J., Ch. 1007.

If a term in gross exists on an estate, and

has not been attendant upon the inheritance, no surrender will be presumed, and such a term is liable to an extent; but the judgments having been satisfied by purchase of part of the estates extended, the tenancy by elegit was gone, and the parties entitled may enter. *Ib.*

Though the elegits are satisfied, an outstanding unsatisfied claim will still be considered in taking the accounts under a trust for the benefit of incumbrancers. *Ib.*

—— **Eviction.**]—Judgment creditor having sued out an elegit, and having obtained possession, and continued in receipt of the issues of a moiety of the lands until the death of his debtor, and being then evicted:—Held, that his judgment was not extinguished, and that he was entitled to come into equity after the death of the conusor for satisfaction of so much as remained unpaid. Whether if he was not evicted, but elected to abandon his elegit he would be so entitled, quære. Lord Chancellor expressing an opinion that equity would not hold a creditor disentitled to participate in the ordinary and regular distribution of assets, because during the lifetime of his debtor he had gone as far as he could go to obtain payment. *Leahy* v. *Dancer*, 1 Moll. 313.

Set-off.]—The court in the exercise of its equitable jurisdiction, allowed the costs of an interlocutory order which was made after judgment in an action, and by which the plaintiff was ordered to pay the defendant the costs, to be set off against the judgment. *Thompson* v. *Parish*, 5 C. B. (N.S.) 685; 28 L. J., C. P. 153; 5 Jur. (N.S.) 986; 7 W. R. 210.

The set-off of a judgment in one action against a claim arising out of another and separate action cannot be allowed. *Ib.* S. P., *Taylor* v. *Waters*, 5 M. & S. 103; 2 Chit. 303.

A judgment for damages and costs being signed by a plaintiff suing in formâ pauperis, a judge, on summons, ordered satisfaction to be entered, on the defendant's acknowledging satisfaction for costs to a like amount taxed for him against the same plaintiff in a former action. The court refused to set aside the order, the now plaintiff not having appeared in formâ pauperis in the former action, and there being no proof that, in the subsequent action, the plaintiff's attorney had any lien on the costs for moneys advanced. *O'Hare* v. *Reeves*, 13 Q. B. 659; 18 L. J., Q. B. 231; 13 Jur. 535.

A tenant having obtained judgment, and issued execution against his landlord, afterwards became indebted to him for arrears of rent and dilapidations:—Held, that the landlord was not entitled, by injunction, to restrain proceedings upon the judgment on the ground of set-off. *Maw* v. *Ulyatt*, 31 L. J., Ch. 33; 7 Jur. (N.S.) 1300; 5 L. T. 251; 10 W. R. 4.

Practice.]—A rule to compel the entry and docketing of a judgment should be addressed to the party in the cause, and not to his attorney. *Engler* v. *Twisden*, 4 Bing. (N.C.) 714; 6 Scott, 580; 8 L. J., C. P. 128.

The court has no jurisdiction over the senior master, as to the entry of particulars of a judgment, for the purpose of charging lands, under the provisions of the 1 & 2 Vict. c. 110, s. 19. The master must act upon his own discretion. *Ness, Ex parte*, 5 C. B. 155; 5 D. & L. 339; 17 L. J., C. P. 15.

The Court of Exchequer would not order the senior Master of the Common Pleas to make an entry in the book of registry of judgments, recording a ca. sa. executed upon a defendant in a judgment registered in his book. *Hallett* v. *Dyne*, 2 H. & C. 696; 3 N. R. 297; 33 L. J., Ex. 86; 10 Jur. (N.S.) 157; 9 L. T. 574; 12 W. R. 159. *Lewis* v. *Dyson*, 1 B. C. C. 33; 21 L. J., Q. B. 194; 16 Jur. 222, overruled.

The Court of Chancery had no jurisdiction to order the Master of the Common Pleas to vacate a memorandum, entered under 1 & 2 Vict. c. 110, of an order of the Court of Chancery. *Wells* v. *Gibbs*, 3 Beav. 399; 10 L. J., Ch. 97; 4 Jur. 1176.

Effect on Costs.]—A judgment creditor, whose debt had been satisfied, but who had not entered satisfaction on the rolls, was made a defendant to a foreclosure suit in equity. He disclaimed:—Held, that he was not entitled to his costs, in consequence of his negligence in not entering up satisfaction of his judgment. *Thompson* v. *Hudson*, 34 Beav. 107.

Irish Cases.]—The court has jurisdiction to direct satisfaction to be entered on the registry of an order under 3 & 4 Vict. c. 105, and made such an order on affidavit of payment, and on consent signed by party in whose favour order was made. *O'Neill* v. *Bass*, 6 Ir. Eq. R. 307.

G. devised certain lands to A., subject to the payment of his debts; and reciting that he had obtained a decree for payment of a large sum of money, directed that money, when recovered, to be the primary fund for payment of his debts: and appointed A. and J. his executors. Before the primary fund was available, the executors, being pressed for the payment of a debt of the testator, joined in mortgaging the lands devised to A., and executed a bond, on which a joint judgment was afterwards entered up against them. The money so raised was applied partly in payment of the testator's debt, and partly in obtaining a renewal of the lease of the mortgaged lands. A., out of his own moneys, afterwards paid off the mortgage, and took an assignment of it, and of the judgment, as to a trustee:—Held, that he could not rely on the judgment as a subsisting incumbrance affecting the estate of J., notwithstanding that there was an unsettled account of the assets of G. between him and J., on which he alleged that J. was indebted to the estate in a sum larger than the amount of the judgment. *Beresford* v. *Chambers*, 5 Ir. Eq. R. 482.

6. Relief Against.

On the Ground of Fraud.]—*See* Fraud.

Facts discovered since the Trial.]—A bill in equity to set aside a verdict is not sustainable, where the facts on which the bill is founded, though discovered since the trial, might have been established at the trial upon cross-examination. *Taylor* v. *Sheppard*, 1 Y. & C. 271.

On Equitable Grounds.]—A court of equity has no jurisdiction to relieve a plaintiff against a judgment at law, where the case in equity proceeds upon a ground equally available at law and in equity; but the plaintiff must establish some special equitable ground for relief,

Harrison v. *Nettleship*, 2 Myl. & K. 423 ; 3 L. J., Ch. 86.

Although the court will, by decree, restrain the setting up of an outstanding term to prevent the fair trial of a legal right ; yet, after the trial of an ejectment has taken place, and a term has been set up whereby the trial of the merits of the case was prevented, and the party using it obtained a verdict and judgment, a suit cannot be sustained to set that judgment aside ; nor will the fact, that the communications made before the trial by the party, who so gained the advantage at law, led the other party to believe that the substantial question of the title would be tried in the ejectment, enable him to sustain a suit for such a purpose ; but if there be any impediment to the trial of the legal right in another action of ejectment, a suit may be sustained for relief by removing that impediment to the trial of the right in such future action. *Clare Hall* v. *Harding*, 6 Hare, 273 ; 17 L. J., Ch. 301 ; 12 Jur. 511.

Upon a bill filed by a creditor, to enforce a judgment of twenty-eight years' standing, the plaintiff, in order to rebut the presumption that the judgment had been satisfied, gave evidence of the insolvency of his debtor during the greater part of that period :—Held, that such evidence would not avail the plaintiff against the unexplained fact of his not having sooner attempted to enforce the judgment, and that, to obtain relief in equity, he was bound, under the circumstances, to shew to demonstration that the judgment had not been satisfied. *Grenfell* v. *Girdlestone*, 2 Y. & C. 662 ; 7 L. J., Ex. Eq. 42 ; 1 Jur. 940.

Mistake.]—A party who has mistaken or misshapen his defence at law, cannot require relief in equity. *Evans* v. *Solly*, 9 Price, 525.

Lands were devised to a trustee and his heirs, to the use of A. for life, without impeachment of waste, with divers remainders over ; and a power was given to the trustee, with the consent of the tenant for life in possession, to sell the property, or any part of it, and to lay out the money in the purchase of other lands to be settled to the same uses, and in the meantime, to invest it in the public funds, and for the purposes of such sale, to revoke the original uses, and appoint new uses. A contract was entered into for the sale of the estate for 13,400*l.* exclusive of the timber, which was to be taken at a valuation ; and it being conceived that the tenant for life, without impeachment of waste, was entitled to receive for his own benefit the amount of the valuation of the timber, a deed was executed, by which he, in consideration of 2,448*l.*, conveyed the timber to the purchaser, and the trustee in consideration of 13,400*l.* conveyed the land exclusive of the timber. Many years afterwards, the tenant for life, being advised that he was not entitled to the amount of the valuation of the timber, transferred to the trustee as much three per cent. stock as 2,448*l.* would have produced at the time of the sale. After the death of A., the next remainderman, though he had concurred in proceedings, in which the fund produced by the sale was treated as applicable to the purposes of the testator's will, brought a writ of formedon, and obtained judgment on the ground that the power of sale was not well executed :—Held, that a court of equity could not relieve against that judgment. *Cockerell* v. *Cholmeley*, 1 Russ. & M. 419.

7. Interest on Judgments.

For what Time.]—On the 9th of September, 1869, judgment was signed for 28.850*l.* (awarded by an arbitrator in a cause) and costs ; on the 26th of October an order was made to stay proceedings until Michaelmas term, to give the defendants an opportunity to set aside the award, they bringing the money into court to abide the event ; and on the 8th of November a motion was made, but no rule granted, of which the plaintiff had notice. Delay occurred in the taxation of the plaintiff's costs, a review having been ordered at his instance, and the amount was not ultimately settled until the 29th of January, 1870 ; and on the 2nd of February the money was paid out of court to the plaintiff under a judge's order upon the defendants' summons, and the costs, with interest upon the judgment down to the 8th of November, 1869, were tendered to his attorneys. They, however, claimed interest down to the 2nd of February, 1870 :—Held, that the plaintiff was only entitled to interest down to the 8th of November, 1869, inasmuch as he might at any time after that day have taken the money out of court ; and the court ordered satisfaction to be entered on the roll. *Sinclair* v. *G. E. Ry.*, 39 L. J., C. P. 224 ; L. R. 5 C. P. 391 ; 22 L. T. 410.; 18 W. R. 758.

On a judgment in case recovered in 1862 :—Held, in a proceeding against the personal assets of the judgment debtor, that more than six years' arrears of interest were recoverable. *Breslin* v. *Hodgens*, Ir. R. 10 Eq. 260.

The time of entering up the judgment, from which period interest is given on the judgment debt by the 1 & 2 Vict. c. 110, s. 17, is the day on which judgment is signed in the master's book, and not the day on which the roll is carried in and the judgment entered of record. *Fisher* v. *Dudding*, 3 Man. & G. 238 ; 3 Scott (N.R.) 516 ; 9 D. P. C. 872 ; 10 L. J., C. P. 323. S. P., *Newton* v. *Grand Junction Ry.*, 16 M. & W. 139 ; 16 L. J., Ex. 276.

In what Cases.]—The 1 & 2 Vict. c. 110, s. 17, applies as well to judgments for costs as for the subject-matter of the action. *Pitcher* v. *Roberts*, 2 D. (N.S.) 394 ; 12 L. J., Q. B. 178 ; 7 Jur. 466.

Interest may be recovered on a judgment for costs of a nonsuit. *Newton* v. *Conyngham* (*Lord*), 17 L. J., C. P. 288—Ex. Ch. Affirming 5 C. B. 749 ; 17 L. J., C. P. 200 ; 12 Jur. 556.

A ca. sa. need not contain the clause relating to interest given in the form prescribed by the rule of court, unless the plaintiff chooses to claim interest. *Stopford* v. *Fitzgerald*, 4 D. & L. 725 ; 16 L. J., Q. B. 310.

Under the statute interest is recoverable on costs which one party is ordered to pay to another, but not on costs directed to be raised out of an estate. *Att.-Gen.* v. *Nethercote*, 11 Sim. 529 ; 10 L. J., Ch. 162.

A judgment given for securing an annuity carries interest. *Knight* v. *Bowyer*, 4 De G. & J. 619.

In an action on a judgment affirmed in error, the jury, by way of damages, may give interest upon the sum recovered by the judgment from the time of signing it, where, by the practice of the court in which error is brought, such interest is not allowed in costs upon the affirmance. *Entwistle* v. *Shepherd*, 2 Term Rep. 78.

By a decree the lands of the defendant were declared chargeable with 40*l.* a year, and the

master was directed to take an account of the arrears, and the defendant was ordered to pay what should be found due:—Held, that the defendant was not, under the 1 & 2 Vict. c. 110, ss. 17, 18, liable to pay interest on the amount found due from the date of the decree to the date of the master's report. *Att.-Gen.* v. *Carrington* (*Lord*), 6 Beav. 454; 12 L. J., Ch. 453.

Where the court orders payment out of a particular fund, it is tantamount to a decision, not only that such fund is liable to make such payment, but also the interest directed to be computed thereon. *Davis* v. *Browne*, 14 Beav. 127.

P. carried in a claim as an incumbrancer upon real estate in respect of an annuity, and in November, 1855, the chief clerk certified 1,002*l.* to be due to him for arrears. The cause did not come on for further consideration till July, 1858. P. then claimed interest on the 1,002*l.*, from the date of the certificate as against subsequent incumbrancers:—Held, that as the payment of the arrears had been delayed merely through hindrances in the prosecution of the suit, and not in consequence of misconduct or improper attempts to evade payment, interest ought not to be allowed, and that the 3 & 4 Will. 4, c. 42, s. 28, did not alter the case. *Mansfield* (*Earl*) v. *Ogle*, 4 De G. & J. 38; 28 L. J., Ch. 422; 5 Jur. (N.S.) 419; 7 W. R. 423.

The effect of s. 17 of 1 & 2 Vict. c. 110, is that interest at the rate of four per cent. is a debt necessarily attached to every judgment debt, and recoverable at law as a debt; and the judgment creditor is not confined to the remedy by execution mentioned in the section. Therefore, where, in the case of a deceased insolvent debtor who became insolvent before 1869, a sum of money subsequently came to the hands of the assignee, out of which the principal of all the debts entered in the debtor's schedule was paid, it was held that the judgment debts were not satisfied within the meaning of s. 92 (since repealed) of that act until interest was paid, and the assignee was ordered to pay interest before handing over any surplus to the representatives of the insolvent. *Lewis, Ex parte, Clagett, In re*, 36 W. R. 653—C. A.

—— **Under Irish Judgments Act.**]—Orders in lunacy giving the receiver liberty to pay money, are not within the meaning of the 27th section of 3 & 4 Vict. c. 105, so as to bear interest. *Hoops* v. *Kingston* (*Lord*), 11 Ir. Eq. R. 469.

The proceeding by sci. fa. on a receiver's recognisance is an award of execution, and not a judgment recovered, and does not bear interest under 3 & 4 Vict. c. 135, s. 26. *Feely* v. *Kilkenny*, 10 Ir. Eq. R. 443.

Interest is not payable under the 3 & 4 Vict. c. 105, ss. 26, 27, upon a sum of money decreed to be paid out of the produce of the sale of real estate, and not personally by the defendant. *Lynch* v. *Skerrett*, 5 Ir. Eq. R. 494.

—— **County Court.**]—A county court judgment debt does not carry interest under 1 & 2 Vict. c. 110, s. 17. *Reg.* v. *Essex County Court Judge*, 56 L. J., Q. B. 315; 18 Q. B. D. 704; 57 L. T. 643; 35 W. R. 511; 51 J. P. 549—C. A.

Judgment by Consent—Sum recovered to be paid in equal Instalments—Execution stayed unless Default in Instalments.]—Under a consent order for judgment for a fixed sum with taxed costs by way of settlement of an action for breach of promise of marriage and an action for moneys lent, the total amount was agreed to be paid by "eight equal payments half-yearly," and execution was not to issue except in default of such payments. A claim was made, after payment of the instalments, for interest upon the full amount, under the provisions of 1 & 2 Vict. c. 110, ss. 17 and 18, for interest upon a judgment debt:—Held, that the order could not be construed so as to include interest, since the instalments were to be of equal amounts, and when these had been duly paid no execution could issue for any further amount as interest. *Caudery* v. *Finnerty*, 61 L. J., Q. B. 496; 66 L. T. 684.

Refunding.]—In January, 1836, a defendant was charged in execution for 61*l.* 14*s.* On the 1st of October, 1838, the 1 & 2 Vict. c. 110, came into operation. The plaintiff having afterwards died, and his widow having taken out administration, A., who had acted as an attorney for the plaintiff, commenced proceedings in the Insolvent Debtors Court to obtain a vesting order upon the defendant's estate. The defendant sent B. (an attorney) to A. to endeavour to effect a compromise. A. claimed 85*l.* 5*s.* 2*d.*, including a claim for interest at 4*l.* per cent. upon the judgment from the time it was entered up. It was ultimately agreed between A. and B. that the defendant should be discharged, upon payment of 80*l.*, which agreement was carried into effect. The court refused to compel A. to refund 18*l.* 6*s.*, the excess beyond the sum for which the defendant was taken in execution, it having been paid under a compromise. *Haigh* v. *Jones*, 5 Man. & G. 634; 6 Scott (N.R.) 696; 1 D. & L. 81.

On Reversal of Judgment.]—By an order in council regulating appeals from Hong Kong, the Supreme Court shall in all cases of appeal conform to, execute, and carry into immediate effect, such judgment and orders as her Majesty, in her privy council, shall make thereupon, in such manner as any original judgment or decree of the Supreme Court can or may be executed. In 1867, the respondents recovered from the appellants, in an action of trover in the Supreme Court at Hong Kong, a large sum of money, as principal, interest, and costs, and execution was had and the money was paid. Upon appeal in February, 1869, this judgment was reversed. In June, 1869, the Supreme Court directed the respondents to repay to the appellants the money, but declined to direct interest to be paid during the time the money remained in the respondents' possession:—Held, that it was in the power of the court at Hong Kong to make every order which was fairly and properly consequential upon the reversal of the original judgment, and that the appellants were entitled to the current rate of interest, whilst the money remained in possession of the respondents, on both the principal and interest, but not on the costs. *Rodger* v. *Comptoir d'Escompte de Paris*, 7 Moore. P. C. (N.S.) 314; 40 L. J., P. C. 1; L. R. 3 P. C. 465; 24 L. T. 111; 19 W. R. 449.

Interest at 4*l.* per cent. was allowed on money which had been paid on an order of the Court of Chancery which was reversed on appeal. *Merchant Banking Co. of London* v. *Maud*, 43 L. J., Ch. 861; L. R. 18 Eq. 659; 22 W. R. 874.

Reversal of Outlawry.]—A defendant is not liable to pay the interest that may have accrued between judgment and reversal of outlawry. *Ibbotson* v. *Fenton*, 1 N. & P. 779; W. W. & D. 292; 6 A. & E. 772; 6 L. J., K. B. 143; 1 Jur. 397.

Under Awards.]—On an award directing payment of money at a certain time, interest from that time till payment may be recovered by action, but not by motion for an attachment. *Chureher* v. *Stringer*, 2 B. & Ad. 777; 1 D. P. C. 332; 9 L. J. (o.s.) K. B. 318. S. P., *Johnson* v. *Durant*, 4 Car. & P. 327; 2 B. & Ad. 925; 1 L. J., K. B. 47.

An arbitrator made his award on the 1st of September, 1841, directing payment on the 25th January, 1842, of a sum of money with interest:—Held, that the plaintiff could recover under the award no interest accruing subsequently to the 25th January, though such interest might be given by a jury. *Doe* d. *Moody* v. *Squire*, 2 D. (N.S.) 327; 7 Jur. 236.

A plaintiff having, after notice of action for extortion by a railway company in carrying his goods, served the company with a demand of interest, under 3 & 4 Will. 4, c. 42, s. 28:—Held, that the arbitrator, under a submission of "all matters in difference," might award him interest, notwithstanding the notice of action did not contain a demand of interest. *Edwards* v. *G. W. Ry.*, 11 C. B. 588; 21 L. J., C. P. 72.

Where the time for making an award was enlarged by the parties altering and re-executing the bonds of submission, the arbitrator was justified in awarding interest on the principal found due beyond the date of the original submission, but within the time of re-executing the bonds. *Watkins* v. *Phillpotts*, M'Cle. & Y. 393; 29 R. R. 809.

A. being indebted to B. upon bonds, disputes arose between them as to what was due, and by an order in a suit, referring it to arbitration, and an award made under that order, the debt of A. was fixed at 8,000*l.*, which was ordered to be paid in two sums on days certain; and if payment was not made, the securities were to be sold, and payment made out of the proceeds. The 8,000*l.* and the surplus were to be paid to A.; no mention was made of interest. The securities were not, by reason of various transactions, realised for a very long time:—Held, that the produce of the securities was not, as against subsequent incumbrances of A., chargeable with more than the principal sum of 8,000*l.* *Collett* v. *Newnham*, 1 Drew. 447; 1 W. R. 241.

Computation of Rate.]—*See* post, col. 538.

Scotch Judgment.]—Action on a judgment of the Admiralty Court of Scotland, which gave interest on a balance of accounts from 1811 to the time of payment. The contract was by letter, written in London. The services were performed in Scotland, that being the plaintiff's place of residence:—Held, that a contract made in England, to be executed in Scotland, ought to be regulated by the rules of the English law; and that this contract having been made in England, interest could not be recovered, merely because it was given by the decree in Scotland. *Arnott* v. *Redfern*, 3 Bing. 353; 11 Moore, 209; 2 Car. & P. 88; 4 L. J. (o.s.) Car. P. 89.

Irish.]—In an action on an Irish judgment, the question, whether any, and what interest is recoverable, is a question for the jury, under all the circumstances of the case; and in deciding this question, they will have to consider whether the plaintiff has taken proper steps to find his debtor, and follow up his judgment by an execution, or whether he has been guilty of laches. *Bann* v. *Dalzell*, 3 Car. & P. 376; M. & M. 228.

Foreign.]—A plaintiff is not entitled to interest on a foreign judgment. *Atkinson* v. *Braybrooke* (*Lord*), 4 Camp. 380; 1 Stark. 219.

Unless interest is payable by virtue of the judgment in the foreign country or colony. *Bank of Australasia* v. *Nias*, 16 Q. B. 717; 20 L. J., Q. B. 284.

In an action on a foreign judgment, for an entire sum recovered on counts for the balance of a merchant's account for goods sold, moneys advanced and paid, moneys due on bills of exchange, and for interest, the court would not formerly give interest on affirmance of the judgment of the court below. *Doran* v. *O'Reilly*, 3 Price, 250; 7 Taunt. 244; 5 Dow, 133.

Merger of Debt in Judgment.]—By a mortgage deed the mortgagor covenanted to pay the debt on a day named, and (by a separate covenant) to pay interest at 7*l.* per cent., so long as the 3,000*l.* or any part thereof should remain due. The mortgagee obtained a judgment for the principal and interest due at the date of the judgment with interest at 4*l.* per cent. on the sum made up by such principal and interest:—Held, that the security of the mortgage was not merged in the judgment, but that the mortgagee was entitled to sue for the difference between interest at 7*l.* per cent. on the mortgage debt and the interest at 4*l.* per cent. paid under the judgment. *Popple* v. *Sylvester*, 52 L. J., Ch. 54; 22 Ch. D. 98; 47 L. T. 329; 31 W. R. 116.

A railway company, in 1864, issued debentures by which they bound themselves to pay a principal sum one year from the date of issue, with interest at 6 per cent., and charged the railway and undertaking with the payment of the principal sum and interest. Soon after the expiration of the year, a debenture-holder brought an action against the company, and recovered judgment for the principal debt, interest, and costs. The company was ordered to be wound up in 1868, and the debenture-holder was admitted to prove for the judgment debt and interest at 4 per cent. The debenture-holder claimed to prove for an additional 2 per cent. on the original amount of the debenture from the date of the judgment:—Held, that the original debt was merged in the judgment, and that the claimant was only entitled to interest on the judgment at 4 per cent. *European Central Railway, In re, Oriental Financial Corporation, Ex parte*, 46 L. J., Ch. 57; 4 Ch. D. 33; 35 L. T. 583; 25 W. R. 92—C. A.

A defendant jointly and severally with A., undertook, if a bill of exchange drawn by the defendant in favour of the plaintiff was not paid at maturity, to pay as interest thereon 20*l.* for each month afterwards. The bill not being paid at maturity, the plaintiff sued the defendant for the bill and interest, as per agreement, but declared in such action on the bill only, and recovered judgment by default for the amount of such bill only. He afterwards brought an action against the defendant on the agreement for interest:—Held, that he was entitled to maintain such action for the interest which

accrued prior to the judgment in the former action, but not for the interest subsequently to such judgment, as the right to interest under the agreement ceased when judgment was obtained. *Florence* v. *Jenings*, 2 C. B. (N.S.) 454; 26 L. J., C. P. 274; 3 Jur. (N.S.) 772.

A mortgage deed contained a covenant by the mortgagor for payment of the principal sum on the expiration of six months next after a specified day, together with interest thereon at 5 per cent. per annum for the six months. And there was a further covenant by the mortgagor that if the principal sum, or any part thereof, should remain unpaid after the expiration of the six months, the mortgagor would, so long as the same sum or any part thereof should remain unpaid, pay to the mortgagee interest for the principal sum, or for so much thereof as should for the time being remain unpaid, at 5 per cent. per annum. After the expiration of the six months the mortgagee recovered judgment against the mortgagor on the covenant for the principal sum and interest in arrear:—Held, that the covenant being merged in the judgment, the mortgagee was, as from the date of the judgment, entitled to interest on the judgment debt at the rate of 4 per cent. only, and was not entitled to interest under the covenant at the rate of 5 per cent. on the principal sum. *Fewings, Ex parte, Sneyd, In re*, 53 L. J., Ch. 545; 25 Ch. D. 338; 50 L. T. 109; 32 W. R. 352—C. A.

——**Mistake as to Amount.**]—The defendant borrowed money of the plaintiff, and he gave his promissory note for the amount, with interest at 60*l.* per cent., together with an equitable charge on copyholds as a collateral security for the note. The plaintiff sued on the note, and by mistake he claimed and recovered interest at 5*l.* instead of 60*l.* per cent., which was paid:—Held, that the plaintiff could not afterwards sue upon the mortgage to recover the deficiency, and a bill in equity for that purpose was dismissed, with costs. *Darlow* v. *Cooper*, 34 Beav. 281.

8. MERGER IN JUDGMENT—*See* MERGER.

9. OTHER MATTERS.

A private act of parliament provided that, with certain exceptions, no incumbrance should be paid, unless the claim in respect thereof was proved to the satisfaction of the court. A claim being made, upon a judgment entered up for 3,850*l.*, for services performed by a non-professional person in obtaining the act and other matters, the court refused to allow the claim, the claimant failing to prove the services in respect of which the claim was made. *Isaac, Ex parte, Carew's Estate, In re*, 30 Beav. 274; 31 L. J., Ch. 214; 8 Jur. (N.S.) 297; 10 W. R. 98.

A person who, without consideration, confesses a judgment for the purpose of thereby withdrawing his property from the demands of his creditor, ex. gr. the creditors of a joint-stock company in which he was a shareholder, has no equity for an injunction to restrain the conusee proceeding to levy the amount of the judgment, although it never was used for the purpose for which it was confessed. *M'Curdy* v. *Martin*, 5 Ir. Eq. R. 515.

Where a judgment is not tainted with fraud, the assignee cannot rely on a mere defence at law, which the bankrupt had neglected to make. The consideration of the judgment is always subject to investigation. *Jennings, In re*, 1 Ir. Ch. R. 236.

The statute 11 & 12 Vict. c. 48, s. 72, enacting that the release of any portion of lands in Ireland from any judgment affecting the same shall not nullify or affect the force of such judgment as regards the residue of such lands, or any other property not specially released, does not apply to releases executed before the passing of that statute. *Handcock* v. *Handcock*, 1 Ir. Ch. R. 444.

A. E. R.

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A. APPOINTMENT AND REMOVAL.

Right of Appointment cannot be Delegated.]—Semble, that since the 27 Hen. 8, c. 24, s. 2, the king cannot delegate the power of creating justices of the peace. *Jones* v. *Williams*, 5 D. & R. 654; 3 B. & C. 762; 1 Car. & P. 459, 669; 3 L. J. (O.S.) K. B. 112.

By a charter of Edward 4, the crown granted to the abbot and convent of S. the right of appointing their own justices, with power of oyer and terminer for all felonies, trespasses, and misdemeanours occurring within the liberty of S., in the county of H., with a non-intromittent clause, and that they might have a gaol under their own government, without interference by other justices or others, for felons and malefactors within the liberty, until such were delivered by due course of law. Admitted, that the power to appoint justices was put an end to by 27 Hen. 8, c. 24, and that the justices created by the liberty under that statute by the crown had no exclusive jurisdiction over felonies, trespasses, and misdemeanours. *Arnold* v. *Dimsdale*, 2 El. & Bl. 580; 22 L. J., M. C. 161; 17 Jur. 1157; 1 W. R. 430.

The 31 Hen. 8, c. 13, gave the crown the franchises appertaining to the then dissolved abbeys, or those that should thereafter be dissolved, as large as the abbots ought to have held the same at the time of their coming to the king's hands. Afterwards the abbey of S. was dissolved. Afterwards, by 32 Hen. 8, c. 20, it was enacted that the same liberties, franchises, and jurisdictions which the late owners had exercised within three months before the abbeys came to the king's hands, should be revived in the king's hands. Admitted that these statutes did not revive in the justices appointed by the crown for the liberty the exclusive jurisdiction given by the charter of Edward 4. *Ib.*

Ancient Custom—Charter.]—By an ancient custom, all the burgesses of Colchester, except innkeepers and others, could vote in the election of headmen, who chose the justices. A charter was granted to the borough 58 Geo. 3, restoring all rights, but directing that all the burgesses, except the servants of innkeepers and others, should vote for the headmen. The defendant was named a justice by headmen elected by persons coming within the first exception, and not within the second; and the court held that the two classes of disqualifications were not inconsistent with each other, and therefore that the defendant improperly exercised the office of justice of the peace. *Rex* v. *Abell*, 3 D. & R. 390; 1 L. J. (O.S.) K. B. 250.

Chancery Jurisdiction over.]—Chancery has only jurisdiction over justices of peace in their appointment, and cannot punish them for misbehaviour which is the province of the King's Bench only. *Rook, Ex parte*, 2 Atk. 2.

Petition for Removal of.]—An elector and an inhabitant of a borough bonâ fide signed and sent to the Secretary of State for the Home Department a memorial complaining of the conduct of a magistrate of the county, during an election for the borough, imputing to him gross acts of violence, and praying that the Secretary of State would cause an inquiry into his conduct to be made, and that if the allegation in the memorial were substantial, he would recommend to the Queen that the magistrate should be removed from the commission of the peace:—Held, that this was a privileged communication. the elector having both an interest and a duty in the subject-matter of the memorial; and that the memorial being substantially a petition to the Queen for the removal of the magistrate from the commission of the peace, the Secretary of State had a corresponding duty to cause the inquiry prayed for to be made, although the Lord Chancellor is the functionary by whose advice and agency the crown usually acts in removing magistrates. *Harrison* v. *Bush*, 5 El. & Bl. 344; 25 L. J., Q. B. 25; 1 Jur. (N.S.) 846; 3 W. R. 474.

B. QUALIFICATION.

Under 18 Geo. 2, c. 20, s. 1.]—If a party acts as a justice of the peace for a county under a landed qualification of more than 100*l.* a year, it is not an objection to that qualification that the land was originally purchased (even with the knowledge of the party qualifying) with a trust

fund, under circumstances which would render the party liable, if proceeded against in equity, to be declared a trustee for the original cestui que trust. *Jones* v. *Edwards*, 2 Jur. 519.

Where the qualification of a justice is an ecclesiastical benefice, a sequestration issued at the suit of a creditor, under which possession has been duly taken and the profits received, is an "incumbrance affecting the estate," within the above statute. *Pack* v. *Tarpley*, 9 A. & E. 468; 1 P. & D. 478; 2 W. W. & H. 88; 8 L. J., M. C. 93.

Upon issuing such sequestration against a vicar, the bishop licensed him as a stipendiary curate; directed the sequestrator to pay him 120*l.* a year, as such; and assigned to him the vicarage house and grounds as a residence, which were together worth above 100*l.* a year:—Held, first, that the salary and the grounds, being enjoyed by assignment of the bishop, and not simply as vicar, were no qualification within the above statute. *Ib.*

Held, secondly, that the vicar being bound to reside, notwithstanding the sequestration, occupied the house by right, as vicar, and not by the bishop's assignment, which, quoad hoc, was merely void; but that such house, unless proved to be alone worth 100*l.* a year, was no qualification. *Ib.*

Under a devise of real estate in trust for the daughter of the testator for life, for her separate use, and if her husband, W., should survive her, upon trust for him for his life, with remainder over, he has not such an estate in remainder as is a qualification within the 18 Geo. 2, c. 20, s. 1. *Woodward* v. *Watts*, 2 El. & Bl. 452; 22 L. J., M. C. 149; 17 Jur. 790; 1 W. R. 386. *See now* 38 & 39 Vict. c. 54.

Neglecting to take Oaths.]—Acts done by a justice of the peace in a judicial character, who has not duly qualified, are not absolutely void; therefore, persons seizing goods under a warrant of distress for levying poor-rates, signed by a justice of one of the Cinque Ports, who had not taken the oaths at the general sessions, nor delivered in the certificate required by 51 Geo. 3, c. 36, s. 3, are not trespassers. *Margate Pier Company* v. *Hannan*, 3 B. & Ald. 266; 22 R. R. 378.

C. JURISDICTION AND DUTY.

1. WHERE DISQUALIFIED FROM ACTING.

Pecuniary Interest—Probability of Bias.]—Any direct pecuniary interest, however small, in the subject-matter of inquiry, disqualifies a justice from acting judicially in the matter, but the mere possibility of bias in favour of one of the parties does not ipso facto avoid the justice's decision. But if a magistrate has such a substantial interest, other than pecuniary, in the result of the hearing, as to make it likely that he will have a bias, he is disqualified. *Reg.* v. *Rand*, 35 L. J., M. C. 157; L. R. 1 Q. B. 230. S. P., *Reg.* v. *Farrant*, 57 L. J., M. C. 17; 20 Q. B. D. 58; 57 L. T. 880; 36 W. R. 184; 52 J. P. 116.

Member of Town Council enforcing Borough Rate.]—Where by statute a member of the town council of a borough may act as a justice of the peace in matters arising under the act, in order to disqualify him from so acting it is not sufficient to shew that, as a member of the town council, he has a pecuniary interest in the result of the information or complaint, or that the corporation of which he is a member are the prosecutors; but it must be established that he has such a substantial interest in the result of the hearing as to make it likely that he has a real bias in the matter. *Reg.* v. *Gibbon* (6 Q. B. D. 168) disapproved. *Reg.* v. *Handsley*, 51 L. J., M. C. 137; 8 Q. B. D. 383; 30 W. R. 368; 46 J. P. 119.

An officer of a corporation appointed to collect the borough rate obtained a summons against a ratepayer in arrear. In so doing he acted in the discharge of his duty, but on his own responsibility and without consulting the town council. At the hearing the justices dismissed the summons, on the ground that one of the sitting magistrates, being a town councillor, was thereby disqualified from adjudicating upon the summons. On motion for a mandamus to the justices to hear and adjudicate on the summons:—Held, that there was no ground for supposing either substantial interest or likelihood of bias, and consequently no disqualification. *Ib.*

Pecuniary Interest as Ratepayer.]—A justice of the peace attended a vestry meeting, called by the district surveyor, at which he proposed a resolution that S. should be called upon to remove an alleged nuisance left by the side of a highway. Proceedings were thereafter taken by the district surveyor, and the justice heard and adjudicated upon a summons against S. for non-removal of the said nuisance. The order made by the justice directed that the matter deposited, being soil and compost, should be sold and the proceeds applied to the repair of the highways:—Held, that the order must be quashed, for that the justice was disqualified from sitting to hear the summons, not only on account of the part he had taken at the vestry meeting, but also because he was pecuniarily interested as a ratepayer in the result of the order. *Reg.* v. *Gaisford*, 61 L. J., M. C. 50; [1892] 1 Q. B. 381; 66 L. T. 24; 56 J. P. 247.

A justice is not disqualified from acting at special sessions in the determination of a rating appeal by reason of the fact that he is a ratepayer in the parish in which the rate appealed against was made. *Reg.* v. *Bolingbroke* (infra) followed. *Workington Overseers, Ex parte*, [1894] 1 Q. B. 416; 9 R. 135; 70 L. T. 143; 42 W. R. 177; 58 J. P. 381—C. A.

Sect. 1 of 16 Geo. 2, c. 18, has not been repealed by s. 6 of the Union Assessment Commitment Amendment Act, 1864. Justices in special sessions can, therefore, hear appeals against rates made by a parish though they are themselves ratepayers in the same parish. *Reg.* v. *Bolingbroke*, 62 L. J., M. C. 180; [1893] 2 Q. B. 347; 5 R. 536; 69 L. T. 717; 42 W. R. 128; 58 J. P. 118.

Member of Authority by whom Proceedings Instituted.]—By a local act for the improvement of a borough, the corporation was made the authority for the execution of the act, with power to direct prosecutions for this purpose. An information for an offence under the act having been preferred by an officer on behalf of the corporation, a summons was issued upon it by a justice, who was also an alderman and member of the corporation, but came on for hearing before justices, none of whom were

connected with the corporation:—Held, notwithstanding, that such justices could not proceed with the hearing of the summons, for it had been issued by one who was virtually prosecutor. *Reg.* v. *Gibbon*, 6 Q. B. D. 168; 29 W. R. 442.

—— **Nuisance.**]—Complaint having been made to the local government board of a nuisance upon premises belonging to B., in the borough of W., the board communicated with the town council of W., who were the urban sanitary authority under the Public Health Act, 1875, and required them to abate the nuisance. The council having made inquiries, passed a resolution that steps should be taken for the removal of the nuisance, and took out a summons against B. At the hearing an order for the abatement of the nuisance was made. Two justices who were present were members of the town council when the resolution was passed:—Held, that the councillors who were justices had such an interest as might give them a bias in the matter, that consequently they ought not to have sat as justices upon the hearing of the summons, and that a rule for a certiorari to quash the order must be made absolute. *Reg.* v. *Milledge*, 48 L. J., M. C. 139; 4 Q. B. D. 332; 40 L. T. 748; 27 W. R. 659.

—— **Exposure of Meat unfit for Food.**]—By s. 258 of the Public Health Act, 1875, "No justice of the peace shall be deemed incapable of acting in cases arising under this act by reason of his being a member of any local authority." In the borough of Wakefield the sanitary committee of the town council, who were the local authority under the Public Health Act, 1875, passed a resolution directing the town clerk to prosecute S. for exposing for sale meat unfit for human food, contrary to the provisions of the act, and at the hearing of an information laid in pursuance of this resolution S. was convicted before four justices of the borough, who imposed a penalty upon him. One of the justices was a member of the sanitary committee, and had been present at the meeting at which the resolution was passed:—Held, that s. 258 did not remove the disqualification which attached to the justice by reason of his having acted as a member of the sanitary committee in directing the prosecution, and that a rule for a certiorari to bring up and quash the conviction must be made absolute. *Reg.* v. *Lee*, 9 Q. B. D. 394; 30 W. R. 750; 47 J. P. 118.

Member of County Finance Committee — Cesspayer—Obstruction of Highway.]—A person was convicted on two separate occasions for obstructing a highway. One of the justices who adjudicated was a member of the finance committee of the county of Dublin, and also a cesspayer. The complainant was the district surveyor, an officer of the grand jury having a statutory duty of reporting generally on the state of all roads, and the name and description of all persons prosecuted by him for any injury to any road, or like offence, and the result of such prosecution, and generally on all matters and things which might be given to him in charge by the finance committee. There was evidence that the first prosecution was undertaken by him in obedience to a direction from the finance committee to take steps to have the obstruction removed, but that the subsequent prosecution was undertaken by him on his own responsibility, and that the justice of the peace in question, when adjudicating in the cases, was not aware that any directions had been given to the complainant:—Held, that the justice was not disqualified either by his being a member of the finance committee, as that committee could not be considered as being directly or indirectly the prosecutors, or his being a cesspayer, even assuming that the costs of such a prosecution were to be paid out of the county funds. *Reg.* v. *Dublin County JJ.*, [1894] 2 Ir. R. 527.

Cp. *Allinson* v. *General Medical Council*, 63 L. J., Q. B. 534; [1894] 1 Q. B. 750; 9 R. 217; 70 L. T. 471; 42 W. R. 289; 58 J. P. 542 —C. A.; post, MEDICINE.

Chairman of Local Board—Legal Proceedings pending—Pollution of River.]—Legal proceedings had been taken by one local board against another in consequence of the discharge of sewage into a river by H., who had contracted with one of the boards to take the sewage of its district for manuring his farm. H. having been summoned before justices for pollution of the river the proceedings between the boards were suspended, by the mutual consent of their chairmen, until the result of the summons against H. could be seen. H. was ordered to pay a sum of money by a bench upon which both such chairmen sat:—Held, that the order upon him was bad. *Reg.* v. *Meyer*, 1 Q. B. D. 173; 34 L. T. 247; 24 W. R. 392.

Member of Watch Committee.]—A borough magistrate of a town which has a municipal corporation, of the watch committee of which he is a member, is not thereby disqualified from adjudicating upon an information instituted with the sanction of such watch committee, even though the fine imposed in the case goes into the borough fund. *Reg.* v. *Pettitmangin*, 4 B. & S. 921; 33 L. J., M. C. 99, n.; 9 L. T. 683.

Member of Board of Conservators — Salmon Fishery.]—A member of a board of conservators, who was also a justice of the peace, was present at a meeting of the board when a resolution was passed directing a prosecution against the defendant S. for violating certain provisions of the Salmon Fishery Acts, and voted in favour of the resolution. He afterwards sat as one of three justices to hear the case, when S. was convicted:—Held, that he was disqualified from sitting to hear the charge by reason of his having voted in favour of the resolution directing the prosecution, and that the disqualification was not affected by the provisions of s. 61 of the Salmon Fishery Act, 1865. *Reg.* v. *Henley*, 61 L. J., M. C. 135; [1892] 1 Q. B. 504; 66 L. T. 675; 40 W. R. 383; 17 Cox, C. C. 518; 56 J. P. 391.

Member of Salmon Fishery Landowners Association.]—On the 23rd of February, 1861, H. was convicted on an information laid against him by a superintendent watcher appointed by a salmon fishery landowners' association, under 24 & 25 Vict. c. 109, s. 20. The convicting justices were members of the association, and one of them was a member of the committee, and had been present at the meeting of the association which authorised proceedings to be taken against H.:—Held, that the conviction was bad on the ground of interest in the justices. *Reg.* v. *Allan* or *Hodgson*, 4 B. & S. 915; 33 L. J., M. C. 98; 10 Jur. (N.S.) 796; 9 L. T. 761; 12 W. R. 422.

Interest in Fishery.]—Where a complainant had a right of fishery, under a lease from the mayor, aldermen and burgesses of a borough, under the corporate seal, in which was contained a proviso that the mayor, aldermen and councillors for the time being might fish at their free will and pleasure, but the lease had not been executed, nor any counterpart, by the lessee:—Held, that the justices, one of whom was mayor, and the other aldermen of the borough, were not disqualified from hearing and deciding the complaint by reason of any interest in the matter. *Fuller* v. *Brown*, 3 New Sess. Cas. 603.

Shareholder—Railway.]—Justices who were shareholders in a railway company, convicted a man of travelling on the railway with an improper ticket:—Held, that the fact of their being shareholders, however slight their interest might have been, disqualified them from so acting. *Reg.* v. *Hammond*, 9 L. T. 423.

—— **Shipping Company.**]—Semble, the fact that justices are shareholders in shipping companies, the ships of which were insured by associations that were members of a federation in which the prosecutor was agent, is not sufficient to disqualify the justices on the ground of interest or bias. *Reg.* v. *Mackenzie*, 61 L. J., M. C. 181: [1892] 2 Q. B. 519; 5 R. 10: 67 L. T. 201; 41 W. R. 144; 17 Cox, C. C. 542; 56 J. P. 712.

Licensing—Application for Renewal—Circular sent to Magistrates to attend.]—The justices of the Tower division of the county of London refused to renew a licence to a certain public-house. Against their decision K., an aggrieved party, appealed to quarter sessions. Prior to the hearing of the appeal the chairman of the Tower bench issued a circular to all the magistrates of the county of London, requesting them to attend on the day fixed for hearing the appeal, and informing them that on that day six appeals relating to one licensed house in the Tower division would be heard. The appeal was heard and dismissed. K. then obtained a rule, directed to the justices of the county of London, to shew cause why their decision dismissing the appeal should not be set aside on the ground of bias:—Held, that as the circular did not ask those justices who attended to vote in any particular way, and as no interested justices took part in the proceedings except as mere spectators, the proceedings were not vitiated, and, therefore, a mandamus ought not to issue commanding the justices to hear and determine the application. *Reg.* v. *London JJ., Kerfoot, Ex parte*, 45 W. R. 58; 60 J. P. 726.

—— **Member of Committee negotiating for Purchase.**]—The corporation of S. acquired for improvement purposes a licensed house, and appointed a committee for the purpose of negotiating the disposal of the premises. T., an alderman, was a member of this committee. The negotiations ended in the licensed premises being sold and the licence becoming merged in that of other premises should the licence of those other premises be granted. The sale was to be null and void if the licence was not granted. T. afterwards sat as a justice when an order of the licensing committee sanctioning the provisional removal of the licence was confirmed:—Held, that T. was not disqualified by interest or bias. *Reg.* v. *Stockport JJ.*, 60 J. P. 552.

—— **Owner of Licensed House.**]—W. having applied to the licensing justices for a licence for a new hotel, and the three justices who were sitting having refused it, afterwards applied to the court for a mandamus to have the case heard again on the ground that B., one of the justices, was interested as owner in one of the licensed houses near the proposed hotel. The affidavits shewed that B.'s wife had succeeded to the licensed house, and was tenant for life, but it was a small house without hotel accommodation, and not likely to be injured by the new licence being granted:—Held, (a) that a mandamus could not be granted because the decision not having been set aside or quashed on certiorari, the case could not be heard again; (b) If a certiorari were applied for, the affidavits ought to state that the party applying and his solicitor did not know at the time that one of the justices was interested. *Reg.* v. *Kent JJ.*, 44 J. P. 298.

After making Order under Dogs Act, 1871.]—Three justices who were members of the town council of a borough, and as such had taken an active part in the making of an order under the Dogs Act, 1871 (34 & 35 Vict. c. 56), sat to hear a complaint of non-observance of the order:—Held, that they had no such interest in the subject-matter as to oust their jurisdiction. *Reg.* v. *Huntingdon JJ.*, 4 Q. B. D. 522.

Commoner.]—A commoner of Epping Forest, who objected to the proceedings of the corporation of London as owners of the forest, removed and destroyed their notice-boards and gave them warning that he should remove their fences and other obstructions. The corporation promptly commenced an action against him and obtained an injunction to restrain him from carrying out his threats. They also summoned him under 24 & 25 Vict. c. 97, s. 52, for destroying their boards. At the hearing of the summons before two justices, the applicant objected to one of them on the ground that he was disqualified by interest in adjudicating on the summons. This justice had made an affidavit on behalf of the corporation in the action, in which he stated that he was a commoner, and that the corporation had by their proceedings rendered the forest better fitted for the use of the commoners and the public. The applicant also objected that no leave of the Epping Forest Commissioners had been obtained under 35 & 36 Vict. c. 95, s. 3, for this prosecution. The justices overruled these objections and convicted the applicant:—Held, that the justice was not disqualified from adjudicating on this summons; that no leave of the commissioners was required for a criminal prosecution; and that the conviction was right. *Reg.* v. *Alcock, Chilton, Ex parte*, 37 L. T. 829.

Churchwarden — Order of Removal.] — A churchwarden cannot act as a magistrate in making an order for the removal of a person from his own parish. His disqualification arises not from interest, but because he acts both as complainant and judge. *Rex* v. *Great Yarmouth (Inhabitants)*, 5 L. J. (O.S.) M. C. 73.

Sheriff.] — A justice of the peace who is appointed sheriff cannot, during his year of office, act as a justice of the peace for the county of which he is sheriff. This disqualification extends

to financial matters or county business, as well as to criminal questions. *Colville, Ex parte*, 45 L. J., M. C. 108; 1 Q. B. D. 133; 24 W. R. 456.

Coroner.]—A justice of the peace does not become disqualified from acting as such by reason of his being elected coroner for the county or division for which he so acts as justice. *Davis* v. *Pembrokeshire JJ.*, 7 Q. B. D. 513.

Clerk of Peace.]—A person holding the commission of the peace was appointed clerk of the peace, and acted in both capacities for the same county:—Held, that the appointment to the clerkship of the peace did not vacate the commission of the peace. *Forbes* v. *Lloyd*, Ir. R. 10 C. L. 552.

Member of Privileged Class—Person charged with Contravention of Privileges.]—A justice, who is a member of a small class of privileged persons, is disqualified from adjudicating in proceedings taken against a person for an infringement of the privileges of such class. Therefore, a justice who is a licensed pilot cannot adjudicate on a complaint against an unlicensed pilot for a contravention of s. 361 of the Merchant Shipping Act, 1854. *Reg.* v. *Huggins, Clancy, Ex parte*, 64 L. J., M. C. 149; [1895] 1 Q. B. 563; 15 R. 203; 72 L. T. 193; 43 W. R. 329; 59 J. P. 104.

Subscriber to the Prosecuting Society.]—The applicant had been convicted and fined for cruelty to a horse, upon the prosecution of an officer of the Royal Society for the Prevention of Cruelty to Animals. Some of the justices who heard the summons and took part in the conviction were subscribers to a branch of the said society, which received subscriptions in the country and forwarded them to the society's office in London. All prosecutions by the society were directed by the secretary or committee in London, and no subscribers had any authority over or responsibility for such prosecutions, and the society never accepted any part of the penalties inflicted under the Cruelty to Animals Prevention Act, 1849. ss. 2, 18, 21:—Held, upon a rule for a certiorari, that there was nothing in these facts to create a real bias in the minds of the justices which could amount to a disqualifying interest. *Reg.* v. *Deal Corporation*, 45 L. T. 439; 30 W. R. 154; 46 J. P. 71. Cp. *Reg.* v. *St. Albans (Bishop)*, 9 Q. B. D. 454; 46 L. T. 692.

Member of Incorporated Law Society—Proceedings against Unqualified Person acting as Solicitor.]—In proceedings taken at the instance of the Council of the Incorporated Law Society against an unqualified person for acting as a solicitor a justice is not disqualified from adjudicating by reason of the fact that he is a member of the Incorporated Law Society. *Reg.* v. *Burton, Young, Ex parte*, 66 L. J., Q. B. 831; [1897] 2 Q. B. 468; 77 L. T. 364; 46 W. R. 127; 61 J. P. 727.

Litigant in similar Cases.]—At a special sessions for appeals against a poor-rate, the chairman of the magistrates, who was himself appellant in one of the cases for hearing, took part in the decision of all the cases except his own. When his own case was called on, he left the bench and went to the body of the court and conducted the case himself. On a rule for a certiorari to bring up all the orders for the purpose of quashing them:—Held, that the chairman, being a litigant in a matter similar to the other matters before the court, was disqualified from acting as a justice, and that the orders were bad. *Reg.* v. *Great Yarmouth JJ.*, 51 L. J., M. C. 39; 8 Q. B. D. 525; 30 W. R. 460.

Presence of Disqualified Justice—Taking Part in Discussion.]—At the hearing and determination of an appeal against a refusal to grant an excisable licence, one of the justices who refused the licence was present on the bench, and during the hearing conversed with some of the magistrates. His affidavit stated that he did not recollect being present at the hearing or determination of the appeal, nor conversing with any of the magistrates hearing the appeal; and that he did not converse with them on any matter relating to the appeal, nor act in the hearing or determination of the appeal:—Held, nevertheless, that being present, he formed part of the court, and therefore the order of sessions was invalid. *Reg.* v. *Surrey JJ.*, 1 Jur. (N.S.) 1138; 4 W. R. 86.

If any one of the magistrates hearing a case at sessions is interested in the result, the court is improperly constituted, and an order made in the case will be quashed on certiorari. *Reg.* v. *Hertfordshire JJ.*, 6 Q. B. 753; 1 New Sess. Cas. 490; 14 L. J., M. C. 73; 9 Jur. 424.

It is no answer to the objection, that there was a majority in favour of the decision, without reckoning the vote of the interested party, nor that the interested party withdrew before the decision, if he appears to have joined in discussing the matter with the other magistrates. *Ib.*

At the hearing of a summons for an offence under the Fishery Acts, one of the magistrates was interested in the decision and sat on the bench. He stated openly in court that he should take no part in the hearing of the case, but he made an observation in the course of the case that he could prove a material fact in controversy. He also remained and was present at the consultation of the magistrates. He stated that he took no other part in the matter, and did not vote on the decision:—Held, that he took such a part in the hearing as invalidated the conviction. *Reg.* v. *O'Grady*, 7 Cox, C. C. 247.

Where, at the quarter sessions, some of the justices voted in support of an order in which they were interested:—Held, that the court was improperly constituted, and a case of malversation made out; and the order, having been removed notwithstanding a statute taking away certiorari, was quashed. *Reg.* v. *Cheltenham Paving Commissioners*, 1 G. & D. 167; 1 Q. B. 467; 10 L. J., M. C. 99.

At the hearing of an appeal against an order of removal, one of the justices present was a ratepayer in the appellant parish. During the hearing his presence was objected to by the appellants, whereupon the chairman stated that he would take no part in the hearing or decision of the appeal. Subsequently he pointed out documents and made observations to the chairman, but the affidavits of the justices stated that he took no part in the decision of the appeal:—Held, that his presence vitiated the order of sessions. *Reg.* v. *Suffolk JJ.*, 18 Q. B. 416; 21 L. J., M. C. 169; 16 Jur. 612. See *Reg.* v. *Surrey JJ.*, 1 B. C. C. 70; 21 L. J., M. C. 195; 16 Jur. 641.

On the hearing of an appeal from a conviction and sentence of imprisonment at petty sessions, one of the magistrates who had adjudicated in the court below took his seat on the bench and remained there until the appeal was decided, and was consulted as to the number of magistrates who took part in the decision appealed from, and their unanimity, but he did not otherwise take part in the hearing of the appeal :— Held, sufficient to invalidate the proceedings, and to entitle the prisoner to be discharged on habeas corpus. *Clarke, Ex parte*, 26 L. R., Ir. 1.

The mere presence on the bench of an interested magistrate during part of the hearing of an appeal is not sufficient ground for setting aside an order of sessions made on such hearing, if it is expressly shewn that he took no part in the hearing, came into court for a different purpose, and did not in any way influence the decision. *Reg.* v. *London JJ.*, 18 Q. B. 421, n.

If a disqualified justice sits upon the bench, the order or conviction by his fellow-justices will be quashed, although the disqualified justice may not have signed such order or conviction. *Reg.* v. *Meyer*, 1 Q. B. D. 173 ; 34 L. T. 247 ; 24 W. R. 392.

A justice, having an interest in the matter under adjudication, sat close to the bench. During the hearing a communication in writing passed between him and one of the adjudicating justices ; he was also alleged to have interrupted a witness, and that before the hearing he had discussed the subject-matter of the dispute with one of the justices. It having been shewn that the contents of the note passing between the particular justice and the bench had not and could not have had any influence on the decision (which was a conviction of the defendant), and the other allegations having been disproved, the court refused to interfere with the conviction, but having regard to the need for explanation of the primâ facie aspect of the case, the rule for a certiorari was discharged without costs. *Reg.* v. *Budden*, 60 J. P. 166.

Justice taking active Part in Defending Appeal.]—Where a justice of the peace is shewn to have taken an active part in defending an appeal against a decision of which he approves, but to which he was no party, he is disqualified on the ground of probability of bias from taking part in deciding the appeal. *Reg.* v. *Cumberland JJ.*, 58 L. T. 491 ; 52 J. P. 502.

Justice giving Advice — Attempt to bring about Settlement.]—A magistrate, who was a surgeon, attended a patient professionally for injury caused by an assault. He endeavoured to induce his patient not to prosecute for the assault, and conveyed to him a message, sent by the person who had committed the assault, offering an apology and suggesting a settlement. A summons was issued for the assault, the magistrate was subpœnaed to give evidence for the prosecution, and a writ of prohibition was obtained to prohibit him from sitting at the hearing. The magistrate moved to set aside the prohibition :—Held, that the acts of the magistrate did not shew that he had such a substantial interest in the result as to make it likely that he would have a bias, and that the fact of his being subpœnaed did not disqualify him from sitting, and therefore the prohibition must be set aside. *Reg.* v. *Farrant*, 57 L. J., M. C. 17 ; 20 Q. B. D. 58 ; 57 L. T. 880 ; 36 W. R. 184 ; 52 J. P. 116. Cp. *Fobbing Commissioners* v. *Reg.*, 56 L. J., M. C. 1 ; 11 App. Cas. 449 ; 55 L. T. 493 ; 34 W. R. 721 ; 51 J. P. 227—H. L. (E.)

Justice Summoned as Witness.]—Upon the trial of a parish appeal C., one of the justices, not a ratepayer, was summoned as a witness, and sat upon the bench, and in the course of the proceedings suggested audibly certain facts to the chairman : — Held, that the order in sessions was good, as it did not appear that C. had acted judicially or done more than a witness might properly do. *Reg.* v. *Middlesex JJ.*, 2 W. R. 459.

The mere fact of a subpœna having been served on a magistrate to give evidence in a particular case, does not disqualify him from sitting as a magistrate in the hearing and adjudication of that case. *Reg.* v. *Tooke*, 32 W. R. 753 ; 48 J. P. 661. See also *Reg.* v. *Farrant*, supra.

Taking Indemnity.]—Semble, that, on deciding a case, magistrates ought not to take an indemnity, as it has the effect of enabling them to decide more safely in favour of a party who is able to give an indemnity, than of one who cannot do so. *Selwood* v. *Mount*, 9 Car. & P. 75.

Clerk to Justices acting as Solicitor.]—The clerk to the justices should not act as solicitor for one of the parties on a prosecution before his own bench of justices, but such an interest in the clerk does not affect the jurisdiction of the bench. *Reg.* v. *Brakenridge*, 48 J. P. 293.

Waiver of Objection.]—Where on the hearing of an appeal one of the justices taking part in the decision is an interested party, this court will grant a certiorari to bring up the order of the justices and quash it, the application for the certiorari being made by the attorney for the unsuccessful party, although he was at the trial and it is shewn by affidavits that he must have known of the interest of such justice, and did not object to his remaining on the bench. *Reg.* v. *Cambridgeshire JJ.*, 3 W. R. 418.

H. was convicted under 7 & 8 Geo. 4, c. 30 (the Malicious Trespass Act), by justices who were personally interested. H. was represented by an attorney, and neither H. nor his attorney made any objection to the justices at the time of the conviction. There being no affidavit that H. and his attorney were ignorant of the justices' interest at the time of the conviction, the court refused to quash the conviction. *Reg.* v. *Huntingtower* (*Lord*), or *Richmond JJ.*, 8 Cox, C. C. 314 ; 8 W. R. 562 ; 2 L. T. 373. See *Reg.* v. *Kent JJ.*, ante, col. 548.

Before the sessions were held the appellants gave notice to the clerk of the justices that objection would be made "if any justices who were rated in Yarmouth heard the appeals." At the hearing this objection, and no other, was made, and it was overruled by the justices :— Held, that the appellants were not precluded by the form of their notice from contending, in support of the rule for a certiorari, that the chairman, even if not disqualified by reason of his being rated, was disqualified by reason of his being himself a litigant ; although this latter objection was not specifically mentioned in the notice or made before the justices. *Reg.* v. *Great Yarmouth JJ.*, 51 L. J., M. C. 39 ; 8 Q. B. D. 525 ; 30 W. R. 460.

Where a justice has an interest on public grounds as to make a real bias reasonably probable, complainants by acquiescing in his sitting and adjudicating on the case, are precluded from relying on this objection. *Reg.* v. *Antrim JJ.*, [1895] 2 Ir. R. 603.

—— **Under Railways Clauses Act.**]—The Railways Clauses Act (8 & 9 Vict. c. 20), s. 3, defines "justice" as a justice of the peace for the county, &c., in which the matter requiring the cognisance of such justice shall arise, and who shall not be interested in the matter:—Held, in proceedings before such a justice, it is not necessary to negative the fact that he is interested, and the objection may be waived by the party against whom the interest is alleged to exist. *Wakefield Local Board* v. *West Riding and Grimsby Ry.*, 6 B. & S. 794; 35 L. J., M. C. 69; 12 Jur. (N.S.) 160; 13 L. T. 590; 14 W. R. 100; 10 Cox, C. C. 162.

Specific Statement of alleged Ground of Disqualification.]—Where it is intended to rely on the bias or interest of a particular justice as vitiating the proceedings at petty sessions, the established and proper practice of the court is that such bias or interest should be specifically stated as a ground on the face of the conditional order for a certiorari. *Reg.* v. *Antrim JJ.*, supra.

2. WHERE CLAIM OF RIGHT SET UP.

In Case of Assault and Battery.]—A person making a bonâ fide claim of right to be present as one of the public in a law court at the hearing of a suit, is not justified in committing an assault upon a police-constable and an official who endeavour to remove him. Such a claim of right does not oust the jurisdiction of the magistrate who has to try the charge of assault, and he may refuse to allow cross-examination and to admit evidence in respect of such a claim. *Reg.* v. *Eardley*, 49 J. P. 551.

—— **Execution of Process of Court.**]—A county court bailiff, while acting in the course of his duty, was assaulted by F., who was summoned for the assault under 9 & 10 Vict. c. 95, s. 114:—Held, that the justices could not decline jurisdiction on the ground that a question might arise as to execution under the process of a court of justice. *Reg.* v. *Briggs*, 47 J. P. 615.

Question as to Property.]—The question as to property which will oust the jurisdiction of justices to determine a charge of assault under 24 & 25 Vict. c. 100, s. 42, must be a question as to real property. Where two persons who were gamekeepers in the employ of a landlord of a farm to whom the right to game and rabbits was reserved, were charged before the justices by the tenant of such farm, under 24 & 25 Vict. c. 100, s. 42, with assaulting and beating him, and the acts complained of were done in a scuffle to take from the tenant whilst on his farm his bag, in which were rabbits claimed as the landlord's property:—Held, that the fact that the justices were of opinion that the gamekeepers acted under a bonâ fide belief that they had a right to do the acts complained of did not oust the jurisdiction of the justices, no question having arisen as to title to any interest in land within the meaning of s. 46 of 24 & 25 Vict. c. 100. *White* v. *Fox*, 49 L. J., M. C. 60; 44 J. P. 618.

The power given to justices by 24 & 25 Vict. c. 100, s. 42, of summarily hearing and determining charges of assault and battery, is, by s. 46, ousted in any case where a question as to the title to land arises, and they cannot in such a case convict a person for using more violence than was necessary. *Reg.* v. *Pearson*, 39 L. J., M. C. 76; L. R. 5 Q. B. 237; 22 L. T. 126; 11 Cox, C. C. 493.

The court will not grant a certiorari to bring up and quash a conviction by magistrates under 9 Geo. 4, c. 31, s. 27, on an affidavit by the defendant which states that the assault for which he was convicted arose out of a dispute as to the title to land, if it appears that on the hearing of the complaint there was any evidence before the magistrates on which they might decide that the assault was committed independently of or before any dispute arose as to title to land. *Reg.* v. *Edwards*, 4 W. R. 257.

Trespass.]—To oust the summary jurisdiction of justices on the ground that a bonâ fide question of title arises, it is sufficient to shew that the act complained of as a trespass was committed in the exercise of a supposed right, which the alleged trespasser bonâ fide believed that he possessed. *Mathews* v. *Carpenter*, 16 L. R., Ir. 420.

—— **Right to cut Ditch.**]—W. was employed by an owner of real property to enter upon the land of F., and cut a ditch therein to carry off the surface water, W.'s employer contending that he had a prescriptive right to such an easement. W. being convicted under the 24 & 25 Vict. c. 97, s. 52, of wilful damage to real property:—Held, that the justices not having found that W.'s employer acted under a fair and reasonable supposition that he had a right to send men to cut a ditch through F.'s private property, W. could not be in a better position than his employer, and that the conviction was therefore right. *White* v. *Feast*, 41 L. J., M. C. 81; L. R. 7 Q. B. 353; 26 L. T. 611; 20 W. R. 382.

Right to cut down Trees—Nuisance.]—The appellant's premises adjoined a public road, on the opposite side of which there grew a chestnut tree which overhung the road to within a few feet of the appellant's premises. The appellant cut off certain portions of the tree, and on a charge of maliciously and wilfully damaging the tree, contended that he had a right to cut it to protect his property from the nuisance caused by stones which boys threw at the blossoms and from the nuisance caused by the branches interfering with the entrance of light and air to his dwelling:—Held, that the magistrates were justified in finding that the appellant wilfully committed damage to the tree, and that he did not act under a fair and reasonable supposition that he had a right to do the acts complained of. *Hamilton* v. *Bone*, 16 Cox, C. C. 437; 52 J. P. 726.

Recovery of Possession of Land—Jus tertii.]—Upon an application (under 1 & 2 Vict. c. 74) by a landlord to justices in petty sessions to recover possession of premises held over by his tenant after the expiration of the term, the tenancy having been proved to the satisfaction of the justices and its legal determination, and the tenant's refusal to quit:—Held, that the

jurisdiction of the justices to give the landlord possession was not ousted by the tenant's setting up the title of a third person. *Rees* v. *Davies*, 4 C. B. (N.S.) 56.

Obstructions in a Street.]—A local act gave jurisdiction to justices over the offence of "throwing or laying down stones, iron, &c., or other materials in a street." A person charged with the offence maintained that the spot on which iron had been laid down was his private property, free from any right of way, and the justices declined to adjudicate:—Held, that their jurisdiction was not ousted, as the statute gave them power to determine what was a street. *Reg.* v. *Young, White, Ex parte*, 52 L. J., M. C. 55; 47 J. P. 519. S. P., *Reg.* v. *Smith. Pritchard, Ex parte*, 52 L. J., M. C. 56, n.

A shopkeeper in a borough placed goods upon the pavement in front of his shop for sale. Upon being summoned under the Towns Police Clauses Act, 1847, for obstructing the footway, he contended that he bonâ fide claimed the right to place his goods there. The justices considered that their jurisdiction was ousted, but stated a case:—Held, that the justices ought to determine whether the land on which the goods were placed was part of the public highway or not, that no question of title was involved, and that their jurisdiction was not ousted. *Leicester Urban Sanitary Authority* v. *Holland*, 57 L. J., M. C. 75; 52 J. P. 788.

Custom to cut Sods in Graveyard.]—The proviso in 24 & 25 Vict. c. 97 (the Malicious Trespass Act), s. 52, providing that no person shall be summarily convicted for trespass to real property where he "acted under a fair and reasonable supposition that he had a right to do the acts complained of," will not oust the jurisdiction of the justices unless the right claimed is one possible in law. *Reg.* v. *Westmeath JJ.*, 15 W. R. 59.

A claim to cut sods in a graveyard for the purpose of covering newly-made graves is not such a right; and although a custom to cut the sods is shewn to exist, it will not confer any such right. *Ib.*

Trespass in Pursuit of Game.]—It is not sufficient to oust the jurisdiction of the justices in regard to a charge of trespass in pursuit of game under 1 & 2 Will. 4, c. 32, that there is an honest claim of right if such claim is absurd and impossible in point of law. The question is whether a reasonable claim of right is involved, and not one of mens rea, inasmuch as the statute is not a mere criminal statute, but is intended for the protection of the peculiar rights of persons entitled to shoot game. *Watkins* v. *Major*, 44 L. J., M. C. 164; L. R. 10 C. P. 662; 33 L. T. 352; 24 W. R. 164.

M. laid an information against A. for trespassing in pursuit of game, under 1 & 2 Will. 4, c. 32 (Game Act), s. 30. At the hearing he gave evidence that the lords of the manor had, in 1815, granted the right of shooting, down to the present time, and that he was then renting the shooting from them. On A.'s part it was alleged that he had a lease from the lords of the manor of the lands said to be trespassed upon, dated 1859, in which there was no reservation of a right to the game, and that the alleged trespass was committed in the assertion of his right to the game. The justices having convicted A.:—Held, that, under the circumstances, the claim of right having been bonâ fide made, the jurisdiction of the justices was ousted. *Adams* v. *Masters*, 24 L. T. 502.

B. was proved to have shot game on glebe land over which the rector of the parish had always exercised the privilege of sporting. B.'s defence was that he was game watcher employed by three gentlemen who were proved to rent shooting from the lord of the manor, and that the lord claimed the shooting over part of the glebe under an inclosure act. He proved that his employers ordered him to go upon this land, but he produced no evidence, although an adjournment was offered for that purpose, that it was included in the lands over which his employers' shooting extended, or that it was in the disputed part of the glebe:—Held, that the magistrate was right in deciding that then B. had no bonâ fide claim of right. *Binnie* v. *Marshall*, 35 L. T. 373.

B.'s covert adjoined the field of P., and B. went on a public footpath in this field, directing his servant to beat B.'s own covert and hedge. B. on being charged with trespassing in pursuit of game, under s. 30 of 1 & 2 Will. 4, c. 32, set up a claim of right, as the hedge was his:—Held, that the justices were wrong in allowing a claim of right, as no title to property was involved, and that B. ought to have been convicted. *Philpot* v. *Bugler*, 54 J. P. 646.

—— **Right of Lord of Manor.**]—Where a party, upon an information for trespassing in pursuit of game, made a claim of right to shoot over lands as lord of the manor, and gave in evidence, in support of such right, certain documents of title and an inclosure act, but the justices found that there was no evidence that he, as such lord, had any rights other than those possessed by every other lord, and that he having practised for years as an attorney, did not bonâ fide believe when he committed the trespass that he had any such right as that claimed, and convicted him, the conviction was quashed upon the ground that there was evidence of the bonâ fides of the claim set up. *Reg.* v. *Derbyshire JJ.*, 11 W. R. 780.

—— **Right of Burgess—Ancient Charter.**]—Under an ancient charter granting to the mayor, aldermen and burgesses of a borough the right to sport over lands within the liberties thereof, individual burgesses, in the absence of all evidence of exercise, are not entitled to the enjoyment of the right over land within the liberties but in the occupation of a third party. *Potter* v. *Berry*, 6 W. R. 71.

—— **Reasonableness.**]—A question of title bonâ fide raised in the course of proceedings, on an information, before justices, for trespassing in pursuit of game, operates to oust the jurisdiction of the justices, and their proper course is to dismiss the charge. The bonâ fides of the claim is for the justices to determine. *Legg* v. *Pardoe*, 9 C. B. (N.S.) 289; 30 L. J., M. C. 108; 7 Jur. (N.S.) 499; 3 L. T. 371; 9 W. R. 234.

A person charged with trespassing in pursuit of game in the daytime on land in the occupation of a tenant to A., set up a claim of right to shoot over the land, on the ground that he and every one who chose had always shot there till some recent acts of interruption, and declared his readiness to try the right with A.:—Held, that

the mere assertion of a general right in himself and every one else, though he really believed it, without shewing any such claim of right as would be a defence to an action of trespass, did not oust the jurisdiction of the magistrates to convict. *Leatt* v. *Vine*, 30 L. J., M. C. 207 ; 8 L. T. 581.

An information was laid against K. for a trespass in pursuit of game. At the hearing he gave in evidence a lease, dated 1794, for 99 years, of the land upon which the trespass was alleged to have been committed, to a party through whom he claimed ; the lessor being the party through whom the informant claimed the right to the game. The lease contained the following reservation to the lessor : "and also liberty to hawk, hunt, set and fowl in and upon the demised premises during the term hereinafter granted." K. having set up his title through the lessee to take the game upon the land, and so disputed the right of justices to adjudicate, they held that the claim of right was not sufficient to oust their jurisdiction, and convicted him :—Held, that the objection being made, it was a reasonable one, and that the jurisdiction of the justices was ousted. *Reg.* v. *Kayley*, 10 L. T. 339.

The tenant of a farm under a lease which reserved the game to the lessor, but did not expressly say that it did so exclusively, shot three hares in the presence of the keeper to assert his right. He set up this claim of right on the hearing of an information against him before the justices, and alleged that it ousted their jurisdiction. They found that the claim was not bonâ fide, because he had a copy of the lease, and convicted him :—Held, that this finding as to the bona fides was not conclusive, because there was no evidence that his claim was made malâ fide ; and that as he asserted his claim of right the magistrates had no jurisdiction to hear the information. *Lovesy* v. *Stallard*, 30 L. T. 792.

Where proceedings for trespassing on land in pursuit of game are taken before justices against a person who raises a question of title, he must allege such title to be in himself, and not in a third person ; and it is the province of the justices to determine whether or not such claim has a reasonable foundation. *Cornwell* v. *Sanders*, 3 B. & S. 206 ; 32 L. J., M. C. 6 ; 9 Jur. (N.S.) 540 ; 7 L. T. 356 ; 11 W. R. 87.

A trespasser in search of game set up as a defence, under 1 & 2 Will. 4, c. 32, s. 30, the leave and licence of the occupier under a parol lease. The occupier denied that the game was reserved ; evidence was given to shew that it was :—Held, that the defence was not bonâ fide, and, therefore, the jurisdiction of the justices was not ousted. *Reg.* v *Critchlow*, 26 W. R. 681.

—— **Adjournment to produce Evidence.**]—On the hearing of an information for trespassing in pursuit of game, it was stated by the parties that they had authority from the owner of the land ; but not being prepared to prove that fact they asked for an adjournment :—Semble, that this was a claim on a matter which would be a defence to an action ; and therefore under the proviso in s. 30 of 1 & 2 Will. 4, c. 32, the justices ought not to have proceeded to convict. *Reg.* v. *Cridland*, 7 El. & Bl. 853 ; 27 L. J., M. C. 28 ; 3 Jur. (N.S.) 1213 ; 5 W. R. 679.

Right to Fish.]—A river was made navigable by a company, and the public allowed to navigate it on payment of tolls, under certain acts of parliament ; but the soil and rights of the owners on each side of the river remained untouched. The public had fished for many years in the river without interruption by the owner of the soil ; but he caused a notice to be set up forbidding all fishing. A person afterwards fished in the river, and an information was taken out against him under 24 & 25 Vict. c. 96, s. 24. At the hearing he set up the right in the public, and contended that the jurisdiction of the justices was ousted by this bonâ fide claim of right :—Held, that the right set up could not exist in law, and therefore title could not come in question, and the jurisdiction of the justices was not ousted. *Hargreaves* v. *Diddams*, 44 L. J., M. C. 178 ; L. R. 10 Q. B. 582 ; 32 L. T. 600 ; 23 W. R. 828.

The right of the public to fish in a non-tidal river which is made navigable by locks cannot exist in law. M. was convicted under 24 & 25 Vict. c. 96, s. 24, of fishing in water which was private property. The water was part of a navigable river, which was not tidal, and which was navigated by means of locks. At the hearing he set up a public right of fishing, and argued that the jurisdiction of the justices was ousted by such bonâ fide claim of right :—Held, that no such right could exist in law, and therefore the jurisdiction of the justices was not ousted. *Mussett* v. *Burch*, 35 L. T. 486.

In answer to an information before two justices under 24 & 25 Vict. c. 96, s. 24, for unlawfully and wilfully attempting to take fish in water where another person had a private right of fishery, by angling at an hour not between the beginning of the last hour before sunrise and the expiration of the first hour after sunset, the accused justified under a supposed right on the part of the public to fish in that water. Concession,—that such a right of fishing by the public in a non-navigable river could not exist in law : —Held, that the accused justifying himself under the bonâ fide, though mistaken notion, of such a right, did not make such a claim of right as ousted the jurisdiction of the justices. *Hudson* v. *M'Rae*, 4 B. & S. 585 ; 33 L. J., M. C. 65 ; 9 L. T. 678 ; 12 W. R. 80.

Upon hearing of an information against a defendant for fishing in the prosecutor's fishery, the latter proved the purchase by him from the crown of a manor, with the fishery appurtenant thereto, and that previously to the purchase the crown had from time to time granted leases of the right of fishing. For the defendant it was shewn that the locus in quo was a navigable river, subject to the ebb and flow of the tide, and witnesses were called, who proved that for forty years they had exercised, without molestation, the right of fishing there :—Held, that the question of title fairly arose, and that the jurisdiction of the justices to determine the case was at an end. *Reg.* v. *Stimpson*, 4 B. & S. 307 ; 32 L. J., M. C. 208 ; 10 Jur. (N.S.) 41 ; 8 L. T. 536 ; 9 Cox, C. C. 356. And see *Paley* v. *Birch*, 8 B. & S. 356 ; 16 L. T. 410.

In a prosecution before magistrates under the 5 & 6 Vict. c. 106, s. 65, the jurisdiction of the magistrates is ousted if the defendant bonâ fide claims to be entitled to a several fishery in the locus in quo ; and if the magistrates believe that the claim is bonâ fide made, they should not proceed further with the case, and have no jurisdiction to determine the question of title. *Johnston* v. *Meldon*, 30 L. R., Ir. 15.

Right of Way.]—On a charge, under 24 & 25 Vict. c. 97, s. 25, for maliciously damaging a

fence, it appeared that the defendant had been fishing in a canal, and had passed over a field of growing wheat in the occupation of the prosecutor, and was going away, when (whether wilfully or not was disputed) he damaged the fence, which he alleged was not upon the land of the prosecutor, and he produced a letter from a person who claimed to be the owner of, and had given him leave to fish in the canal:—Held, that this was evidence of a bonâ fide claim of title, and reasonable colour of right, which ousted the jurisdiction of the magistrates, and that they were wrong in proceeding to convict. *Reg.* v. *Snape*, 11 W. R. 434.

The appellant was convicted by justices in petty sessions—(1) under the 38th section of 45 & 46 Vict. c. ccxiv., for having unlawfully trespassed on a railway in such a manner as to expose himself to danger; and (2) under the 23rd section of the Regulation of Railways Act, 1868, for having been unlawfully on the railway after receiving warning not to go or pass thereon. There was, prior to the making of the railway, and prior to the acts of parliament authorising the same, a public right of way for persons on foot over the land now occupied by the railway at the place where the appellant crossed, and the appellant went upon and crossed the railway, in the assertion of the right of way which formerly existed, and believing that he was entitled to do so by virtue thereof:—Held, that the conviction on both summonses was wrong—(1) because the claim of the right of way set up by the appellant ousted the jurisdiction of the justices to determine the case; and (2) because there were no provisions in the act of parliament extinguishing the right of way, which was consequently still in existence. *Cole* v. *Miles*, 57 L. J., M. C. 132; 60 L. T. 145; 36 W. R. 784; 53 J. P. 228.

The respondent's wife was the owner of the land on each side of a public footpath and also of the land over which the footpath passed. To prevent his cattle straying along the footpath, the respondent erected in the middle of the footpath two wooden posts, one at the entrance to the footpath, the other some distance further down the path. There was a space of about two feet on either side of these posts through which foot passengers could but cattle could not pass. The appellants, with a number of others, inhabitants of the district, considering that these posts interfered with their use of the footpath, pulled up one of them and threw it over the fence. They were convicted, under s. 52 of 24 & 25 Vict. c. 97, of having committed wilful damage to the post:—Held, that, even assuming it not to be an obstruction, the appellants had acted under a fair and reasonable supposition that they had a right to do what they did, and that they therefore came within the proviso of the section, and ought not to have been convicted, as the jurisdiction of the justices was ousted. *Usher* v. *Luxmore*, 62 L. T. 110; 38 W. R. 254; 54 J. P. 405.

E. was charged under 24 & 25 Vict. c. 97, s. 24, with unlawfully damaging growing oats and dredge corn, to the amount of one shilling. At the hearing, E. claimed a right of highway, but the justices convicted him, though several old witnesses spoke of a highway being claimed and used:—Held, that the defendant's evidence was sufficient to support his claim of right, and that the justices were wrong in convicting. *Edwards* v. *Cock*, 58 J. P. 398.

Right to Collect Tolls.]—A private act incorporating a bridge company, and enabling the company to take certain maximum tolls, which the company by resolution might diminish and alter, provided for the settlement of disputed tolls by a justice, by arbitration. By a subsequent section, if any collector should demand or take a greater or less toll from any person than he should be authorised to do by virtue of the act or resolutions under it, or should demand or take a toll from a person exempt from payment, he was to forfeit a sum less than 5*l.* upon an information before justices. A foot-passenger paid the collector of tolls, upon demand, a toll the second time the same day, and laid an information before justices against him for demanding it. There was no exemption in the act upon a passenger's crossing the bridge a second time on the same day; but it was admitted that from the passing of the act, forty years before, until this demand, no passenger ever had paid under such circumstances. No resolution of exemption, however, was in existence. The justices convicted, notwithstanding the collector's assertion of a bonâ fide claim of right:—Held, that as there was a particular provision in the act for the settlement of such a dispute, the information ought to have been dismissed; and that the fact of forty years' practice, although evidence of exemption, was not conclusive. *Dixon* v. *Cockett*, 25 L. T. 826.

Disputed Church-rate.]—Upon the hearing of a summons against the defendant for non-payment of a church-rate, he gave notice to the justices that he disputed the validity of the rate, and his liability to pay it, and stated his reasons for doing so. The justices were of opinion, though without any evidence to justify that opinion, that the allegations and notices of the defendant were not made and given in good faith, but were put forward as a pretext for avoiding payment of the rate, and therefore they made an order for payment:—Held, that they were wrong, as by the course adopted by the defendant they were deprived of all jurisdiction to make such order. *Reg.* v. *Nunneley*, El. Bl. & El. 852; 27 L. J., M. C. 260; 4 Jur. (N.S.) 1146.

At the hearing of a summons to enforce payment of a church-rate, although the justices are the tribunal to decide in the first instance whether a party's objection is bonâ fide or not, they cannot, by deciding contrary to the facts that it is not bonâ fide, give themselves jurisdiction. *Reg.* v. *Huntsworth*, 33 L. J., M. C. 131; 10 Jur. (N.S.) 945; 10 L. T. 374; 13 W. R. 7.

Where a party bonâ fide disputes the validity of a church-rate and gives notice to the justices of his intention to dispute it, the jurisdiction of the justices is ousted. *Pease* v. *Chaytor*, 1 B. & S. 658; 31 L. J., M. C. 1; 8 Jur. (N.S.) 482; 5 L. T. 280; 10 W. R. 16.

As to House belonging to Parish.]—In a proceeding to recover possession of a house alleged to belong to a parish, under 59 Geo. 3, c. 12, s. 24, the jurisdiction of the justices is not ousted by a claim of title, as the question of title is necessarily involved in the matter which the justices have to determine. *Vaughan, Ex parte*, 7 B. & S. 902; 36 L. J., M. C. 17; L. R. 2 Q. B. 114; 15 L. T. 277; 15 W. R. 198.

What Objection Sufficient.]—A householder was summoned before justices under 7 & 8 Will. 3, c. 6, for nonpayment to the rector of the parish

of dominicals, a tax in lieu of tithes in respect of dwellings erected on land formerly subject to tithes. Evidence of custom in the parish to pay these dominicals was adduced before the justices, and the attorney who appeared for the party objected in writing "to the jurisdiction of the magistrates, on the ground that his client had a bonâ fide objection to the validity of the payment, which being due by custom they could not try," the justices stated that they thought the custom was established, and made an order on the householder for payment of the claim with costs :—Held, that, although a claim of right may oust the jurisdiction of justices under this statute, this mere assertion by the attorney did not sufficiently establish a bonâ fide objection on his client's part. *Reg.* v. *Sandford*, 30 L. T. 601.

Restrictions to bonâ fide Claims.]—This ouster of jurisdiction is restricted to cases where the justices are reasonably satisfied of the fair and reasonable character of the claim. *Reg.* v. *Essex JJ.*, *Reg.* v. *Mussett*, 26 L. T. 429 ; 20 W. R. 670.

Upon an information for a trespass of any kind, if it appears that the trespass was committed in the bonâ fide assertion of a claim of right, the justices have no jurisdiction to convict. But if upon hearing the evidence they are satisfied that the assertion of a claim of right is not made bonâ fide, and the facts proved warrant them in that belief, their jurisdiction is not ousted. *Paley* v. *Birch*, 8 B. & S. 356 ; 16 L. T. 410.

If a party is charged with obstructing the works of a local board of health, he is not necessarily entitled to have the case dismissed by the magistrates because the obstruction took place in assertion of a private right. *Reg.* v. *Pollard*, 14 L. T. 599.

To oust justices of their jurisdiction by the assertion of a bonâ fide claim of right, such claim must have some colour to support it. *Hudson* v. *McRea*, 4 B. & S. 585 ; 33 L. J., M. C. 65 ; 9 L. T. 678 ; 12 W. R. 80.

—— **Previous decided Case in High Court.**]—Where in any proceedings before justices a claim of right is set up which on the face of it is not obviously absurd or unreasonable, their jurisdiction to determine the matter in dispute is ousted. In determining the reasonableness of a claim of right, justices are not entitled to consider the effect of a previous decision of a high court of justice as to the locus in quo. *Scott* v. *Baring*, 64 L. J., M. C. 200 ; 15 R. 216 ; 72 L. T. 495.

3. Locality.

a. In the Metropolis.

Alderman—Deserted Premises.]—An alderman sitting at the Mansion House or Guildhall has not the power to send a constable to view deserted premises, and to put the landlord into possession thereof, which a police magistrate has by virtue of 3 & 4 Vict. c. 84, s. 13. *Edwards* v. *Hodges*, 15 C. B. 477 ; 3 C. L. R. 472 ; 24 L. J., M. C. 81 ; 1 Jur. (N.S.) 91 ; 3 W. R. 167.

Surcharge by Auditor of Poor-Law District.]—A metropolitan police magistrate sitting alone has jurisdiction to hear and determine an information by the auditor of a metropolitan poor-law district for non-payment of disbursements regularly disallowed and surcharged by such auditor, and certified to the poor-law commissioners under 7 & 8 Vict. c. 101, s. 32. *Reg.* v. *Tyrwhitt*, 4 New Sess. Cas. 266 ; 15 Q. B. 249 ; 19 L. J., M. C. 249.

Apprenticeship.]—Under 56 Geo. 3, c. 139, s. 2 ; 3 & 4 Will. 4, c. 63, s. 3 ; and 2 & 3 Vict. c. 71, s. 14, when a pauper child is bound apprentice by parish officers from one parish into another, both within the city, a single metropolitan police magistrate, having jurisdiction both within the city and county wherein it is situate, may allow the indenture. *Reg.* v. *St. George, Bloomsbury*, 16 Q. B. 1005 ; 20 L. J., M. C. 200 ; 15 Jur. 799.

—— **In Hatton Garden.**]—An order for binding a pauper apprentice, under 56 Geo. 3, c. 139, purported to be made by "two justices for the county of Middlesex," and to be signed and sealed by them at "the police office, Hatton Garden." In 10 Geo. 4, c. 44, "Hatton Garden" is mentioned as one of the places in Middlesex forming the Holborn division of the police district :—Held, that jurisdiction sufficiently appeared on the face of the order, as the court would take judicial notice from the act of parliament that Hatton Garden was in Middlesex. *Reg.* v. *Holborn Union*, 6 El. & Bl. 715 ; 25 L. J., M. C. 110 ; 2 Jur. (N.S.) 571 ; 4 W. R. 606.

In Bexley.]—A person was charged before justices of the county of Kent, sitting at Dartford, out of the metropolitan police district, with committing an offence under 2 & 3 Vict. c. 47, s. 54, at Bexley, which is a place within the metropolitan police district, not assigned to any of the police courts of the metropolis :—Held, that they had no jurisdiction to try the offence. *Dann* v. *Manby*, 26 L. T. 730 ; 20 W. R. 627.

In Southwark.]—By charter, the mayor and some of the aldermen of London have jurisdiction in Southwark ; but, as the charter contains no non-intromittent clause as to the justices of the county of Surrey, the latter have a concurrent jurisdiction with the former. *Rex* v. *Sainsbury*, 4 Term Rep. 451 ; 2 R. R. 433. And see *Kite, Ex part*, 2 D. & R. 212 ; 1 B. & C. 101.

b. In Counties and Boroughs.

Special Local Commission.]—An offence was committed within a separate locality which had a body of justices exercising jurisdiction within the liberty by virtue of their separate commissions : (1) the ordinary commission of the peace ; (2) a commission to try all treasons, murders, felonies, &c. ; (3) a general commission of gaol delivery : —Held, that these commissions did not oust the jurisdiction of her majesty's justices of gaol delivery for the whole county. *Reg.* v. *Crane*, 3 Cox, C. C. 53.

Borough—When Exclusive.]—All magisterial jurisdiction over places or precincts, which by 2 & 3 Will. 4, c. 64, are included within the metes and bounds of any borough mentioned in the first division of schedules (A.) and (B.) to the 2 & 3 Will. 4. c. 76, is, from the passing of the latter act, vested exclusively in the borough justices. *Rex* v. *Gloucester JJ.*, 6 N. & M. 115 ; 4 A. & E. 689 ; 1 H. & W. 682.

—— **Township partly without—Rate.**]—The mayor of a borough, acting under 5 & 6 Will. 4, c. 76, s. 92, issued a warrant against an overseer of a township, part of which was within,

and part without, the borough, to levy the proportion of a borough rate for that part of the township which was within the borough. In an action against the mayor for a seizure of the goods under this warrant:—Held, that the mayor had no jurisdiction to issue such warrant, and that trespass was the proper remedy. *Fernley* v. *Worthington*, 1 Scott (N.R.) 432; 1 M. & G. 491; 10 L. J., M. C. 81; 4 Jur. 918.

—— **Backing of Warrant.**]—C. was convicted of an assault on two police constables of the county police of Worcestershire in the execution of their duty, who were apprehending him in the city of Worcester under a warrant issued by two justices of and for the county of Worcestershire for his commitment to prison for default in payment of a fine, but not backed by any justice of and for the city of Worcester. Worcester is a borough having a separate commission of the peace with exclusive jurisdiction, and a separate police force. C. was not pursued from the county, but found in the city:—Held, that the conviction was wrong, and that the constables were not acting in the execution of their duty in so executing such warrant. *Reg.* v. *Cumpton*, 49 L. J., M. C. 41; 5 Q. B. D. 341; 42 L. T. 543; 28 W. R. 539; 44 J. P. 489.

Charter.]—The jurisdiction of county justices can only be taken away by express words in a charter to borough justices. *Blankley* v. *Winstanley*, 3 Term Rep. 279; 1 R. R. 704.

County Rates.]—A charter granted jurisdiction to borough justices within a borough, in exclusion of the county justices, and likewise gave them jurisdiction over a place beyond the limits of the borough, but not in exclusion of the county justices:—Held, that the latter might assess such place to the county rates. *Bates* v. *Winstanley*, 4 M. & S. 429.

In a borough to which the king has granted by charter that the borough justices shall have exclusive jurisdiction in misdemeanours without jurisdiction in felonies, and that the county justices shall not intromit themselves within the borough; and in which a borough rate applicable to the purposes of a county rate was levied before the passing of 55 Geo. 3, c. 51, the county justices have no power to order the levying of a county rate, although by virtue of its charter the borough brings burdens upon the county. *Rex* v. *Shepherd*, 4 N. & M. 185; 2 A. & E. 298; 4 L. J., M. C. 30.

By a charter granted to a borough, officers were appointed justices of the peace therein, with power to hold sessions, but not to deal with treasons, murders or felonies. Sessions were regularly held, but no indictments tried thereat, the practice being to send offenders to the county gaol for trial at the county assizes or sessions, the borough sometimes, but not always, defraying the expense of the maintenance of such offenders. The charter also contained a non-intromittent clause as regarded the county justices, who never exercised any jurisdiction within the borough:—Held, that the county justices had no power to include the borough in the basis or standard for the purpose of county rates, under 15 & 16 Vict. c. 81, s. 21. *Reg.* v. *East Looe*, 3 B. & S. 20; 31 L. J., M. C. 245; 8 Jur. (N.S.) 1128; 6 L. T. 748; 10 W. R. 866.

Trial of Prisoners.]—The justices of a borough had exclusive jurisdiction within the borough itself, but jurisdiction concurrent with that of the county justices over certain places called the liberties of the borough:—Held, that for an offence committed within the liberties, they might commit to the county gaol, and cause the prisoner to be brought before them for trial at the borough sessions. *Rex* v. *Musson*, 6 B. & C. 74; 9 D. & R. 172; 5 L. J. (O.S.) M. C. 28.

A royal charter granted to a liberty, situate in a county, a separate quarter sessions, and the right of having a common gaol, and excluded all other justices from delivering such gaol. The gaol was not used as a gaol or a house of correction for the whole county, and it was entirely supported out of rates raised, in the nature of county rates, within and for the purposes of the liberty, no part of which contributed to the general county rate. The keeper of the gaol was appointed by the justices of the liberty, who acted under a separate commission from that of the county, but not with exclusive jurisdiction. The commission under which the justices of the county acted gave them jurisdiction "as well within liberties as without":—Held, that county justices sitting in the county, and without the liberty, had power to commit to the gaol of the liberty for an offence committed within the liberty, inasmuch as they were justices of the liberty as well as of the county at large. *Arnold* v. *Dimsdale*, 2 El. & Bl. 580; 22 L. J., M. C. 161; 17 Jur. 1157; 1 W. R. 430. See *Arnold* v. *Gaussen*, 8 Ex. 463; 22 L. J., Ex. 180.

The 15 Geo. 2, c. 24, is a declaratory act, and should have a liberal construction; and, therefore, where justices of a borough, contributory to the county rate, have committed prisoners to the county house of correction for offences cognisable within the county, the justices at their borough sessions have a right to order such prisoners to be brought before them for trial there. *Rex* v. *Amos*, 2 B. & Ald. 533; 21 R. R. 386.

Form of Order.]—Where an act gives jurisdiction to justices of a county, and an order is made under it by justices of the county of a city, which county and city were co-extensive by statute, the order is valid, though the justices describe themselves merely as justices "in and for the said city," for the court will take notice that the city is also a county. *Reg.* v. *St. Maurice*, 16 Q. B. 908.

Newgate.]—The right of county magistrates to commit to Newgate parties charged with misdemeanours, was not taken away by 4 Geo. 4, c. 64, s. 4. *Rex* v. *Cope*, 1 N. & P. 515; 6 A. & E. 226; W. W. & D. 164; 6 L. J., M. C. 81; 1 Jur. 54.

Borough without Commission of Peace—Mayor a Justice of the Peace for Borough.]—The mayor of a borough, without a commission of the peace, before whom a person was brought charged with embezzlement, remanded the accused to the next meeting of the justices of the peace for the county in which the borough was situated, and admitted him to bail, taking the recognizance of the defendant in 100*l.* for the appearance of the accused. The accused paid the defendant 100*l.* to indemnify him against liability under the recognizance:—Held, that by s. 57 of the Municipal Corporations Act, the mayor was a justice of the peace for the borough, and the recognizance was valid; that the 100*l.* was paid to the defendant in pursuance of a contract which was contrary to public policy, but that as the contract had not been executed, the plaintiff was entitled

to recover. *Wilson* v. *Strugnell*, 50 L. J., M. C. 145; 7 Q. B. D. 548; 45 L. T. 219; 45 J. P. 831.

—— **Payment of Penalties.**]—A parliamentary borough was by charter constituted a municipal borough, with the powers and privileges belonging to those named in schedule (B.) to 5 & 6 Will. 4, c. 76. It had no grant of a separate court of quarter sessions; and the justices of the county, by virtue of s. 111, exercised the jurisdiction of justices of the peace in and for the borough concurrently with the mayor, who by s. 57 is ex officio a justice of the peace for the borough, and so continues during the year next succeeding his year of office:—Held, that the mayor, while acting as a justice in and for the borough, was acting as a justice for the county, and therefore penalties imposed by him were to be paid to the treasurer of the county and not to the treasurer of the borough. *Reigate Corporation* v. *Hunt*, 9 B. & S. 129; 37 L. J., M. C. 70; L. R. 3 Q. B. 244; 18 L. T. 237; 16 W. R. 896.

Penalties imposed by justices acting in and for a municipal borough, having a separate commission of the peace but no separate court of quarter sessions, in respect of offences against the general law of the land, are, under 11 & 12 Vict. c. 43, s. 31, to be paid to the treasurer of the county and not of the borough. *Winn* v. *Mossmann*, 38 L. J., Ex. 200; L. R. 4 Q. B. 292; 20 L. T. 672; 17 W. R. 924.

Penalties imposed by such justices, under 9 Geo. 4, c. 61, and not awarded to the prosecutor under s. 20, are to be paid to the treasurer of the county and not of the borough, notwithstanding the Municipal Corporations Act Amendment Act, 1861 (24 & 25 Vict. c. 75), s. 4. *Ib.* See also *Att.-Gen.* v. *Moore*, 47 L. J., M. C. 103; 3 Ex. D. 276; 38 L. T. 251; 26 W. R. 366; and *Metropolitan District Receiver* v. *Bell*, 41 L. J., M. C. 153; L. R. 7 Q. B. 133.

As to Licensing.]—A. was convicted by justices for a petty sessional division of a county, under 3 & 4 Vict. c. 61, s. 6, for using a false certificate relative to the rating of a house, within the petty sessional division, occupied by A., for the purpose of obtaining a licence to retail beer on the premises. The certificate was used and the offence committed within a borough where the county justices had no general jurisdiction:—Held, that the jurisdiction over this offence was not given by 11 Geo. 4 & 1 Will. 4, c. 64, and 4 & 5 Will. 4, c. 85, to the county justices, within whose jurisdiction the house was situate, but was in the borough justices, within whose jurisdiction the offence was committed; and therefore the conviction was bad. *Reg.* v. *Waghorn*, 1 El. & Bl. 647; 22 L. J., M. C. 60; 17 Jur. 785; 1 W. R. 179.

Before 24 & 25 Vict. c. 75, s. 4, borough justices of a corporation not having a separate court of quarter sessions had no power to grant licences to sell excisable liquors by retail under 9 Geo. 4, c. 61, but the county justices had such power exclusively. *Candlish* v. *Simpson*, 1 B. & S. 357; 30 L. J., M. C. 178; 8 Jur. (N.S.) 34; 4 L. T. 437; 9 W. R. 745.

It is not necessary that a borough should have a separate quarter sessions in order to be a town corporate within 9 Geo. 4, c. 61, s. 1. *Brown* v. *Nicholson*, 5 C. B. (N.S.) 468; 28 L. J., M. C. 49; 5 Jur. (N.S.) 99; 7 W. R. 88.

Disorderly House.]—An indictment under the 25 Geo. 2, c. 36, s. 5, for keeping a disorderly house, may, where the house is situate in a borough, be preferred and tried at the quarter sessions for the borough. *Reg.* v. *Charles*, L. & C. 90; 31 L. J., M. C. 69; 7 Jur. (N.S.) 1308; 5 L. T. 328; 10 W. R. 62; 9 Cox, C. C. 18.

Order to repair Highways.]—Two justices of a county made an order on a railway company under 8 & 9 Vict. c. 20, s. 58, to repair highways within the borough of W., to which damage had been done by them in making their railway; the order described them as justices "in and for the said borough of W." The county justices had jurisdiction within the borough of W., and there was no separate commission of the peace for the borough:—Held, that the description of the justices was sufficient. *Wakefield Local Board* v. *West Riding and Grimsby Ry.*, 6 B. & S. 794; 35 L. J., M. C. 69; 12 Jur. (N.S.) 160; 13 L. T. 590; 14 W. R. 100; 10 Cox, C. C. 162.

Search Warrant.]—In an action for breaking and entering the plaintiff's premises, the defendant pleaded a justification under a search warrant granted by a justice of the county of Stafford. At the trial the defendant gave in evidence a search warrant granted by a justice of the borough of Wolverhampton, acting as such, but who was also a justice of the county of Stafford:—Held, that the evidence did not support the plea. *Webb* v. *Ross*, 4 H. & N. 111; 5 Jur. (N.S.) 126.

Discovery of Papers.]—Under 5 & 6 Will. 4, c. 76, ss. 60, 68, county magistrates may determine complaints against corporate officers refusing to deliver up papers, though such officers reside within the precincts of the corporation, and the corporation have magistrates. *Gateshead JJ., In re*, 6 A. & E. 550, n.

Travelling without Payment of Fare.]—A., intending to go by railway from C. to D., which is an intermediate station between C. and N., took a ticket for N., and upon his arrival at D., left the railway. The fare from C. to D. exceeded in amount the fare from C. to N., and the difference was demanded of A., but he refused to pay it. By a by-law of the company, every passenger was to pay his fare previously to entering a carriage, upon payment of which he would be furnished with a ticket specifying the class of carriage and distance for which the fare was paid; and any passenger who entered a carriage without having paid his fare was subject to a penalty. Under this by-law A. was convicted by the borough justices of C. for having within the borough entered a carriage of the company for the purpose of travelling upon the railway from C. to D., not having previously paid his fare for so travelling:—Held, that the borough justices had jurisdiction over the alleged offence, but that the conviction could not be sustained, as A. had paid his fare within the meaning of the by-law. *Reg.* v. *Frere*, 4 El. & Bl. 598; 3 C. L. R. 455; 24 L. J., M. C. 68; 1 Jur. (N.S.) 700.

Smuggling.]—The magistrates of the place on land to which a person charged under 6 Geo. 4, c. 105, s. 74, is carried, have jurisdiction over the subject-matter although the person may have been taken on board a vessel on waters within another jurisdiction. *Rex* v. *Nunn*, 7 L. J. (O.S.) M. C. 10.

Foreshore.]—That part of the seashore which lies between high and low water marks is within and part of the adjoining county, so that the justices of the county have jurisdiction to take cognisance of offences committed thereon whether the land is covered with water or not at the time the offences are committed. *Embleton* v. *Brown*, 3 El. & El. 234; 30 L. J., M. C. 1; 6 Jur. (N.S.) 1298.

Parish Apprentice.]—When a parish apprentice is bound to serve in a county different from that from which he is bound, the allowance of the indenture according to 56 Geo. 3, c. 139, must be "as well by two justices of the peace for the county or district within which the place by the officers of which such child shall be bound shall be situated, as by two justices of the peace for the county or district within which the place shall be situated when such child shall be intended to serve." The allowance by the same justices acting for both counties is insufficient. *Rex* v. *Shipton*, 7 L. J. (O.S.) M. C. 21.

Petty Sessional Division—Place in which the Matter arises.]—The 2nd section of the Public Health Act, 1848, defines a justice to be "a justice acting for the place in which the matter requiring the cognisance of the justice arises":—Held, that this, in a county, means a justice acting within the petty sessional division in which the matter arises; and therefore that justices of the county not acting within the petty sessional division of it in which an offence under the 148th section of the act had been committed had no jurisdiction to convict under the 129th section. *Reg.* v. *Brodhurst*, 32 L. J., M. C. 168.

Offence committed in one Petty Sessional Division—Committal in different Division.]—Justices of the peace sitting in and acting for one petty sessional division of a county have jurisdiction to commit for trial on a charge arising in another petty sessional division of the same county, and are not bound to remand such charge for hearing in the division in which the offence was committed. *Reg.* v. *Beckley*, 57 L. J., M. C. 22; 20 Q. B. D. 187; 57 L. T. 716; 36 W. R. 160; 16 Cox, C. C. 331; 52 J. P. 120—C. C. R.

Indictment found—Warrant to Arrest.]—A woman lived in Gloucestershire, against whom a true bill for perjury had been found at the Kent assizes. The prosecutor applied to justices in Kent, under 11 & 12 Vict. c. 42, s. 3, for a warrant to arrest and hold her to bail, which the justices refused to grant:—Held, that a rule for a mandamus to the justices would not be granted, because it seemed a vexatious proceeding, and the prosecutor should first have applied to the Gloucestershire justices, which was a better remedy. *Lloyd*, *Ex parte*, 53 J. P. 612.

c. Scotch Justices.

A Scotch justice of the peace may take an affidavit out of his jurisdiction, provided the locality is within the authority of Great Britain. Therefore an affidavit before a justice of the peace of the county of Mid-Lothian is valid, though taken in London. *Kerr* v. *Ailsa (Marquis)*, 1 Macq. H. L. 736.

4. Matters within.

Highway—Cutting down Trees.]—Magistrates have no power, under the 5 & 6 Will. 4, c. 50, to cut down trees which may damage the highway, if planted for ornament and shelter. *Frampton* v. *Tiffin*, 2 Jur. 986.

Lunatics—Vagrants.]—Vagrants only, and not persons of rank, are within 17 Geo. 2, c. 5, s. 20, which empowers justices of peace to take care of lunatics. *Anon.*, 2 Atk. 52.

Pending Assizes.]—The power of justices of the peace of a county, or a recorder of a borough, to try prisoners at quarter sessions, is not suspended or affected by the fact of the judges sitting under the usual commission of assize, oyer and terminer, and general gaol delivery. *Smith* v. *Reg.* (*in error*), 3 New Sess. Cas. 564; 13 Q. B. 738; 18 L. J., M. C. 207; 13 Jur. 850; 3 Cox, C. C. 586.

At Quarter Sessions.]—Suicide is not murder within 24 & 25 Vict. c. 100, ss. 11 and 15, and therefore attempting to commit suicide is a misdemeanour triable at quarter sessions. *Reg.* v. *Burgess*, L. & C. 258; 32 L. J., M. C. 55; 9 Jur. (N.S.) 28; 7 L. T. 472; 11 W. R. 96; 9 Cox, C. C. 247.

A court of quarter sessions has, by 24 & 25 Vict. c. 96, s. 115, jurisdiction over the offence of larceny when committed upon the high seas, if the offender is apprehended within the jurisdiction of the sessions, as, where the offender and prosecutor were both fellow-passengers in a vessel, and the larceny was committed on the high seas, between Madras and Point de Galle, and the offender was apprehended at Southampton and tried at the Southampton borough quarter sessions. *Reg.* v. *Peel*, L. & C. 231; 32 L. J., M. C. 65; 8 Jur. (N.S.) 1185; 7 L. T. 336; 11 W. R. 40; 9 Cox, C. C. 220.

They have jurisdiction over conspiracies. *Rex* v. *Rispal*, 1 W. Bl. 368; 3 Burr. 1320.

But they have no jurisdiction over the offence of forgery at common law. *Rex* v. *Gibbs*, 1 East, 173.

To solicit a servant to steal his master's goods is a misdemeanour, though it is not charged in the indictment that the servant stole the goods, nor that any other act was done, except the soliciting and inciting: and such offence is indictable at the sessions, having a tendency to a breach of the peace. *Rex* v. *Higgins*, 2 East, 5; 6 R. R. 358.

So they have jurisdiction over cheats in general. *Rex* v. *Brayne*, 1 East, 183, n.

An indictment alleged that the defendants, contriving and intending to defraud B. of his money, unlawfully, knowingly and designedly, did amongst themselves combine, conspire, confederate and agree together, by divers false pretences against the form of the statute, in that case made and provided, the said B. of his moneys to defraud, against the form of the statute:—Held, that the quarter sessions had jurisdiction to try this indictment. *Latham* v. *Reg.*, 5 B. & S. 635; 33 L. J., M. C. 197; 10 Jur. (N.S.) 1145; 10 L. T. 571; 12 W. R. 908; 9 Cox, C. C. 516.

The sessions have the power of quashing an indictment for forcible entry, riot and assault, before plea. *Reg.* v. *Wilson*, 6 Q. B. 620; 14 L. J., M. C. 3.

A form of request for the payment of money

due under an order of a court of equity directed to the assistant-paymaster-general at the Royal Courts of Justice, is not a "document relating to a proceeding in a court of equity" within the meaning of s. 1 (17) of the Quarter Sessions Act, 1842. A person charged with the larceny of such a document may therefore be tried at quarter sessions. *King* v. *Reg.*, 61 J. P. 663.

Libel — Preliminary Inquiry.] — Upon an information for maliciously publishing a defamatory libel under the 5th section of 6 & 7 Vict. c. 96, the magistrate has no jurisdiction to receive evidence of the truth of the libel, inasmuch as his function is merely to determine whether there is such a case against the accused as ought to be sent for trial, and a defence based upon the truth of the libel under s. 6 of the act can only be inquired into at the trial upon a special plea framed in accordance with the terms of that section. The province of a magistrate upon a preliminary inquiry into a charge of an indictable offence discussed. *Reg.* v. *Carden*, 49 L. J., M. C. 1; 5 Q. B. D. 1; 41 L. T. 504; 28 W. R. 133; 14 Cox, C. C. 359; 44 J. P. 119.

L., the proprietor of a newspaper, published comments on a ball given by S., who professed that it was for the friends of the dramatic profession. L., however, stated, that it was attended by prostitutes, and was an attempt to sully the fame of the stage. L., being charged with libel before a magistrate, proposed to give evidence that loose characters were present, and that the facts were true and proper to be commented on in a newspaper:—Held, that the magistrate rightly rejected that evidence, as it was only proper to be received at the trial before a jury. *Reg.* v. *Flowers*, 44 J. P. 377.

Justices have no right to inquire into the truth of a charge of libel preferred before them, or to hear any other justification. If a publication is proved, they are bound to commit. *Reg.* v. *Townsend*, 4 F. & F. 1089; 10 Cox, C. C. 356.

—— **Exculpatory Evidence.**]—The provision in Lord Campbell's Libel Act (6 & 7 Vict. c. 96), s. 7, as to allowing exculpatory evidence in answer to a primâ facie case of liability for publication, being quite general in its terms, was held to apply to a prosecution for the publication of a blasphemous libel. *Reg.* v. *Bradlaugh*, 15 Cox, C. C. 217.

Upon an application for a criminal information against the proprietor of a newspaper for publishing a seditious libel, evidence was tendered under the 44 & 45 Vict. c. 60, s. 4, of the truth of the libel, and that it was for the public benefit that it should be published. The magistrates refused to receive such evidence. Upon an application to the Queen's Bench Division for a conditional order for a mandamus to compel the magistrate to receive the evidence so tendered:—Held, that no such matters could be given in evidence at the trial, and that therefore the magistrate was right in refusing to admit the evidence at the preliminary inquiry. *O'Brien, Ex parte*, 12 L. R., Ir. 29; 15 Cox, C. C. 180.

—— **Fiat for Criminal Prosecution.**]—When the director of public prosecutions in England has refused to grant his fiat under 44 & 45 Vict. c. 60, s. 3, for a criminal prosecution against the proprietor, &c., of a newspaper for a libel published therein, the High Court of Justice has no power to interfere, the matter being left by the enactment entirely to his discretion. *Hubert, Ex parte*, 15 Cox, C. C. 166; 47 J. P. 724.

An application upon the part of the proprietor of a newspaper, defendant in a criminal information for libel, to quash the information on the ground that the fiat of the director of public prosecutions had not been obtained, the point not being taken on the argument of the rule, was dismissed, and held, by Field, Denman, and Mathew, JJ. (Lord Coleridge, C.J., and Hawkins, J., contra), that in such a case the fiat is not required. *Reg.* v. *Yates*, 52 L. J., Q. B. 778; 11 Q. B. D. 750; 15 Cox, C. C. 272.

Breach of the Peace within view of Justice.]—A magistrate in case of a breach of the peace within his view, may instantly order the offender into custody. *Still* v. *Walls*, 7 East, 536; 6 Esp. 36.

Apprehended Breach of the Peace—Prohibiting Meetings.]—A magistrate is responsible for order in the district over which he has control, and the commissioner of police for the metropolis is the officer mainly responsible for the preservation of peace and order therein. If such magistrate or such commissioner negligently fails to take the precautions necessary to preserve order, he or they can be proceeded against in a criminal court, and be called upon to answer for such negligence. Such officers therefore are justified in issuing a public notice that public meetings will not be permitted to take place in any place of public resort under their control where there are reasonable grounds for believing that a breach of the public peace is likely to result from the holding of any public meeting in such places. *Reg.* v. *Graham*, 16 Cox, C. C. 420.

—— **Dispersing Meeting believed to be Unlawful.**]—In an action for assault and battery against a justice of the peace, the defence set out certain inflammatory placards posted by the promoters of the meeting and their opponents, that informations were sworn, from which it appeared that if the meeting was held the public peace would be broken; and that the defendant believed, and had reasonable grounds for believing, that a breach of the peace would occur if the meeting were allowed to be continued, and that the public peace and tranquillity could not otherwise be preserved than by separating and dispersing the plaintiff and others so assembled; that the defendant, being present, requested them to disperse, which they neglected to do; and that thereupon the defendant laid his hand on the plaintiff in order to separate and disperse the plaintiff and other persons so assembled, using no more violence than was necessary for that purpose; which was the assault and battery complained of. There was not, in the opinion of the court, any allegation in the 13th paragraph shewing that the meeting was in itself an unlawful assembly:—Held, on demurrer, that the defence was a good answer to the action, and that, even assuming that the plaintiff and others assembled with him were engaged in no unlawful act, yet, as there were reasonable grounds appearing on the pleadings for the belief of the defendant that there would be a breach of the peace if the meeting continued; and it was alleged in the defence that there was no other way of averting such breach of the peace, except by stopping the meeting, the defence sufficiently shewed that the defendant was justified in

taking the necessary steps to stop and disperse the meeting. *O'Kelly* v. *Harvey*, 14 L. R., Ir. 105; 15 Cox, C. C. 435—C. A.

Misdemeanour committed within View of Justice.]—Quære, if a magistrate has a right to arrest a person guilty of a misdemeanour before his eyes when there has not been any breach of the peace actual or apprehended. *King* v. *Poe*, 15 L. T. 37.

Disturbance of the Public Peace—Evidence.]—A., B. and S., members of the Salvation Army, led a crowd by a circuitous route through certain of the streets of the town of H., to the meeting-house of the Army, S. during the march blowing the cornet loudly and in a discordant manner, and A. and B. marching with him singing hymns, beating time, and shouting loudly "Alleluia," and other expressions. Several of the inhabitants of the streets through which they passed were disturbed by the loud and discordant noises, but there were not more than fifteen members of the Salvation Army present, much of the noise being caused by a mob of 400 or 500 persons following them and hostile to their proceedings. Information having been preferred against A., B. and S. under a local act, by which a penalty was imposed on any person who should "make, excite, or join in any brawl, or otherwise disturb the public peace," it was found as a fact that they had disturbed the public peace and they were convicted:—Held, on a case stated, that there was no evidence of the offence charged upon which the defendants could be rightly convicted under the act of disturbing the public peace, and that the conviction must be quashed. *Beaty* v. *Glenister*, 51 L. T. 304.

Knowledge by persons peaceably assembling for a lawful object that their assembly will be forcibly opposed by other persons under circumstances likely to lead to a breach of the peace on the part of such other persons does not render such assembly unlawful. *Beatty* v. *Gillbanks*, 15 Cox, C. C. 138.

Committal in Default of Sureties.]—A justice is authorised to require sureties of the peace for a limited term, according to his discretion, and need not bind the party over to the next sessions only. *Willes* v. *Bridger*, 2 B. & Ald. 278.

A justice's warrant, committing a party in default of his finding sureties to keep the peace, is bad, if the commitment is for no definite time, but until he shall find such sureties or be discharged by due course of law. *Prickett* v. *Gratrex*, 8 Q. B. 1020; 2 New Sess. Cas. 429; 15 L. J., M. C. 145; 10 Jur. 556.

It is not necessary that such warrant should fix the amount in which sureties are to be given. *Ib.*

A commitment of a party who refuses to give sureties to keep the peace need not be made to the gaol, but is good if made to the house of correction. *Aston, Ex parte*, 1 New. Sess. Cas. 73; 12 M. & W. 456; 13 L. J., M. C. 52; 8 Jur. 293.

Where upon articles of the peace being exhibited the sessions order the defendant to find sureties in a certain amount, and do not order that in case of default he shall be imprisoned, magistrates out of sessions have no power to commit upon refusal to find such sureties. *Reg.* v. *Huntingdon JJ.*, 1 Cox, C. C. 209.

Sureties for Good Behaviour.]—H. R., at the execution of an habere to enforce payment of rent, addressed a number of persons, including the tenant under eviction, as follows:—"Pay no rent to the landlord. We will make you right about the land; we will build you a house at any expense, and make you comfortable during the winter." A summons was issued against H. R., calling on her to shew cause why she should not be bound over to be of good behaviour, and at the hearing of the summons H. R. was ordered to find bail to be of good behaviour for six months, and in default to be imprisoned for one month. She refused to give bail, and was accordingly imprisoned for one month:—Held, on motion to shew cause against a conditional order for a writ of certiorari, that the justice had jurisdiction to make the order. *Reg.* v. *Cork JJ.*, 15 Cox, C. C. 78.

An information was laid against a person for an assault and battery, and a summons issued against him for that offence. At the hearing, the justices dismissed the information, and gave him a certificate, but they ordered him, in respect of the charge, to enter into his own recognizance in 50*l.* to keep the peace for six months:—Held, that, notwithstanding the justices dismissed the information, they were legally justified in requiring a recognizance to keep the peace. *Davis, Ex parte*, 24 L. T. 547.

Where a summons for assault also called on the defendant to shew cause why she should not be bound over to keep the peace, and the defendant having appeared, the magistrates convicted her of assault, and ordered her to be imprisoned:—Held, that the conviction was right. *Kennington* v. *Daniel*, 22 L. R., Ir. 667.

E. having laid an information before a justice, complaining that M., after having assaulted, had threatened him, and praying that he might be bound over to keep the peace, the case was heard at petty sessions, and an assault was proved. The justices convicted M. of the assault, and also obliged him to find sureties of the peace, notwithstanding the protest of E. against the conviction, and his request that only sureties of the peace should be required from M.:—Held, that the magistrates had no jurisdiction to convict M. of the assault. *Reg.* v. *Totness JJ.* or *Deny*, 2 L. M. & P. 230; 20 L. J., M. C. 189; 15 Jur. 227.

The court refused to interfere with the discretion of magistrates in taking security for keeping the peace. *Rex* v. *Tregarthan*, 2 N. & M. 379; 5 B. & Ad. 678.

The power of justices to require sureties to keep the peace is derived from the commission of the peace, and it is confined to cases where a party makes it appear to the justices that he goes in fear and in danger of personal violence from another, by reason of threats employed by him, or by reason of looks, gestures and conduct; but the party must himself draw the inference that he is in fear of personal violence. *Reg.* v. *Dunn*, 4 P. & D. 415; 12 A. & E. 599; 1 Arn. & H. 8; 5 Jur. 721.

—— **Several Distinct Instances of Misconduct.**]—In an application under the statute 34 Edw. 3, c. 1, to bind a party over to be of good behaviour, several distinct instances of misconduct may be alleged and relied upon. *Reg.* v. *Queen's County JJ.*, 10 L. R., Ir. 294.

—— **Original Jurisdiction of Queen's Bench.**]—Notices were served on D., H. and L., of applications to the Queen's Bench Division, requiring

them to find sufficient sureties to be of good behaviour towards her majesty and all her majesty's subjects, or in default that they should be committed to prison. These applications were made in consequence of certain speeches delivered by D., H. and L., at public meetings held in the counties of Meath and Carlow, in the interests of the Irish National League. The affidavits on which the applications were grounded deposed to the existence for some years preceding of an agrarian agitation in various parts of Ireland, including the counties of Meath and Carlow; that in consequence thereof great excitement prevailed; and that a combination had been set on foot against the payment of rent; and that numerous crimes and outrages had been committed in various parts of the country. It was further stated that, at a public meeting in the county of Meath, attended by upwards of 4,000 persons, D. in addressing the meeting, after condemning the system of using large portions of land for grazing, said:—"Unless wise and just legislation should prevent its necessity, the time will come when the starving people of Donegal and Connemara will be told to march down in their serried phalanxes upon the plains and seize the lands upon which to live like civilized beings in a Christian country." And again, "I propose that in case Mr. Gladstone does not apply the surplus of the Arrears Act estimates to save the people, no rent should be paid from November till next May, that out of this sum a portion should be placed in the National Relief Fund, to save our starving people from starvation." H., at a meeting in the county of Carlow, held for the purpose of founding a branch of the "National League," described the government as simply "a system of land piracy"; "an organisation against the will of the people," "an organisation of so many pirates and so many brigands." "It," i.e. the government, "was entitled to the same moral respect as a cut-purse, who held a revolver at your head and said to you, 'Your money or your life.'" Q. addressed a public meeting in Meath, also held for the establishment of a branch of the "National League," and in his speech he described himself as a rebel; spoke hopefully of the resuscitation of a former organised body known as the Land League, and which, after a period of active operation, had been proclaimed as illegal by the government, and finally exhorted the farmers not to pay any rent. Q. made an affidavit, in which he stated that the report of his speech relied on in support of the application was not a full or accurate report. No affidavit was made by either D. or H.; nor did any of the parties summoned offer any apology or promise to abstain from similar conduct in the future. It was argued on behalf of Q. (who appeared by counsel) that the Queen's Bench Division had no jurisdiction in the matter of the applications, the jurisdiction to order persons to find sureties for good behaviour having been created by the 34 Edw. 3, c. 1, and conferred only on the justices directed to be appointed:—Held, that the judges of the Queen's Bench Division, as conservators of the peace, have original jurisdiction, independently of the statute of Edw. 3, to require sureties for good behaviour from persons whose acts or language are shewn to be likely to endanger the public peace. *Seymour, Ex parte, Davitt, In re.* 15 Cox, C. C. 242; 12 L. R., Ir. 46.

Held, also, that these were proper cases in which to exercise that jurisdiction. *Ib.*

—— **In Case of Libel.**]—A warrant of commitment recited that the plaintiff had been brought before a justice of the peace, charged on the oath of T. P. with having written on the pavement of a lane offensive words reflecting on the character of R. J. W., viz. &c.; and that it had been stated to the justices, on the oath of T. P., that the continued writing for some time past of these offensive words was calculated to produce a breach of the peace; and that T. P. prayed that the plaintiff might be required to find sureties to keep the peace. The justice ordered and adjudged that the plaintiff should enter into his recognizance in 30*l.*, and two sufficient sureties in 15*l.* each, to keep the peace for three calendar months. After stating a refusal by the plaintiff, it commanded that he should be conveyed to prison, and there kept for three calendar months, unless he in the meantime entered into such recognizance, with such sureties. The warrant was afterwards quashed on motion, and an action of trespass was brought:—Held, first, that the warrant put in against the justice was evidence for him of the information recited in it, for the purpose of shewing on what grounds and in relation to what subject-matter he was acting when he granted it. *Haylock* v. *Sparke*, 1 El. & Bl. 471; 22 L. J., M. C. 67; 17 Jur. 731.

Held, secondly, that it must be taken that he intended to exercise the jurisdiction of requiring sureties for good behaviour, although "sureties to keep the peace" were mentioned in the warrant. *Ib.*

Held, thirdly, that a justice of the peace has jurisdiction to require sureties for good behaviour in some cases of libel against private individuals; and therefore the action would not lie, being brought for an act done by him in the execution of his duty with respect to a matter within his jurisdiction, within 11 & 12 Vict. c. 44, s. 1. *Ib.*

Charge of Assault—Compromise.]—When a complaint has been made to magistrates of an assault with a view to an adjudication thereon, they thereby gain jurisdiction to determine the case, and the party injured cannot, by afterwards compromising the case, take away that jurisdiction. *Reg.* v. *Wiltshire JJ.*, 8 L. T. 242; 11 W. R. 594.

After issuing a summons for a common assault, and before the day appointed for hearing by the justices, the parties compromised the matter, and informed the justices thereof. The justices, however, proceeded to hear the summons, and convicted, the prosecutor having given evidence, though involuntarily:—Held, that the conviction could not be quashed on the ground of want of jurisdiction. *Ib.*

—— **Evidence disclosing a Felony.**] — An information was preferred by a female against a man, for that he "did unlawfully assault and abuse her, contrary to the statute." At the hearing it was agreed that the case should be taken as that of an aggravated assault, under 16 & 17 Vict. c. 30. The evidence, if true, shewed that a rape had been committed; but the justices convicted him:—Held, per Pollock, C.B., and Wilde, B., that they had no jurisdiction.

Per Bramwell and Channell, BB., contra. *Thompson, In re*, 6 H. & N. 193; 30 L. J., M. C. 19; 7 Jur. (N.S.) 48; 3 L. T. 409; 9 Cox, C. C. 70; 9 W. R. 203. See *S. C.*, in Q. B., sub nom. *Thompson, Ex parte*, 6 Jur. (N.S.) 1247; 3 L. T. 294.

Under 24 & 25 Vict. c. 100, s. 42, a female charged a man before justices with an assault, and on her examination deposed not only that he had assaulted her and hurt her knee, but that he had had connection with her, though "she did not consent, and did what she could to resist him." The other evidence shewed that the part of her statement which related to indecent assault was very improbable, and the justices, disbelieving it, convicted him of an assault:—Held, that they had jurisdiction to do so, although the evidence, if believed, disclosed a felony. *Wilkinson* v. *Dutton*, 3 B. & S. 821; 32 L. J., M. C. 152; 9 Jur. (N.S.) 1104; 8 L. T. 276.

—— **Evidence on Hearing.**]—When articles of the peace are exhibited against any person, the person against whom they are exhibited may not give evidence before the justices in contradiction of the facts stated in the articles. If it appears on oath to the satisfaction of the justices that the complainant has been threatened, it is their duty to require recognizances to be entered into to keep the peace. *Lort* v. *Hutton*, 45 L. J., M. C. 95; 33 L. T. 730.

Certificates.]—H. preferred an information and complaint before justices in petty sessions against the appellant for indecent behaviour whilst drunk in the streets, contrary to 23 & 24 Vict. c. 27, s. 40. H., after being examined in chief, admitted in cross-examination that he was not a constable or peace officer of the borough, whereupon the information was dismissed, but no certificate of dismissal was given or applied for. An information for the same offence was then preferred against the appellant by a constable of the borough, and came on to be heard at the next petty sessions, when an application was made to the justices for a certificate of dismissal of the former information. The justices refused to grant the certificate. *Foster* v. *Hull*, 20 L. T. 452.

—— **Effect of.**]—A man assaulted a wife, and for such assault was fined by the justices under 24 & 25 Vict. c. 100, and paid the fine:—Held, that an action by the husband in respect of the consequential damage to himself by reason of the assault on his wife was barred under s. 45. *Masper* v. *Brown*, 45 L. J., C. P. 203; 1 C. P. D. 97; 34 L. T. 254; 24 W. R. 369. And see *Holden* v. *King*, 46 L. J., Ex. 75; 35 L. T. 479; 25 W. R. 62.

And see CRIMINAL LAW (ASSAULT).

—— **Collusion.**]—Where a master had by collusion and for the purpose of exonerating himself from penalties under the revenue laws procured a conviction of one of his servants for the same offence which he had himself committed, and a certificate of two justices which operated as a discharge of himself, the court, upon certiorari, quashed the conviction. *Reg.* v. *Gillyard*, 12 Q. B. 527; 17 L. J., M. C. 153; 12 Jur. 655.

Wilful Damage to Premises.]—Where a landlord, during the existence of a tenancy, charged his tenant, under 2 & 3 Vict. c. 71, s. 38, with having three months before wilfully damaged his premises:—Held, that the magistrate had no jurisdiction, and that the charge should have been made within one month. *Dowell* v. *Beningfield*, Car. & M. 9.

Playing Bowls.]—Justices have no jurisdiction to punish persons convicted of playing at bowls as disorderly persons. *Rex* v. *Clarke*, Cowp. 35.

Offence against Statute other than that under which Summons issued.]—A defendant was summoned under the Municipal Corporations Act (5 & 6 Will. 4, c. 76), s. 81, for assaulting a constable in the execution of his duty. The magistrates dismissed the summons, but convicted him, under the 24 & 25 Vict. c. 100, s. 42, for a common assault:—Held, that the conviction was bad, as being under a different statute from that under which the summons was issued. *Reg.* v. *Brickhall*, 33 L. J., M. C. 156; 10 Jur. (N.S.) 677; 10 L. T. 385; 12 W. R. 826.

A. laid an information before a justice of the peace that a house was "kept or used as a common gaming-house" within the meaning of the "Act to amend the Law concerning Games and Wagers" (8 & 9 Vict. c. 109), and thereupon the justice granted a warrant under which B. was arrested at the house in question. He was brought before two justices, and charged under the "Act for the Suppression of Betting-houses" (16 & 17 Vict. c. 119), s. 3, as the person, who "having the management of a room" in the house, used it "for the purpose of betting with persons resorting thereto." No information was laid, nor was any summons issued, under the last-named statute; and B. did not waive this omission. The charge having been heard, he was convicted, and a penalty was imposed:—Held, that the conviction was wrong, and must be quashed. *Blake* v. *Beech*, 45 L. J., M. C. 111; 1 Ex. D. 320; 34 L. T. 764.

A. was summoned on a charge of being drunk, and guilty of riotous behaviour, an offence punishable under the Towns Police Clauses Act (10 & 11 Vict. c. 89, s. 29). The justices convicted him of drunkenness, under 21 Jac. 1, c. 7:—Held, that the conviction was bad, and that it was not a variance within 11 & 12 Vict. c. 43, s. 1. *Martin* v. *Pridgeon*, 1 El. & El. 778; 28 L. J., M. C. 179; 5 Jur. (N.S.) 894; 7 W. R. 412; 8 Cox, C. C. 170.

Repeal of Empowering Acts.]—If justices of the peace adjourn their proceedings to a day subsequent to the repeal of an act of parliament under which they act, their jurisdiction will cease. *Rex* v. *London JJ.*, 3 Burr. 1456.

Jurisdiction of High Court, when Ousted.]—The jurisdiction of the superior courts at Westminster is not to be ousted but by express words or necessary implication. *Cates* v. *Knight*, 3 Term Rep. 442.

The jurisdiction of the court to try the legality of a distress on the goods of A., for an assessment upon B., is not taken away by 43 Geo. 3, c. 99, s. 33, which enacts, that "if any question or difference shall arise upon taking any distress, the same shall be determined and ended by two or more of the commissioners of taxes"; and consequently, an action is maintainable at common law for a wrongful distress. *Shaftesbury (Earl)* v. *Russell*, 3 D. & R. 84; 1 B. & C. 666; 1 L. J. (O.S.) K. B. 202; 25 R. R. 534.

So, the 11 Geo. 2, c. 19, s. 4, authorising a landlord to apply to magistrates, and empowering them to proceed to determine the matter in a summary way, when the value is under 50*l.*, and to issue their warrant to levy the amount adjudged by distress, does not oust the superior courts of their jurisdiction. *Stanley* v. *Wharton*, 9 Price, 301 ; 10 Price, 138 ; 23 R. R. 683. *Basten* v. *Carew*, 5 D. & R. 558 ; 3 B. & C. 649 ; 3 L. J. (O.S.) K. B. 111 ; 27 R. R. 453.

Even after the landlord has made an application to the justices. *Horsefall* v. *Davey*, 1 Stark. 169 ; Holt, 147 ; 17 R. R. 624.

Question of Jurisdiction, how Determined—Prohibition.]—Where the jurisdiction of justices depended upon a particular interpretation of a statutory offence under the Railways Clauses Acts, and the justices adjourned the hearing of a summons for such an offence for the question as to their jurisdiction to be determined, an application for a writ of prohibition against the justices is a just and convenient mode of procedure. *Reg.* v. *Longe*, 66 L. J., Q. B. 278.

5. Offences against.

Attempted Bribery.]—A person was charged with attempting to corrupt a justice of the peace, and the chairman of the bench of a licensing division, before whom he was about to apply for a licence for a public-house, by sending a sum of money to him. The indictment alleged that, at the time he so attempted to corrupt the justice, he knew that he was to be the chairman at the licensing meeting :—Held, that that allegation was surplusage, and might be rejected, the indictment being perfectly good without it. *Reg.* v. *Gurney*, 10 Cox, C. C. 550.

A person sending money to a magistrate with the intention of producing any effect upon his decision is guilty of an attempt to corrupt. *Ib.*

Insult.]—A person indicted for insulting a justice in the execution of his office will not be discharged from the prosecution by the death of the justice. *Rex* v. *Ellers*, 1 Wils. 222.

Contempt.]—If a justice commits for a contempt of himself in his office, it can only be by warrant in writing. *Mayhew* v. *Locke*, 2 Marsh. 377 ; 7 Taunt. 63.

A commitment for punishment must be for a time certain. Where, therefore, a party was committed by two justices for a contempt towards them in their office, "until discharged by due course of law" :—Held, that such commitment was bad. *Rex* v. *James*, 1 D. & R. 559 ; 5 B. & Ald. 894 ; 24 R. R. 611.

Where a party was committed by a justice, "for refusing to give evidence before him, touching a certain riot and disturbance," without shewing that there had been a person charged before the justice, and that the plaintiff was apprised of the existence of such charge, with respect to which he was required to be examined as a witness :—Held, that the warrant of commitment was no justification of the magistrate in an action of trespass. *Cropper* v. *Horton*, 8 D. & R. 166.

A feme covert being a material witness, who refuses to appear upon a charge of felony brought before a justice, may be committed. *Bennet* v. *Watson*, 3 M. & S. 1 ; 15 R. R. 373.

—— **Quarter Sessions.**]—A court of quarter sessions, being a court of record, has power to punish for contempt ; and, if that power is exercised on reasonable grounds, the Court of Queen's Bench will refuse to review the decision of the judge who inflicted the punishment. *Pater, In re*, 5 B. & S. 299 ; 33 L. J., M. C. 142 ; 10 Jur. (N.S.) 972 ; 10 L. T. 376 ; 12 W. R. 823 ; 9 Cox, C. C. 544.

Arrest outside Court for Contempt committed in Court.]—Where, at petty sessions, a contempt committed in court is brought to the notice of the justices there sitting, and while the offender is still in court, the justices order that he be attached to answer there and then for such alleged contempt, the mere fact that the order so made is carried out after the offender, to evade arrest, has left the court, is not sufficient to render his arrest illegal. *Mitchell* v. *Smith*, [1894] 2 Ir. R. 351.

D. PROCEDURE BEFORE.

1. Informations or Complaints.

Form of.]—Informations must be taken as nearly as possible in the language used by the party. *Cohen* v. *Morgan*, 6 D. & R. 8 ; 28 R. R. 533. See *Carratt* v. *Morley*, 1 G. & D. 275 ; 1 Q. B. 18 ; 10 L. J., Q. B. 259 ; 6 Jur. 259.

An information under 4 Geo. 4, c. 34, s. 3, described the defendant as having contracted to serve "T. B. and his partners." At the hearing it appeared that the contract of service was between the defendant and "T. B., on behalf of himself and his partners, constituting the R. M. and H. Coal Company" :—Held, that this variance, if one, was cured by 11 & 12 Vict. c. 43, s. 1. *Whittle* v. *Frankland*, 2 B. & S. 49 ; 31 L. J., M. C. 81 ; 8 Jur. (N.S.) 382 ; 5 L. T. 639.

No magistrate can proceed without an information ; but unless the statute requires the information to be in writing or upon oath, it is not necessary that it should be so. *Reg.* v. *Millard*, Dears. C. C. 116 ; 22 L. J., M. C. 108 ; 17 Jur. 400 ; 1 W. R. 314 ; 6 Cox, C. C. 150.

An information on oath under 6 Geo. 4, c. 129, is sufficient if there is a statement of the facts constituting the offence, though it is not a statement of the offence as described in the act. *Perham, In re*, 5 H. & N. 30 ; 29 L. J., M. C. 33 ; 5 Jur. (N.S.) 1221 ; 1 L. T. 106.

A by-law of the Board of Trade for the regulation of a steam tramway provided that "no smoke or steam shall be emitted from the engines so as to constitute any reasonable ground of complaint to the passengers or the public," under a penalty :—Held, that an information and conviction for permitting smoke to escape from an engine "contrary to the by-laws of the Board of Trade" was bad. *Cotterill* v. *Lemprière*, 59 L. J., M. C. 133 ; 24 Q. B. D. 634 ; 62 L. T. 695 ; 17 Cox, C. C. 97 ; 54 J. P. 583.

—— **Negativing or Disproving Exceptions.**]—Where a prosecutor is not obliged to negative the exceptions in a statute, and negatives some of them only, that part of the information will be rejected as surplusage. *Rex* v. *Hall*, 1 Term Rep. 320.

But an information founded on a penal statute must negative the exceptions in the enacting clause creating the penalty, and also those con-

tained in a former clause to which the enacting clause refers in express terms. *Rex* v. *Pratten*, 6 Term Rep. 559.

An information, appearing to be laid more than ten days after the offence charged and proved to be committed, was sufficient upon the 19 Geo. 3, c. 50, s. 2, without negativing that the owner had, within ten days after the seizure, claimed the vessels seized. *Rex* v. *Chandler*, 14 East, 267.

—— **Duplicity.**]—An information for profanely cursing one profane curse several times repeated is not bad for duplicity, within 11 & 12 Vict. c. 43, s. 10. *Reg.* v. *Scott*, 4 B. & S. 368 ; 33 L. J., M. C. 15 ; 8 L. T. 662.

An information charging an offence in the alternative, is bad ; therefore, where the information charged the defendant with selling beer or ale without a licence :—Held, that it was bad both in matter and substance, and could not be made out by evidence, nor helped by intendment. *Rex* v. *North*, 6 D. & R. 143 ; 28 R. R. 538. And see *Rex* v. *Jukes*, 8 Term Rep. 536 ; 5 R. R. 445.

On the hearing of a charge before a magistrate it was objected that the information disclosed two offences, contrary to the provisions of s. 10 of the Summary Jurisdiction Act, 1848. The magistrate allowed the objection, and dismissed the summons, but stated a case for the opinion of the court :—Held, that, although the prosecutor might have been required to elect on which charge he would proceed, the inclusion of two offences in one information was a "defect in substance" within the meaning of s. 1 of the act, and that no objection to the information could be allowed in respect of it. *Rodgers* v. *Richards*, 66 L. T. 261 ; [1892] 1 Q. B. 555 ; 40 W. R. 331 ; 17 Cox, C. C. 474 ; 56 J. P. 281.

Two Informations—Distinct Charges—Proceeding with Second Information before Disposing of First.]—The appellant was charged by two informations with two offences under ss. 3 and 4 of the Indecent Advertisements Act, 1888, at the same time and place, the evidence being substantially the same in both cases. Upon the conclusion of the hearing of the first information the justices reserved their decision until they had heard the charge contained in the second information ; and, having done so, proceeded to convict the appellant on both charges, and sentenced him to a separate term of imprisonment on each charge :—Held, that the convictions must be quashed, inasmuch as the justices should have disposed of the charge contained in the first information before proceeding to deal with that contained in the second information. *Hamilton* v. *Walker*, 61 L. J., M. C. 134 ; [1892] 2 Q. B. 25 ; 67 L. T. 200 ; 40 W. R. 476 ; 17 Cox, C. C. 539 ; 56 J. P. 583.

—— **Withdrawing one.**]—Two informations were laid against a party, one charging him with the rescue of a person out of lawful custody, and the other with an assault on two police constables ; but on the party being brought up before the petty sessions, the first of these informations was withdrawn :—Held, that this was no valid ground of objection to proceed on the second information. *Galliard* v. *Laxton*, 2 B. & S. 363 ; 31 L. J., M. C. 123 ; 8 Jur. (N.S.) 642 ; 5 L. T. 835 ; 9 Cox, C. C. 127.

Assault—Complaint by or on behalf of the Party aggrieved — Condition precedent.] — A complaint by or on behalf of a person aggrieved by a common assault or battery is a necessary condition precedent to give justices jurisdiction to summarily convict the offender under 24 & 25 Vict. c. 100, s. 42. A police constable who takes a charge of common assault from the person assaulted is not, on the failure of the complainant personally to prefer the charge before the justices, a party who can prefer the complaint on behalf of the person aggrieved. *Nicholson* v. *Booth*, 57 L. J., M. C. 43 ; 58 L. T. 187 ; 16 Cox, C. C. 373 ; 52 J. P. 662.

Refusal to Hear.]—Where an information is laid before justices of the peace for an indictable misdemeanour, it is in their discretion to hear, or to refuse to hear it, and leave the complaining party to originate his prosecution before a grand jury. *Reg.* v. *Ingham*, 14 Q. B. 396 ; 3 New Sess. Cas. 689 ; 19 L. J., M. C. 69 ; 14 Jur. 223. See *Reg.* v. *Bather*, 42 L. T. 532 ; 44 J. P. 490, infra, col. 581.

Before whom.]—The provision in 3 Geo. 4, c. 23, s. 2, that in all cases where two or more justices, deputy-lieutenants or others, are authorised to hear and determine any complaint, one justice, &c., shall be competent to receive the original information, does not repeal provisions of former statutes, expressly requiring more than one justice, &c., to receive an information. *Reg.* v. *Griffin*, 9 Q. B. 155 ; 15 L. J., M. C. 120.

By 8 & 9 Vict. c. 87, s. 82, all penalties imposed by an act relating to the customs may be sued for, prosecuted and recovered by action of debt, or by information before two justices of the peace. By s. 83, upon the exhibiting any information before any justice for any offence against any act relating to the customs, such justice is required to issue a summons for the appearance of the party before two justices of the peace :—Held, that s. 82 referred only to the hearing of the information ; and that by s. 83, the information might be exhibited before one justice. *Reg.* v. *Harwich JJ.*, 3 New Sess. Cas. 368 ; 13 Q. B. 237 ; 18 L. J., M. C. 106 ; 13 Jur. 259.

An information under 7 & 8 Geo. 4, c. 29, s. 39, for stealing a growing ash-tree, the property of M., was preferred by B. to a justice of the peace, who summoned the offender. At the time and place fixed in the summons he appeared and was convicted by another magistrate, the defendant, the summoning magistrate, being present, but not taking any part. The conviction ordered the plaintiff to forfeit and pay over and above the value of the tree stolen 5*s.*, and for the value of the tree stolen 1*s.* ; and also to pay 1*l.* 4*s.* 6*d.* for costs, to be paid on or before the 19th of March next ; and in default of payment of the sums, to be imprisoned in the house of correction, and there kept to hard labour for one month, unless the sums should be sooner paid. An action having been brought against the defendant :—Held, that the conviction was good, notwithstanding it had not proceeded on the information of the party aggrieved, or been made by the magistrate who received the original information, and issued the summons on which the defendant appeared. *Tarry* v. *Newman*, 15 M. & W. 645 ; 2 New Sess. Cas. 449 ; 15 L. J., M. C. 160.

A deposition on oath taken by the justice's clerk, the justice not being present, nor at any time seeing, examining or hearing the deponent,

is irregular, and no justification of proceedings founded upon it. *Caudle* v. *Seymour*, 1 Q. B. 889; 1 G. & D. 454; 10 L. J., M. C. 130.

Defect in Information — Certiorari.]—Mere want of form in an information laid under a statute, and to which no objection is taken, does not deprive the magistrates of jurisdiction to hear and determine the case. *Reg.* v. *Bradley*, 63 L. J., M. C. 183; 10 R. 183; 70 L. T. 379; 17 Cox, C. C. 739; 58 J. P. 199.

Where the writ of certiorari is taken away by statute, it will nevertheless lie in the case of excess of jurisdiction; but a merely formal defect in an information whereby an alleged offence is not properly stated is not an excess within the meaning of this rule. *Ib.*

Want of Information—Waiver.]—A. and B. were apprehended on a charge of felony, for setting fire to the letters contained in a pillar letter-box. Upon their appearing upon the charge before the justices, they were remanded in order that the postmaster-general might be consulted as to the precise nature of the charge to be preferred; and upon their subsequent appearance before the justices, were charged with a misdemeanour, under 24 & 25 Vict. c. 97, s. 52. The attorneys on their behalf called upon the prosecution to prove the case; witnesses were examined and cross-examined, and at the close of the case it was objected that the justices had no jurisdiction, inasmuch as there was no information upon oath, and they were not found committing the offence, and, therefore, were illegally in custody. The justices nevertheless convicted:—Held, that the conviction was right. *Turner* v. *Postmaster-General*, 5 B. & S. 756; 34 L. J., M. C. 10; 11 Jur. (N.S.) 137; 11 L. T. 369; 13 W. R. 89; 10 Cox, C. C. 15.

Proof of Information.]—An examined copy of the magistrate's conviction, reciting the information, is sufficient proof of an information. *Scarth* v. *Gardener*, 5 Car. & P. 38.

2. Summons.

Application for—Discretion—Mandamus.]—Where justices have a discretion to grant or refuse a summons, and exercise that discretion properly, the court will not grant a mandamus to hear and determine the matter. *Reg.* v. *Huggins*, 60 L. J., M. C. 139.

Refusal to Issue.]—When a justice has refused to issue a summons upon complaint, other justices may subsequently refuse to hear an information, and take the recognizances of the prosecutor to prosecute in the same matter. The Vexatious Indictments Act, 1859, does not apply to such proceedings unless a summons or a warrant has been granted upon which it can take effect. *Reg.* v. *Bather*, 42 L. T. 532; 44 J. P. 490.

So, where two police officers charged G., a publican, with supplying liquor to three men whom they alleged to be intoxicated, and the charge was dismissed, on an application on behalf of G. to a justice of the peace for summonses for perjury against the policeman, the application was refused. Subsequently an application was made by G. to a bench of magistrates sitting at petty sessions to grant summonses against the policemen, or in the alternative to take the recognizances of G. under the Vexatious Indictments Act:—Held, that the bench were not bound, under the circumstances, to hear the information at all, and that 22 & 23 Vict. c. 17, s. 2, did not apply until after a summons or a warrant had been granted. *Ib.*

If on an application to justices for a summons for an indictable offence, they have heard and determined the application, and, on the merits, have declined to grant it, the court will not grant a mandamus to compel them to review their decision. *Reg.* v. *Fawcett, Hodson, Ex parte*, 19 L. T. 396; 11 Cox, C. C. 305. And see *Reg.* v. *Adamson*, 45 L. J., M. C. 46; 1 Q. B. D. 201; 33 L. T. 840; 24 W. R. 250.

Secus, if they have refused to hear the application, or if, after hearing, have refused to grant it from a mistaken view of their duty, amounting to a declining of jurisdiction. *Ib.*

—— **Previous Decision — Information Disclosing no Fresh Offence.**]—In 1879, a complainant laid an information, upon which a summons was issued, against a gas and water company for penalties alleged to have been incurred in consequence of non-compliance with certain provisions of a local act. The justices dismissed the summons, on the ground that the complaint had not been made within six months after the commission of the offence, which they considered was not a continuing offence. They offered to state a case, but the matter was allowed to drop. In 1890, the same complainant laid a similar information against the company, when the justices, having regard to their previous decision, considered they had no jurisdiction to go into the matter again, and refused to issue a summons:—Held, that, instead of declining jurisdiction, the justices should have heard and determined whether, upon the circumstances disclosed, a summons ought to have been issued. *Reg.* v. *Byrde*, 60 L. J., M. C. 17; 63 L. T. 645; 39 W. R. 171; 17 Cox, C. C. 187; 55 J. P. 310.

—— **Information not Disclosing Indictable Offence.**]—Where a magistrate has refused a summons on the ground that the information does not disclose an indictable offence, the high court of justice has no jurisdiction to review his decision, either as to law or as to fact, and therefore, in such a case, a rule, under 11 & 12 Vict. c. 44, s. 5, calling upon a magistrate to shew cause why he should not hear and determine the application for a summons, will not be granted. *Lewis, Ex parte* (No. 2), 57 L. J., M. C. 108; 21 Q. B. D. 191; 59 L. T. 338; 37 W. R. 13; 16 Cox, C. C. 449; 52 J. P. 773.

Summons Issued by Magistrate who had not heard Complaint—Appearance by Defendant—Objection to Jurisdiction.]—On the 10th of October, 1889, a complaint under the Sale of Food and Drugs Acts was preferred to two justices, sitting as a court of summary jurisdiction, against D. for selling, on the 20th of September, milk not of the quality demanded. A summons was granted, but neither of these justices signed it; and on the 14th of October it was signed and issued by another justice who had not heard the complaint. On the return-day, the 23rd of October, D. appeared, and objected that the summons was invalid, and that the court then assembled had no jurisdiction to entertain the charge:—Held, that the summons had not been signed and issued in accordance

with Jervis's Act (s. 1), and, as a citation, was worthless. The defendant's appearance did not cure it. *Reg.* v. *Hughes* (4 Q. B. D. 614), distinguished. *Dixon* v. *Wells*, 59 L. J., M. C. 116; 25 Q. B. D. 249; 62 L. T. 812; 38 W. R. 606; 17 Cox, C. C. 48; 54 J. P. 725.

Amendment — Substituting Name.] — The manager of a company was summoned for breach of a by-law, and, on objection being taken, the justices amended the summons by substituting the company for the manager, and convicted the company:—Held, that the justices had no power to amend by substituting one name for the other. *Oxford Tramway Co.* v. *Sankey*, 54 J. P. 564.

Defect in Summons — Appearance without Objection.]—The jurisdiction of justices is not necessarily ousted by a defect in a bastardy summons, and their order is not a nullity if the defendant appears and takes no objection at the hearing. *Reg.* v. *Fletcher*, 51 L. T. 334; 32 W. R. 828; 48 J. P. 407.

Want of Summons—Waiver.]—If a party appears before justices, and allows a charge which they have jurisdiction to hear to be proceeded with without objecting, he waives the want of a summons. *Reg.* v. *Shaw*, 34 L. J., M. C. 169; 11 Jur. (N.S.) 415; 12 L. T. 470; 13 W. R. 692; 10 Cox, C. C. 66.

A man was brought before a magistrate upon one charge which the evidence wholly failed to support, whereupon another and a different charge was preferred against him, no fresh summons being taken out. He defended himself against the second charge at first, but after being remanded took objection to the magistrate's jurisdiction, that he was not legally in custody after the dismissal of the charge on which he had been summoned:—Held, that his objection was too late; he having submitted to the second charge being entered upon, the want of any summons or warrant to bring him legally before the magistrate was cured by his voluntary submission. *Egginton* v. *Pearl*, 33 L. T. 428. And see *Blake* v. *Beech*, 45 L. J., M. C. 111; 1 Ex. D. 320; 34 L. T. 764.

Joint Summons—Cruelty to Animals—Master and Servant.]—B. and C. his servant were both summoned for ill-treating and causing to be ill-treated a horse:—Held, that the prosecutor could not be compelled to elect which charge he would proceed with, but the justices ought to have convicted each of the offence he had committed. *Bartholomew* v. *Wiseman*, 56 J. P. 455.

Service of Summons, Length of Time for.]—C., a butcher at Cambridge, was summoned for removing cattle out of an infected area without a licence. The summons was left at his house on Saturday, 6th September, but as he had gone to Jersey it was sent by post, and did not come to his hands till the morning of the 20th, which was the day of hearing. He telegraphed to the chairman of the justices, giving some explanation, and his foreman asked for an adjournment, but the justices convicted him:—Held that a certiorari to quash could not be granted, as the justices were satisfied that there was reasonable time to instruct a solicitor, if C. had been so inclined. *Reg.* v. *Cambridgeshire JJ.*, 44 J. P. 168.

The time and place mentioned in a summons under 7 & 8 Vict. c. 15, s. 47, is in the discretion of the magistrates. *Hopwood, Ex parte*, infra.

A summons was left at eight o'clock in the morning at the house of a person, who was a collier, with his wife, requiring him to attend at a petty sessions to be held at eleven o'clock the next morning at a place eight miles off, to answer a charge of assault. He not returning home from the colliery till eleven o'clock at night, did not receive the summons till that hour. Not being able in time to arrange for some one to supply his place at the colliery, or to collect his witnesses to defend himself against the charge, he did not attend the petty sessions, and the justices convicted him of the assault in his absence:—Held, that the justices were the judges of whether the summons was served in a reasonable time before the hearing, and that the fact (not known to them) that he did not receive the summons until eleven o'clock at night did not deprive them of their jurisdiction to hear and adjudicate upon the complaint. *Williams, In re*, 2 L. M. & P. 580; 21 L. J., M. C. 46; 15 Jur. 1060.

By 4 & 5 Will. 4, c. 51, s. 19, a summons calling upon a party to appear to answer to an information, is to be served upon him ten days at least before the time appointed in the summons for the hearing. Where a summons was served on 20th September and the party was convicted on 30th September, the court held that the magistrate had acted without jurisdiction. *Mitchell* v. *Foster*, 12 Ad. & E. 472; 4 P. & D. 150; 9 L. J., M. C. 95.

Proof of Service—Evidence.]—By 7 & 8 Vict. c. 15, s. 47, every person who shall be summoned to answer any complaint shall be bound to appear at the time and place mentioned in the summons, and by s. 69 the certiorari is taken away. Several summonses by a magistrate were served upon the owner of a factory mill, to appear and answer complaints on the following morning. He instructed an attorney to appear before the magistrates and apply for an adjournment of the hearing; that being refused, the attorney said that he had no alternative but to submit to a conviction in all the cases in which the offence was proved. The first case was called on, and the offence proved, and the magistrates convicted in that case, and in the others without any evidence being given in them; and there was no proof of the service of the summons:—Held, that neither the want of proof of service of the summons, nor the absence of evidence in all the cases except the first, took away the jurisdiction of the magistrates, so as to entitle the party to a certiorari to remove the convictions. *Hopwood, Ex parte*, 4 New Sess. Cas. 174; 15 Q. B. 121; 19 L. J., M. C. 197; 14 Jur. 812.

Proceeding ex parte.]—Justices acting under 11 & 12 Vict. c. 43, s. 2, have no jurisdiction to convict ex parte during the absence of the accused person, unless satisfied that the summons left at his usual place of abode has been brought to his notice. *Smith, In re*, L. R. 10 Q. B. 604; 32 L. T. 394; 23 W. R. 523.

A fisherman went to sea in pursuit of his calling on the 9th of March. On the same day a summons for an assault was taken out against him, requiring him to answer the charge upon the 12th. On that day, it having been proved

that a summons was served upon him on the 10th. by leaving it with his mother at the usual place of abode, the justices convicted him in his absence. Upon the 9th of April he returned from sea, and was arrested under the conviction :—Held, that there was no evidence before the justices that a reasonable time had elapsed between the time of the service of the summons and the day for hearing the summons, and the justices had no jurisdiction to convict. *Ib.*

By a court of requests act, a summons for a debt might be served by leaving it at the dwelling-house of the debtor, with his servant or other person belonging to him, and if he did not appear, the creditor might proceed ex parte to judgment and execution. A summons was left with his wife at the house where the debtor, who was a seafaring man, and absent on a voyage to the East Indies, had lived before his departure from England, and where his wife still lived :—Held, that the summons had been duly served, and that the creditor might proceed to execution. *Culverson* v. *Melton*, 4 P. & D. 445 ; 12 A. & E. 753 ; 10 L. J., Q. B. 31.

Issue previous to Distress Warrant.]—By a statute establishing a gas-light company, it was enacted, "that if any person should refuse or neglect, for ten days after demand, to pay any rent due from him to the company for the supply of gas, such rent should be recovered by the company or their clerk by warrant of any justice of the peace for the town ; and it should be lawful for the company or their clerk, or any person acting under their authority, with such warrant to levy the sum so due by distress and sale of the goods of the party so neglecting or refusing to pay, or the same might be recovered by action" :—Held, that a warrant so issued by a justice, without previously summoning and hearing the party to be distrained upon, was illegal, though a summons and hearing were not in terms required by the act. *Painter* v. *Liverpool Gas Co.*, 3 A. & E. 433 ; 6 N. & M. 736 ; 2 H. & W. 233 ; 5 L. J., M. C. 108.

Where a magistrate grants a warrant in the nature of an execution, he is bound first to summon and hear the parties, unless the statute under which he acts clearly renders the discharge of that function ministerial only, or in some other manner dispenses with the summons and hearing. *Ib.*

Where a local act declares that it shall be lawful for justices to issue their warrant to levy a rate imposed by certain commissioners under the act, upon a neglect or a refusal to pay the rate, but does not contain any language directly making it compulsory on them to issue it, they may refuse to issue the warrant till the party has been summoned before them ; and the court will not compel them by mandamus to issue a warrant in the first instance without any summons. *Rex* v. *Stafford JJ.*, 5 N. & M. 94 ; 3 A. & E. 425 ; 1 H. & W. 328.

3. Appearance by Counsel or Solicitor.

Right.]—Before 11 & 12 Vict. c. 43, s. 10, and 6 & 7 Will. 4, c. 114, s. 2, on an investigation of a charge of felony before a justice of the peace, an attorney was only permitted to be present as a matter of courtesy. *Rex* v. *Borron*, 3 B. & Ald. 432 ; 22 R. R. 447. S. P., *Cox* v. *Coleridge*, 2 D. & R. 86 ; 1 B. & C. 37 ; 25 R. R. 298. See *Rex* v. *Staffordshire JJ.*, 1 Chit. 218. *Collier* v. *Hicks*, 2 B. & Ad. 663 ; 9 L. J. (o.s.) M. C. 138.

Adjournment for.]—Although a defendant has a right under 11 & 12 Vict. c. 43, s. 12, to make his full defence by counsel or attorney, this does not give him a right to have a case adjourned in order to procure such assistance, although he has had no opportunity of procuring it. *Reg.* v. *Biggins*, 5 L. T. 605. And see *Reg.* v. *Cambridgeshire JJ.*, 44 J. P. 168.

Sufficiency of.]—Upon a conviction under the Copyright Designs Act (6 & 7 Vict. c. 65), the party convicted making default was, upon complaint made, summoned to shew cause why he had not paid the amount of the penalties and costs, and why he should not be committed in default of payment, and be further dealt with according to law. Thereupon his counsel and attorney appeared to shew cause, but the magistrate refused to hear the case in the absence of the party himself, and granted a warrant reciting the summons and neglect of the party to appear, and commanding his apprehension to answer to the complaint made, and to be further dealt with according to law, under which the party was apprehended and imprisoned :—Held (the conviction being afterwards quashed), that the magistrate was liable to an action of trespass for the false imprisonment ; first, on the ground that the 11 & 12 Vict. c. 44, s. 2, did not apply to default on non-appearance to a summons after conviction ; and, secondly, assuming the section to apply to a summons after conviction, that there had been no default in appearance, the appearance by counsel and attorney being sufficient. *Bessell* v. *Wilson*, 1 El. & Bl. 489 ; 22 L. J., M. C. 94 ; 17 Jur. 664 ; 1 W. R. 126.

Plea of Guilty by an unauthorised Solicitor.]—A., residing in London, was summoned before justices at Hastings to answer to informations for maliciously injuring a window and maliciously injuring a bell-pull. Being unable from illness to attend, he admitted to his father that he had broken the window, but had not done it intentionally, and that there ought to be compensation. The father thereupon went to Hastings and communicated with an attorney there, who, under all the circumstances, recommended that he should appear and plead guilty. Accordingly on the day of hearing the attorney pleaded guilty, and the justices thereupon convicted A., and sentenced him to a term of imprisonment. In fact he had given neither to his father nor to the attorney any authority whatever to plead guilty, and he was not aware that his father intended to employ an attorney :—Held, that as he had not authorised an attorney to appear and plead guilty, the conviction was bad. *Reg.* v. *Axes*, 24 L. T. 64.

4. Hearing.

Sitting in Court on Wrong Day.]—A person was convicted of an offence before two magistrates sitting in the petty sessions court-house upon a day specially fixed by themselves, but which was not one of the days upon which the petty sessions of the district were usually held :—Held, that the magistrates were acting out of petty sessions, and, therefore, had no jurisdiction to convict without first requiring the person convicted to find bail for his appearance on the next regularly-

appointed petty sessions day. *Reg.* v. *Martin*, Ir. R. 8 C. L. 556.

Where Held.]—A conviction before the magistrates, upon an information under the game laws, is a judicial proceeding, at which all the king's subjects for whom there is room, and against whom there rests no special ground for exclusion, have a right to be present. (And 11 & 12 Vict. c. 43, s. 12, recognises this right in summary convictions.) *Daubney* v. *Cooper*, 5 M. & Ry. 314; 10 B. & C. 237; 8 L. J. (O.S.) K. B. 21.

The 16 & 17 Vict. c. 30, empowered two justices of the peace to punish, on summary conviction for assaults committed on females, or children under fourteen years, any person charged before them "sitting at a place where the petty sessions are usually held":—Held, that a warrant of commitment for such offence, in the form given by 11 & 12 Vict. c. 43, schedule (P 1) was good, although it did not state that the justices, before whom the party was charged, were sitting at a place where petty sessions are usually held. *Allison, In re*, 10 Ex. 561; 3 C. L. R. 319; 24 L. J., M. C. 73; 18 Jur. 1055; 3 W. R. 62.

The fact of a petty sessions for a division of a county having been usually held at several places within the limits of that division, did not constitute such places separate petty sessional divisions, under 8 & 9 Vict. c. 10, s. 10. *Reg.* v. *Whittles*, 3 New Sess. Cas. 397; 18 L. J., M. C. 96; 13 Jur. 403.

The quarter sessions ought to take judicial notice of the petty sessional divisions in their county. *Ib.*

—— **Petty Sessional Court-house.**]—In a borough which had no separate commission of the peace, the mayor and a county justice used to sit at the town hall, where they held petty and special sessions. Since the Summary Jurisdiction Act, 1879 (s. 20), petty sessions had been held at the county hall only, but latterly, since the Summary Jurisdiction Act, 1884, the justices again sat in the town hall:—Held, that the town hall was a petty sessional court-house within the meaning of s. 20 of the Summary Jurisdiction Act, 1879, being a place where justices were accustomed to assemble. *Jones* v. *Jones*, 51 J. P. 198.

By Whom.]—Where an act of parliament empowers two justices to execute a judicial act, they must meet and execute it together. *Rex* v. *Forrest*, 3 Term Rep. 38; 1 R. R. 628. S. P., *Rex* v. *Great Marlow*, 2 East, 244; 6 R. R. 420. *Rex* v. *Hamstall Ridware*, 3 Term Rep. 380. *Weller* v. *Toke*, 9 East, 364. *Penny* v. *Slade*, 7 Scott, 285; 5 Bing. (N.C.) 319; 8 L. J., C. P. 221.

Discretion as to severing Defence.]—At petty sessions an information was laid against two persons charging that they did use a gun and kill two pheasants contrary to 1 & 2 Will. 4, c. 32, s. 3; each claimed to be tried separately in order to call the other as a witness; the justices refused, and heard the charge against both together, and convicted them, and a conviction was drawn up separately against each of them, imposing a penalty of 3*l.*:—Held, that it was in the discretion of the justices whether they would hear the charge separately or not; that, as the penalty was imposed on every person acting in contravention of the statute, each was separately liable to the whole penalty, and that separate convictions were right. *Reg.* v. *Littlechild*, *Reg.* v. *Heslop*, 40 L. J., M. C. 137; L. R. 6 Q. B. 293; 24 L. T. 233; 19 W. R. 748.

S. managed his father's farm, his father being an invalid, and while working in a field, part of the farm, forbade P., E. and others, who were out with the Taunton Vale foxhounds, in pursuit of a fox, from entering that field. P. insisted upon riding into the field, S. turned his horse back. P. and E. then committed an assault upon S., for which they were summoned by S. before the justices and jointly charged in the information. The justices refused to allow P. and E. to sever their defence, so that they might give evidence for each other, and convicted them both:—Held, that such conviction was right. *Paul* v. *Summerhayes*, 48 L. J., M. C. 33; 4 Q. B. D. 9; 39 L. T. 574; 27 W. R. 215; 14 Cox, C. C. 202.

The 1 & 2 Will. 4, c. 32, does not apply to such a case. *Ib.*

—— **Waiver.**]—Where there are general charges against several defendants, but the evidence against them all is the same, and they are all tried at the same time, and each is separately convicted, no objection having been raised at the time by the defendants to this course of proceeding, such convictions cannot afterwards be objected to upon the ground that each defendant should have been tried separately. *Reg.* v. *Biggins*, 5 L. T. 605.

Discretion to reduce Fine—Cotton Cloth Factories Act, 1889.]—Where by s. 13 of the Cotton Cloth Factories Act, 1889, a fine of "not less than 5*l.* shall be imposed" for the first offence, which offence is to be dealt with by a court of summary jurisdiction, the general discretion to reduce fines given by s. 4 of the Summary Jurisdiction Act, 1879, must be taken to be limited in this particular instance to that extent. *Osborn* v. *Wood*, 66 L. J., Q. B. 178; [1897] 1 Q. B. 197; 76 L. T. 60; 45 W. R. 319; 18 Cox, C. C. 494; 61 J. P. 118.

Dismissal of Charge—Trifling Nature.]—Upon hearing an information against the owner of a dog "for keeping a dog without a licence," the justices cannot dismiss the charge "as of so trifling a nature that it is inexpedient to inflict any punishment," in the exercise of the discretionary power given to them by s. 16 of the Summary Jurisdiction Act, 1879, though they might exercise such a discretion on condition of the licence being then and there paid for by the owner so charged. *Phillips* v. *Evans*, 65 L. J., M. C. 101; [1896] 1 Q. B. 305; 74 L. T. 314; 44 W. R. 429; 18 Cox, C. C. 300; 60 J. P. 120.

Where Property laid in several Persons.]—In an information for malicious injury to property under 24 & 25 Vict. c. 97, s. 52, where the ownership is laid in several persons, and it appears that only one of these is the legal owner, the justices ought not to dismiss the information, but ought to hear the case, or if they think the variance likely to mislead, to adjourn the hearing. *Ralph* v. *Hurrell*, 44 L. J., M. C. 145; 32 L. T. 816.

Adjournment of Hearing.]—By a railway act, penalties for breach of by-laws were recoverable before a justice of the peace, and officers of the railway company were empowered to seize

offenders under certain circumstances, and to convey them before a justice without any warrant, such justice being "empowered and required to proceed immediately to the conviction or acquittal of such offender":—Held, that, although the act constituting the offence gave no power to the justice to remand the accused, yet that by 11 & 12 Vict. c. 43, s. 16, the justices had power to adjourn the hearing and to issue a warrant for committal of the accused to the house of correction. *Gelan* v. *Hall*, 2 H. & N. 379; 27 L. J., M. C. 78; 5 W. R. 757.

Justices sitting at petty sessions have not only the power of adjournment given them by the Petty Sessions Act (14 & 15 Vict. c. 93), but also an inherent power of adjourning a case at any time to any further sessions. But where a case is fully heard by several justices, and only adjourned for the purpose of determining and pronouncing the order, the same justices who heard the case must also concur in the order pronounced. *Reg.* v. *Cork JJ.*, 18 L. R., Ir. 99.

—— **Civil Proceedings Pending.**]—A magistrate cannot judicially consider, as ground for adjourning a summons for libel, pending civil proceedings between different parties for a different libel, though arising out of the same matters. *Reg.* v. *Evans*, 62 L. T. 570; 17 Cox, C. C. 81; 54 J. P. 471.

—— **Conviction in absence of Person charged.**]—Where a defendant, having appeared in answer to a summons before justices at petty sessions, during the hearing of the case forcibly leaves the court, the justices may adjourn, and at the adjourned sitting of the court, if the defendant do not appear, may in his absence convict him of the offence with the commission of which he was charged. *Reg.* v. *Carrick-on-Suir JJ.*, 16 Cox, C. C. 571.

—— **Absence of Informant.**]—Justices having refused to hear certain informations laid by a local board of health on the ground that the clerk of the board, who was the real informant, was not present, a rule to compel them to do so was refused. *Leamington Local Board, Ex parte*, 5 L. T. 637.

What is a Hearing—Res judicata.]—L. was charged with night poaching under 9 Geo. 4, c. 69, and in course of cross-examination of prosecutor's witnesses, the justices considered he had been illegally arrested, and discharged him. L. was again summoned for the same offence on the same facts, when the justices held that they had no jurisdiction, as the former case was res judicata:—Held, that the justices had rightly decided. *Reg.* v. *Brackenridge*, 48 J. P. 293.

Res Judicata.]—The appellant was charged with non-compliance on August 21st, 1889, and ten days thereafter with an order made by justices under s. 2 of the Dogs Act, 1871, requiring him to keep a dangerous dog under proper control. No evidence was given except as to August 21st, and the charge was dismissed. Subsequently the appellant was charged and convicted for not keeping a dog under proper control on August 21st simply:—Held, that the matter was res judicata. *Ryley* v. *Brown*, 17 Cox, C. C. 79.

Rehearing.]—Where a woman, on the 19th June, 1847, applied to a petty sessions at W., in the county of P., while resident therein, for an order on the putative father of a child which was born on the 22nd March, 1847, and the application was dismissed for a defect in the evidence; and on the 19th February, 1848, having removed to the county of B., made another application against the same person to a petty sessions there; and the justices made an order upon the putative father, who appealed to the quarter sessions, by whom the order was confirmed without hearing the evidence of the women:—Held, that although a dismissal of the first application, upon the merits, would have been an answer to the second, provided it was made out by evidence, yet that the second petty sessions and the quarter sessions having a general jurisdiction over the subject-matter, and being bound to hear and decide upon the evidence, their decision was final, and could not be reviewed. *Reg.* v. *Buckinghamshire JJ.*, 3 New Sess. Cas. 500; 18 L. J., M. C. 113; 13 Jur. 1053.

Evidence — Absence of Justice—Waiver.]—When upon a hearing before two justices at petty sessions, one of them is not present until a portion of the evidence has been given, the witness should be resworn, and should again give his evidence; and it is not sufficient that the evidence already given should be read over to such justice. This, however, is only an irregularity which may be waived by the parties. *Reg.* v. *Jeffreys*, 22 L. T. 786.

An affiliation summons was being heard before A. and B. (justices); after the woman had given her evidence, C., another justice, came in and took his seat upon the bench, and the previous evidence was read over to him in the hearing of the putative father and his attorney. The case then proceeded, and the putative father's attorney addressed the bench and called a witness; but before the bench decided upon the application A. left, and B. and C. made an order:—Held, that the putative father had by his conduct waived the objection. *Ib.*

—— **Rejection of.**]—A penalty is imposed by 2 & 3 Vict. c. 47, s. 60, sub-s. 7, upon every person "who shall set up or continue any . . . projection from any . . . part of any . . . shop . . . so as to cause any . . . obstruction in any thoroughfare." R. was summoned before a metropolitan police magistrate for an offence against the foregoing enactment. It was proved that he had affixed to the front of his shop a movable showboard, 11½ inches of which projected at a height of 2 feet 3 inches over the footway of the street, which was 36 feet 8 inches wide. He proposed to call witnesses to prove that they were not incommoded by the projection; but the magistrate refused to hear them, and convicted him:—Held, that the magistrate had power to reject the evidence proposed to be adduced as irrelevant, and that the conviction must be affirmed. *Read* v. *Perrett*, 1 Ex. D. 349.

A magistrate cannot be required to hear evidence which ought not to affect his determination. *Rex* v. *Minshull*, 1 N. & M. 277.

—— **Refusal to Convict on.**]—Where a magistrate has exercised his discretion by refusing to convict on the evidence adduced before him, in support of an information, the court will not compel him to rehear the case, or return the proceedings which have taken place before

him. *British and Foreign Patent Invention Co., Ex parte*, 7 D. P. C. 614; 2 W. W. & H. 57.

—— **Previous Hearing before another Magistrate.**]—The judicial discretion which a magistrate has to exercise on cases brought before him must be based on the evidence taken before him, and it is not competent for him to act upon evidence taken before another magistrate. *Guerin, In re*, 58 L. J., M. C. 42; 60 L. T. 538; 37 W. R. 269; 16 Cox, C. C. 596; 53 J. P. 468.

—— **Articles of the Peace.**]—When articles of the peace are exhibited, the question for the justices is, whether or not they believe the exhibitor on his oath, and neither the evidence of the exhibitee himself nor witnesses tendered on his behalf may be heard to contradict the exhibitor. *Lort* v. *Hutton*, 45 L. J., M. C. 95; 33 L. T. 730.

A party gave information on oath before a magistrate that from certain language used towards him he was in bodily fear from another; and the magistrate upon hearing the complaint required the latter to enter into recognizances to keep the peace. On motion to discharge the recognizances on the ground that the language was used in a metaphorical sense only, the court refused to interfere because it was for the magistrate to judge in what sense the language was used. *Rex* v. *Tregarthen*, 5 B. & Ad. 678; 2 N. & M. 379.

Claim to be tried by Jury—Night-Poaching—"Imprisonment for a Term exceeding Three Months."]—By the Summary Jurisdiction Act, 1879, s. 17, a person when charged before a court of summary jurisdiction with an offence in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months, may claim to be tried by a jury:—Held, that the offence of night-poaching, whereby the person charged is liable under 9 Geo. 4, c. 69, to imprisonment for a period not exceeding three months, and at the expiration of that period to a further imprisonment of six months in case he fail to find sureties for his not so offending again, is not within the act so as to entitle the person charged to be tried by a jury. *Williams* v. *Wynne*, 57 L. J., M. C. 30; 58 L. T. 283; 52 J. P. 343.

—— **Offence punishable by Fine—Imprisonment in Default.**]—Where an offence is punishable by fine, but the person convicted is liable to a term of six months' imprisonment in case of non-payment, the offence is not one that entitles the offender to claim to be tried by a jury within s. 17 of the Summary Jurisdiction Act, 1879. *Carle* v. *Elkington*, 67 L. T. 374; 40 W. R. 510; 17 Cox, C. C. 557; 56 J. P. 359.

—— **Trial as for first Offence—Statement as to previous Conviction.**]—Where a person is charged before a court of summary jurisdiction with an offence in respect of which a term of imprisonment exceeding three months cannot be inflicted, a statement made after the close of the case and after the justices have decided to convict, by a police constable that the defendant has been previously convicted of a like offence, does not put him in peril of being convicted as for a second offence in respect of the commission of which a term of imprisonment for a period of more than three months might have been inflicted, and thereby give him the right to claim to be tried by a jury, as provided by s. 17 of the Summary Jurisdiction Act, 1879. *Reg.* v. *Fowler, Walters, Ex parte*, 64 L. J., M. C. 9; 15 R. 265.

Trial as for first Offence—Proof of previous Conviction, effect of.]—A magistrate has no power to treat a second offence of keeping a dog without a licence as a first offence, upon the ground that the prior conviction was not set out either in the information or summons before him, when it is proved to him at the hearing that the defendant has been previously convicted. *Murray* v. *Thompson*, 58 L. J., M. C. 41; 22 Q. B. D. 142; 60 L. T. 151; 37 W. R. 221; 16 Cox, C. C. 554; 53 J. P. 70.

Depositions—How to be Taken.]—Where magistrates first took the examination of witnesses not on oath, in support of a conviction, and afterwards swore them to the truth of their evidence, the court expressed its disapprobation of the practice. *Rex* v. *Kiddy*, 4 D. & R. 734.

A justice should not allow depositions to be framed in the words of a clause in a statute under which a party is committed. *Mills* v. *Collett*, 3 M. & P. 242; 7 L. J. (O.S.) M. C. 97; 6 Bing. 85; 31 R. R. 355. *And see* CRIMINAL LAW (EVIDENCE).

Cautioning Accused Persons.]—The 11 & 12 Vict. c. 42, s. 18, requiring magistrates to caution the accused with respect to statements he may make in answer to the charge, is not applicable to witnesses asked questions tending to criminate them. *Reg.* v. *Coote*, 9 Moore, P. C. (N.S.) 463; 42 L. J., P. C. 45; L. R. 4 P. C. 599; 29 L. T. 111; 21 W. R. 553; 12 Cox, C. C. 557.

Criminal Proceedings—Competent Witness.]—An information before justices under 1 & 2 Will. 4, c. 32, s. 23, for using an engine for the purpose of taking game, without the authority of a certificate, is a criminal proceeding in which the party is charged with the commission of an offence punishable on summary conviction, within 14 & 15 Vict. c. 99, s. 3, and therefore the party charged is not competent or compellable to give evidence for or against himself. *Cattell* v. *Ireson*, El. Bl. & El. 91; 27 L. J., M. C. 167; 4 Jur. (N.S.) 560; 6 W. R. 469.

Compelling Attendance.]—A magistrate has no right to issue a warrant for the apprehension of a person to attend to find bail for his appearance as a witness at the assizes, although it is sworn that the witness is material and has refused to obey a summons, which had previously been issued, to give evidence before the magistrate. *Evans* v. *Rees*, 4 P. & D. 32; 12 A. & E. 55; 4 Jur. 1032.

Commitment.]—A justice of the peace may commit a feme covert, who is a material witness upon a charge of felony brought before him, and who refuses to appear at the sessions to give evidence, or to find sureties for her appearance. *Bennet* v. *Watson*, 3 M. & S. 1; 15 R. R. 373. And see *Cropper* v. *Horton*, 8 D. & R. 166.

Conduct of Case by Complainant in Person—Cross-examination of Witness.]—An inspector

of a society for the prevention of cruelty to animals may, under the 14th section of Jervis's Act, conduct the case and examine and cross-examine witnesses at the hearing before the magistrates of an information preferred at the instance of the society. *Duncan* v. *Toms*, 56 L. J., M. C. 81; 56 L. T. 719; 35 W. R. 667; 16 Cox, C. C. 267; 51 J. P. 631.

Cross-examination by Defendant's Solicitor—Discretion to Prohibit.]—Certain justices at a preliminary inquiry into an alleged case of highway robbery declined to permit the solicitor representing the prisoners to cross-examine the witnesses for the prosecution, believing that they possessed a discretionary power in the matter. Sect. 7 of the Summary Jurisdiction Act, 1884, provides that the expression "court of summary jurisdiction" in s. 50 of the Summary Jurisdiction Act, 1879, shall include justices, a justice or magistrate, whether acting under the Summary Jurisdiction Acts, or any of them, or under any other act, or by virtue of his or their commission or by the common law:—Held, that the justices had no discretion to prohibit the solicitor to the prisoners from cross-examining the witnesses for the prosecution, and that the right to cross-examine is absolute both under the Summary Jurisdiction Acts and by the common law. *Reg.* v. *Griffiths*, 54 L. T. 280; 16 Cox, C. C. 46.

Witnesses privileged from Arrest on attending Magistrate's Court.]—A person attending before a police magistrate, as a witness, on a charge of felony after a remand, is privileged from arrest on civil process, eundo, morando et redeundo, though he was not under recognizances or a summons to appear. *Montague* v. *Harrison*, 3 C. B. (N.S.) 292; 27 L. J., C. P. 24; 4 Jur. (N.S.) 29; 6 W. R. 43.

Privilege of Solicitor.]—Disobedience by a solicitor to an order of court made against him as an officer of the court is a contempt of a criminal nature, and an attachment granted to enforce compliance with the order of court is process of a punitive and disciplinary character; and therefore no privilege from arrest exists or can be claimed against the execution of the attachment. Privilege from arrest for contempt of court, where it otherwise exists, can be claimed in respect of attendance as an advocate at a police court as well as at any other court, although the proceedings at the police court consist merely of a preliminary inquiry on a charge of felony. F. was a solicitor, and an order was made at chambers that he should deliver up certain documents and should pay the sum of 10*l.* and certain costs. This order was made against F. as an officer of the court. F. delivered up the documents, but he did not pay the sum of 10*l.* or the costs. An order for the attachment of F. for contempt of court was thereupon made at chambers. F. then paid the sum of 10*l.*, but he did not pay the costs. He was arrested under the attachment, whilst he was on his return to his offices from a metropolitan police court, where he had been as advocate attending to defend certain persons at a preliminary inquiry on a charge of treason-felony:—Held, that he was not entitled to be discharged from custody on the ground of privilege from arrest, the attachment having been granted for a contempt of a criminal nature. *Freston, In re*, 52 L. J., Q. B. 545; 11 Q. B. D. 545; 49 L. T. 290; 31 W. R. 804—C. A.

Binding over Prosecutor and Witnesses to Prosecute.]—By 11 & 12 Will. 3, c. 12, and 42 Geo. 3, c. 85, offences committed out of Great Britain by governors of colonies and officers of the government under colour of, or in exercise of, their offices, may be prosecuted or inquired of, heard and determined in the Queen's Bench in England, either upon information or indictment, and the offence may be laid to have been committed in Middlesex:—Held, that the power conferred upon justices by 11 & 12 Vict. c. 42, ss. 2, 17, 20, of binding over the prosecutor and witnesses to prosecute or give evidence against any person charged with an indictable offence committed on land beyond the sea, at the next court of oyer and terminer or gaol delivery, extends to cases where the offence is one of those specified in 42 Geo. 3, c. 85, and that the description "court of oyer and terminer" in 11 & 12 Vict. c. 32, s. 20, applies to the Court of Queen's Bench. *Reg.* v. *Eyre*, 9 B. & S. 329; 37 L. J., M. C. 159; L. R. 3 Q. B. 487; 18 L. T. 511; 16 W. R. 754; 11 Cox, C. C. 162.

Charge dismissed—Binding Prosecutor over under Vexatious Indictments Act.]—Where a prosecutor bonâ fide prefers before a justice, and within his jurisdiction, a charge or complaint in respect of an offence within the Vexatious Indictments Act, 1859, and the justice dismisses it, for want of evidence, such dismissal is equivalent to a refusal to commit, and the prosecutor is entitled to require the justice to take his recognizance to prosecute the charge or complaint by way of indictment. *Reg.* v. *London Corporation*, 54 L. T. 646; 16 Cox, C. C. 77; 50 J. P. 711.

Taking Recognizances.]—A magistrate, if he refuses to commit or bail the person charged, is bound under 22 & 23 Vict. c. 17. s. 2, to take the recognizance of the prosecutor, if the information discloses any of the offences mentioned in the statute; but he has a discretion to refuse if no indictable offence is disclosed. *Wason, Ex parte*, 38 L. J., Q. B. 302; L. R. 4 Q. B. 573; 17 W. R. 881.

Where, therefore, the offence charged is that of conspiracy, by three persons, two of whom are members of the House of Lords, to deceive the house, and so to prevent the due course of justice and injure and prejudice a third person, by making statements in the house which they knew to be false, the magistrate is right in refusing to take any proceedings; as members of either house of parliament are not civilly or criminally liable for any statements made in the house, nor for a conspiracy to make such statements. *Ib.*

5. Detention of Parties.

Not without Charge.]—Magistrates have no authority to detain a person known to them till some other person makes a charge against him. Before they detain a known person, they should have a charge actually made. *Rex* v. *Birnie*, 5 Car. & P. 206; 1 M. & Rob. 160.

Reasonable Time.]—An action will lie against a magistrate for committing a party charged with felony for re-examination for an unreason-

able time, but without any improper motive. *Davis* v. *Capper*, 10 B. & C. 28; 5 M. & Ry. 53; 4 Car. & P. 154; 8 L. J. (O.S.) M. C. 67.

A party was taken before a magistrate, and by him committed for further examination, on a charge of felony, in unlawfully cutting trees;—Held, that this was no excess of jurisdiction, though it did not appear that the amount of the injury exceeded 20*s*., as is required to constitute the offence of felony by 7 Geo. 4, c. 30, s. 19. *Cave* v. *Mountain*, 1 Scott (N.R.) 132; 1 Man. & G. 257; 9 L. J., M. C. 90.

The reasonableness of the period of commitment for examination is a question for the jury. *Ib.*

A. was apprehended by an excise officer and two constables for working an illicit still. He was taken to the police-office, and left in custody there while the excise officer endeavoured to find a magistrate to take the charge. Several magistrates declined to hear it, and he was detained in custody two days, when a magistrate was at length found to hear the case. He was convicted of the offence under 7 & 8 Geo. 4, c. 53, and fined 30*l*. There was no information or conviction, but a warrant of commitment was made out, A. having failed to pay the fine. On motion by him to be discharged, the court of session held the conviction to be bad, on the ground that the justice had no jurisdiction, as it was only in cases of summary or immediate arrest that the excise officer could proceed as he had done:—Held, first, that the detention at the police-office was reasonable. *Evans* v. *M'Loughlan*, 4 Macq. H.L. 84; 7 Jur. (N.S.) 1253; 4 L. T. 31.

Held, secondly, that the justices had jurisdiction. *Ib.*

Held, thirdly, that there was no necessity for an information, as the arrest was an immediate arrest. *Ib.*

—— **Effect on Conviction.**]—The 8 & 9 Vict. c. 87 (Smuggling Act), s. 58, enacted (for the purpose of giving time to prepare informations, convictions, &c.), that when any person shall have been detained by an officer for any offence against this or any other act relating to the customs, and shall have been taken before a justice, if it appear to such justice that there is cause to detain, he is thereby authorised and required to order such person to be detained a reasonable time, and at the expiration of such time to be brought before any two justices, who are thereby authorised and required finally to hear and determine the matter:—Held, that although the justice detains for an unreasonable time, if the offender is then brought before two justices, and convicted, the conviction is still valid, the jurisdiction to convict depending on s. 50, and not being affected by the improper proceeding under s. 58. *Van Boven, In re*, 9 Q. B. 669; 16 L. J., M. C. 4.

Delaying to hear Case.]—Two constables, on a Monday morning were taking the plaintiff before a magistrate, on a charge of misconduct, when they met the magistrate, who desired them to take the plaintiff back to the lock-up, and bring him up for examination on the Tuesday. They did so, when the magistrate fined him 1*l*.:—Held, that the magistrate was liable to an action of trespass for sending the plaintiff back to the lock-up; and that it was the duty of the magistrate either to have gone into the case on the Monday, or to have desired that the plaintiff should be taken before another magistrate. *Edwards* v. *Ferris*, 7 Car. & P. 542.

G., licensed to sell tobacco in his house in the city of N., was found hawking and selling at a public-house in the county division of T., four miles distant, and was arrested and conveyed before justices at N. next day, but as no justices were then sitting he was, on his own recognizance, remitted to justices who sat in T., seven days after the offence, and was convicted. G. objected to the jurisdiction, as the justices were not acting forthwith, nor near the place within 5 & 6 Vict. c. 93, s. 13:—Held, that whether G. was illegally arrested and detained or not, the justices of T. having jurisdiction, and he being charged before them, the conviction was valid. *Gray* v. *Customs Commissioners*, 48 J. P. 343.

Pending Distress Warrant.]—Where a person was convicted under 13 Geo. 3, c. 80, s. 4, and a warrant issued to levy the penalty on his goods, the magistrate might order him verbally to be kept in custody until a return was made on the warrant. *Still* v. *Walls*, 6 Esp. 36; 7 East, 533.

6. Warrants.

Search Warrant.]—A search warrant by which a party is arrested, must be founded on an information which discloses a charge of felony, or contains a statement of facts from which it may fairly be inferred that a felony has been committed. *M'Donald* v. *Bulwer*, 13 Ir. C. L. R. 549; 11 L. T. 27.

A justice of the peace has jurisdiction to issue a search warrant for stolen goods, although the sworn information on which the application for the warrant is made does not allege that a larceny has been committed, if the fair intendment of the allegations made in the information is that the informant has reasonable grounds to suspect, and does suspect, that a larceny has been committed. *Jones* v. *German*, 66 L. J., Q. B. 281; [1897] 1 Q. B. 374; 76 L. T. 136; 45 W. R. 278; 18 Cox, C. C. 497; 61 J. P. 180—C. A.

A secretary of state is not a conservator or a justice of the peace under 24 Geo. 2, c. 44, and has no jurisdiction to grant a warrant to break open doors to search for libellous papers; and such a warrant is illegal and void. *Entick* v. *Carrington*, 2 Wils. 275.

A mandamus will not be granted to compel the justice who signs a search warrant to produce the informations on which it was issued, and to permit a copy of them to be taken on the ground that there was no real ground for suspicion, and that the applicant believed that whoever swore the information was actuated by malice and ill-will. *Reg.* v. *Browne*, 4 Cox, C. C. 1.

—— **Licensed Premises.**]—Complaint having been made under s. 11 of the Betting House Act, 1853, a search warrant was issued thereunder, and certain licensed premises searched by the police:—Held, that the justices had jurisdiction to issue the warrant in respect of licensed premises: and that the powers of the police under such warrant were not restricted by the words of the section, "all such persons found therein," to all such persons as were actually engaged in contravening the Betting House Act, or in aiding and abetting the contravention thereof. *Anderson* v. *Hume*, 46 J. P. 825.

Distress Warrants—Recovery of Rates.]—The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), does not affect or apply to proceedings for the recovery of poor-rates and other rates recoverable in the same manner as poor-rates; and a distress warrant in respect of such rates may be issued as before the act. *Reg.* v. *Price*, 49 L. J., M. C. 49; 5 Q. B. D. 300; 42 L. T. 439; 28 W. R. 615; 44 J. P. 248.

—— **To Levy on Overseers.**]—Upon an application to justices under 11 & 12 Vict. c. 91, s. 9, to issue their warrant to levy the amount due from the assistant overseer of a parish, the evidence prescribed by the above section was adduced, but the justices refused to treat the certificate of the treasurer as conclusive, and allowed the overseer to prove payments made by him between the date of the certificate of the auditor and that of the treasurer:—Held, that in issuing their distress warrant, the justices had not a mere ministerial act to perform, and were right, as the section made the treasurer's certificate primâ facie, but not conclusive, evidence. *Reg.* v. *Fordham*, 42 L. J., M. C. 153; L. R. 8 Q. B. 501; 22 W. R. 85.

The adjudication of magistrates, under 50 Geo. 3, c. 49, s. 1, upon the accounts of churchwardens and overseers rendered by them at the expiration of their office, is in the nature of an award, and cannot be reopened by those magistrates for the purpose of correcting a supposed mistake in the settlement of the accounts. *Barrons* v. *Luscombe*, 5 N. & M. 330; 5 A. & E. 589; 1 H. & W. 457.

Where magistrates are empowered to settle and allow the accounts of a public officer, and in case of a neglect or refusal by such officer, for fourteen days after the allowance, to pay over the balance found to be due from him, are directed, upon application of the parties interested, to issue a distress warrant for such balance,—they cannot, after issuing a warrant in conformity with the power given to them, but before execution of it, order that the execution be suspended, on the ground of an error in the settlement of the accounts, unless the parties interested consent to such suspension. *Ib.*

—— **Public Health.**]—Where the proceedings under the Public Health Act, 11 & 12 Vict. c. 63, are regular, the local inspectors are entitled to a distress warrant from the justices for the payment of money required for carrying out in the district the provisions of the act. *Reg.* v. *Southampton JJ.*, 18 Jur. 494; 2 W. R. 231.

—— **Discretion.**]—On an application to a justice, under 35 Geo. 3, c. 101, s. 3, to issue a warrant of distress for non-payment of charges incurred by the suspension of an order of removal where the charges are under 20*l.*, the justice cannot inquire into the propriety of the order, but is bound to enforce it by issuing his warrant. *Reg.* v. *Higginson*, 8 Jur. (N.S.) 1176.

Under two local acts, by which the rates of a parish were regulated, an appeal was given against any rate to the next quarter sessions, and it was to be enforced by summons before two justices, who were to order the payment, and (if necessary) grant a warrant of distress, if the person summoned "did not prove to them that he was not chargeable with or liable to pay such rate":—Held, that this only gave the justices a power similar to that in enforcing a poor-rate, and that they had no jurisdiction to inquire into the validity of a rate, good on the face of it, and that they had no jurisdiction to determine anything in a summary way, so as to give power to state a case. *May, Ex parte*, 2 B. & S. 426; 31 L. J., M. C. 161.

Where, by an act, power is conferred upon justices to issue a distress warrant, "if they shall think fit," they must not refuse to issue it merely because they think the act of parliament does an injustice in giving such power in the particular case. *Reg.* v. *Boteler*, 4 B. & S. 959; 33 L. J., M. C. 101; 10 Jur. (N.S.) 798; 12 W. R. 466.

Justices refused to issue distress warrants against the goods of defendants fined for the non-attendance of their children at a board school, without affirmative evidence that the defendants possessed goods upon which distraint could be made:—Held, that the justices were, in their discretion, entitled to require affirmative evidence that the defendants possessed goods primâ facie distrainable, and, in the absence of it, could not as of right be called upon by the prosecution to issue distress warrants. *Reg.* v. *German*, 61 L. J., M. C. 43; 66 L. T. 264; 56 J. P. 358.

—— **Power of Justices to delay Execution.**]—Justices, in issuing a distress warrant for the recovery of poor-rates, have no power to order that there shall be any delay in the execution of the warrant. *Reg.* v. *Handsley*, 7 Q. B. D. 398.

—— **Time of Sale—Church Rate.**]—The 27 Geo. 2, c. 2, which directs that in every warrant of distress the justice shall limit in such warrant, a time of sale, so as such time be not less than four days, nor more than eight days, is applicable to cases of distress for church rates (except those directed against persons called Quakers). *Reg.* v. *Williams*, 4 New Sess. Cas. 137; 2 Car. & K. 1001; 1 Den. C. C. 529; T. & M. 235; 19 L. J., M. C. 126; 14 Jur. 115.

—— **Default of Payment — Imprisonment under Licensing Act.**]—By the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 3, a person who sells beer without a licence is liable for a first offence to a penalty of 50*l.* or imprisonment with or without hard labour for a month. By s. 51, where a court of summary jurisdiction has ordered a distress to be made in default of payment of a penalty, the court may order, in default of the said sum being paid as directed, that the person liable to pay the same shall be imprisoned for a period not exceeding six months in cases where the penalty amounts to 50*l.* B. was convicted before justices for selling beer without a licence, and fined 50*s.* He confessed himself unable to pay, and was forthwith committed by the justices to prison for six months without any distress having been made:—Held, that the justices had exceeded their jurisdiction, inasmuch as the issue of a warrant of distress was necessary in all cases to make s. 51 applicable. *Brown, Ex parte*, 47 L. J., M. C. 108; 3 Q. B. D. 545; 38 L. T. 682; 26 W. R. 757.

To Bring up Accused.]—Where an act of parliament gives a magistrate jurisdiction over an offence, it impliedly gives him power to make out a warrant and bring before him any person

charged with such offence. *Bane* v. *Methuen*, 2 Bing. 63 ; 9 Moore, 161 ; 2 L. J. (o.s.) C. P. 121 ; 27 R. R. 546.

Form of Warrant.]—A justice's warrant, commanding a constable to apprehend and bring before him the body of A. B., to answer all such matters and things as, on her majesty's behalf, shall be objected against him on oath by C. D. for an assault committed on C. D., is bad, as not shewing any information on oath upon which the warrant issues. *Caudle* v. *Seymour*, 1 Q. B. 889 ; 1 G. & D. 454 ; 10 L. J., M. C. 130.

A warrant issued by a justice of Tipperary for the apprehension of J. N. stated that he "stands indicted in the peace office of the county," and commanded the police of the county to apprehend, and "him in safe custody keep, so that you may have his body before her majesty's justices of the peace at the next sessions," &c. :—Held, bad, as the words "peace office" were without definite meaning, and did not disclose in what court the indictment had been preferred. *Nesbitt, In re*, 1 New Sess. Cas. 366.

Held, secondly, that a magistrate had no authority to order the police to keep the prisoner in custody. *Ib.*

In order to protect justices from an action of trespass in issuing a warrant of distress, all those facts must appear on the face of the warrant which are necessary to give jurisdiction to the justices over the subject-matter. *Day* v. *King*, 5 Ad. & E. 359 ; 6 N. & M. 845 ; 5 L. J., M. C. 130.

Conviction upon Warrant illegally issued.]—H., a police constable, procured a warrant to be illegally issued without a written information or oath, for the arrest of S. upon a charge of assaulting and obstructing him in the discharge of his duty. Upon such warrant S. was arrested and brought before justices, and was without objection tried by them and convicted. H. was afterwards indicted for perjury committed on the said trial of S., and convicted :—Held, that H. was rightly convicted, notwithstanding that there was neither written information nor oath to justify the issue of the warrant, and that the justices had jurisdiction to hear the charge though the warrant upon which the accused was brought before them was illegal. *Reg.* v. *Hughes*, 48 L. J., M. C. 151 ; 4 Q. B. D. 614 ; 40 L. T. 685.

Backing.]—The backing of the warrant under 24 Geo. 2, c. 55, s. 1, by a justice, is purely ministerial, and the justice who issues the warrant is responsible for an arrest under it, although it is backed and executed in a county other than that in which it was issued. *Clark* v. *Woods*, 2 Ex. 395 ; 3 New Sess. Cas. 253 ; 17 L. J., M. C. 189.

C. was convicted of an assault on two police constables of the county police of Worcestershire in the execution of their duty, who were apprehending him in the city of Worcester under a warrant issued by two justices of and for the county of Worcestershire for his commitment to prison for default in payment of a fine, but not backed by any justice of and for the city of Worcester. Worcester is a borough having a separate commission of the peace with exclusive jurisdiction, and a separate police force. C. was not pursued from the county, but found in the city :—Held, that the conviction was wrong, and that the constables were not acting in the execution of their duty in so executing such warrant. *Reg.* v. *Cumpton*, 49 L. J., M. C. 41 ; 5 Q. B. D. 341 ; 42 L. T. 543 ; 28 W. R. 539 ; 44 J. P. 489.

Evidence to Support.]—A warrant issued by a justice founded upon an information which discloses no criminal offence, cannot be sustained by proof that there was in fact parol evidence on oath given, which conveyed a criminal charge. *Lawrenson* v. *Hill*, 10 Ir. C. L. R. 177.

7. Orders.

"Order," what is—Compensation—Settlement by Two Justices.]—The "settlement" of compensation by two justices for lands taken or injuriously affected under s. 22 of the Lands Clauses Act, 1845, is not an "order" within Jervis's Act, and the complaint need not be made within six months of the matter arising ; neither is it a decision by which "damages are directed to be paid" enforceable by distress within s. 140 of the Railways Clauses Act, 1845. *Reg.* v. *Edmundson, In re* (17 Q. B. 67), overruled. *Reg.* v. *Edwards*, 53 L. J., M. C. 149 ; 13 Q. B. D. 586 ; 51 L. T. 586 ; 49 J. P. 117—C. A.

Construing.] — The court will make every reasonable intendment in favour of an order of justices. *Rex* v. *Aire and Calder Navigation*, 2 Term Rep. 665 ; 1 R. R. 579. And see *Rex* v. *Farringdon*, 2 Term Rep. 471.

Evidence to Contradict.]—It is competent to an appellant to shew by evidence that an order was not actually signed on the date which it bears. *Reg.* v. *Flintshire JJ.*, 15 L. J., M. C. 50.

Form.]—An order is void if it does not appear on the order itself that the justice had jurisdiction to make it. *Rex* v. *Hulcott*, 6 Term Rep. 587. And see *Day* v. *King*, 5 Ad. & E. 359 ; 6 N. & M. 845 ; 5 L. J., M. C. 130.

An order, made by two justices under 5 & 6 Vict. c. 54, s. 16, for payment, by way of contribution, of a proportion of a rent-charge on a close, after stating that complaint on oath had been made before one of the said justices, of the several matters giving them jurisdiction to make the order, proceeded as follows : "and now at this day the said" (complainant, and the party summoned), "appear before us the undersigned justices, and we having examined into the merits of the complaint, do in pursuance of the statute in that case made and provided, determine, that the just proportion," &c., "to be contributed by E. W." (on whom the order was made) "in respect of the close" is, &c. The order then declared the amount of the proportion payable, and ordered payment :—Held, that the order, upon the face of it was insufficient, inasmuch as it did not shew any adjudication, express or implied, of the truth of the matters of complaint. *Reg.* v. *Williams*, 21 L. J., M. C. 150 ; 18 Q. B. 393 ; 16 Jur. 1065.

An order to stop up a highway must state that it is made "upon view" of such highway. *Rex* v. *Rogers*, 6 L. J., M. C. 106.

To reimburse themselves the amount of expenses incurred in respect of duties cast upon them by the provisions of a statute, the parish authorities of W. obtained a magistrate's order upon the county treasurer for payment. The order did not shew on its face matters from which the jurisdiction could be inferred, and

omitted to specify the nature of the expenses incurred sufficiently to indicate that they were incurred under and by virtue of the provisions of the statute, but merely contained a reference to the year of the reign in which the statute was passed:—Held, that the order was bad, and that a mandamus ought not to issue to enforce it. *Reg.* v. *Kent* (*Treasurer*), 58 L. J., M. C. 71; 22 Q. B. D. 603; 60 L. T. 426; 37 W. R. 619; 16 Cox, C. C. 583; 53 J. P. 279.

An order of sessions must adjudge and determine the matter, and not merely state the evidence of the case. *Rex* v. *Luffington*, 1 Wils. 74.

A magistrate's order under 17 Geo. 2, c. 5, s. 1, for the payment of money to a person for apprehending vagrants, must be unconditional, and not merely to be paid on the order of the constable. *Rex* v. *Rushworth*, R. & R. 317; 1 Stark. 396.

—— **Apprentices.**]—The act of justices in ordering the binding a pauper child apprentice under 56 Geo. 3, c. 139, s. 1, is judicial, and it must therefore appear on the face of the order that the justices made it within their jurisdiction. *Reg.* v. *St. George, Bloomsbury*, 4 El. & Bl. 520; 3 C. L. R. 550; 24 L. J., M. C. 49; 1 Jur. (N.S.) 231; 3 W. R. 170.

So, for binding a parish apprentice, under 43 Eliz. c. 2, it must appear on the face of the allowance of the justices that they were, at the time of granting it, acting within their jurisdiction. *Staverton Overseers* v. *Ashburton Overseers*, 4 El. & Bl. 526; 3 C. L. R. 562; 24 L. J., M. C. 53; 1 Jur. (N.S.) 233; 3 W. R. 173.

An order of a justice for discharging a servant from her master's service under 5 Eliz. c. 4, was void, and not merely voidable, because it did not appear on the order itself that she was a "servant in husbandry." *Rex* v. *Hulcott*, supra, col. 600.

Order of Petty Sessions Affirmed on Appeal to Quarter Sessions—Order of Quarter Sessions Quashed on Certiorari.]—An order made in petty sessions is not affected by the quashing on certiorari of an affirming order by quarter sessions. *Suffolk County Lunatic Asylum* v. *Stow Union*, 76 L. T. 494; 45 W. R. 620; 61 J. P. 328.

Order or Conviction.]—An instrument in which a magistrate states that a party was brought before him, and is to be punished in pursuance of an act of parliament, is a conviction and not an order. *Gray, Ex parte*, 1 New Sess. Cas. 354; 8 Jur. 1049.

Absence of Party.]—No order can be made in the absence of the party whose interests are to be affected by it. *Reg.* v. *Totnes Union*, 2 New Sess. Cas. 82; 14 L. J., M. C. 148.

Void in Part.]—An order may be good in part, and void for the residue; the court directed an order to be confirmed where good, and quashed where defective. *Rex* v. *Fox*, 6 Term Rep. 148.

An order of justices, bad in part, may be enforced as to the good part, provided that, on the face of the order, the two parts are clearly separable; and it is not necessary in such a case to quash the bad part of the order before enforcing the residue. *Coley, Ex parte*, 2 L. M. & P. 130; 15 Jur. 128. *S. C.*, nom. *Reg.* v. *Green*, 20 L. J., M. C. 168.

Sealing.]—It is not necessary that an order of justices should be sealed with wax. An impression made in ink with a wooden block in the usual place of a seal is sufficient when the document purports to be given under the hands and seals of the justices, and is in fact signed and delivered by them. *Reg.* v. *St. Paul, Covent Garden*, 7 Q. B. 232.

Signing.]—Justices need not sign their christian-names at full length to an order of removal. *Reg.* v. *Worthenbury*, 7 Q. B. 555; 2 New Sess. Cas. 13; 14 L. J., M. C. 144; 9 Jur. 510.

The signature by the adjudicating justices is an essential part of their order, and the order cannot be considered as made until it has been reduced into writing and signed by them. *Reg.* v. *Flintshire JJ., Roden, In re*, 3 D. & L. 537; 15 L. J., M. C. 50; 10 Jur. 475.

The twenty-four hours within which notice of appeal must be given to the mother of a bastard child begin to run from the time of the oral adjudication and order of the justices in petty sessions, and not from the time of the formal drawing up and signature thereof, *Johnson, Ex parte*, 3 B. & S. 947; 32 L. J., M. C. 193; 9 Jur. (N.S.) 1128; 8 L. T. 275; 11 W. R. 620.

A party having been rated to a church-rate, and refused to pay, a complaint was made before justices and duly heard, and on the 6th of May a verbal order was made for payment by him of the amount of the rate and costs. This order was not formally drawn up till some days afterwards. On the 7th a minute of the order was served upon him, and he refused to pay. After such refusal the order was formally drawn up, dated the 6th of May, and a warrant issued by the justices, dated the same day, which was not executed until October, when a cart was seized for the distress. It did not appear whether the warrant was drawn up before or after the order dated the 6th of May, nor did it recite the order:—Held, that it was not necessary before issuing the warrant that an order should have been formally drawn up under hand and seal, but that the pronouncing of the order on the 6th and the service of the minute of the order on the 7th were sufficient to justify the issuing of the warrant, and that the non-recital of the order in the warrant, and that it had issued subsequently to the disobedience of the order, being all only matters of form, the justices were entitled to the protection of 11 & 12 Vict. c. 44, s. 1. *Ratt* v. *Parkinson*, 20 L. J., M. C. 208.

Correcting.]—Justices may supersede their own order when improvidently made. *Rex* v. *Norfolk JJ.*, 1 D. & R. 69; 5 B. & Ald. 485.

If two orders are made by mistake at the sittings of magistrates, it is competent to them at the time to declare which is the right one. *Wilkins* v. *Hemsworth*, 3 N. & P. 55; 7 A. & E. 807; 1 W. W. & H. 10; 7 L. J., M. C. 28; 2 Jur. 94, 301.

An order by two justices, described therein as "acting in and for the county of S." for the removal of a pauper from B. in that county to H., also in that county, was on the same day suspended by them in consequence of the illness of the pauper. On his death a second order was made, by indorsement on the first, by two other justices, for the payment, by the parish officers of H., of the expenses incurred by the suspension of the first order. In this order the justices described themselves as acting "for the borough

of B." This order contained no statement, in the margin or the body, of the particular locality in which the justices were sitting. The last-mentioned order having been brought up by certiorari, the court amended it, without costs, under 12 & 13 Vict. c. 45, s. 7, by altering the words "for the borough of B." to "in and for the borough of B."; holding that there were necessarily sufficient grounds in proof before the justices, sitting in their judicial capacity, of the locality in which they were sitting, to have allowed of their drawing up the order as amended. *Reg.* v. *Hellingley*, 1 El. & El. 749; 28 L. J., M. C. 167; 5 Jur. (N.S.) 626; 7 W. R. 413.

The justices at sessions may alter their judgment during the continuance of the sessions. *Rex* v. *Leicestershire JJ.*, 1 M. & S. 442; 14 R. R. 494.

An order of affiliation omitted to state that the mother's residence was within the petty sessional division; but the summons, a copy of which was in evidence before the justices, alleged this fact, which was not otherwise proved:—Held, that the justices had sufficient grounds before them to have drawn up the order without the omission, and that on a certiorari to quash the order the court might, therefore, amend it. *Reg.* v. *Higham*, 7 El. & Bl. 557; 26 L. J., M. C. 116; 3 Jur. (N.S.) 691; 5 W. R. 507.

Delegating Powers.]—Justices at sessions appointed a committee of twelve magistrates to inspect the state of a county bridge, and to make any new contract for repairing or rebuilding, to be executed by the clerk of the peace on behalf of the county; afterwards they made an order, adopting a contract for rebuilding proposed by the committee, and directed it to be prepared by the clerk of the peace, which contract having afterwards been executed by the clerk, the justices at a subsequent sessions confirmed all the resolutions of the committee, and ordered the clerk to perform their directions in respect to the contract; the acts of the committee so confirmed are the acts of the sessions, and the authority given to the committee, and exercised by them, is not such a delegation of power by the sessions as will invalidate their orders. *Rex* v. *Glamorganshire JJ.*, 5 Term Rep. 279.

Proof of Service.]—An order of sessions on the dismissal of an appeal against a poor-rate, that the appellant shall pay costs "immediately upon service of this order or a true copy thereof," is valid; for the order is a judgment of the sessions, and, therefore, service of the original, or production of it on service of a copy, cannot be required. *Reg.* v. *Mortlock*, 7 Q. B. 459; 14 L. J., M. C. 153; 9 Jur. 621.

On an indictment for disobeying such order, with an averment that a true copy of the order was served on the defendants, and they had notice of the order, and of the contents thereof, the prosecutors produced in court the minute-book of the sessions in which the order was entered, and a copy of the order on parchment, which was an authentic extract of the minutes, and they offered parol evidence that a true copy of the order was served on the defendants, and the contents of the parchment at the same time read over to them:—Held, that (whether the parchment was original or not) parol evidence as to the copy served was admissible, without notice to the defendants to produce the copy itself, for the object of the evidence was only to prove notice of the order, which notice the copy was, and, therefore, notice to produce it was unnecessary. *Ib.*

Effect in Evidence—Repair of Highway—Boundaries.]—By 34 Geo. 3, c. 64, where the boundary of two parishes lay along the centre of a highway, justices were empowered on information of the fact to summon the surveyors of the respective parishes to hear parties and their witnesses, and finally determine the matter by order apportioning the highway between the parishes for the purpose of repair. By an order, the justices recited an information laid before them that one side of a highway was in and repairable by parish H., and the other side in and repairable by parish W., praying an apportionment; that they had summoned the surveyors, who attended, and that they had examined witnesses, and they ordered that the highway should be apportioned between H. and W., dividing it by a transverse line. The order contained no direct finding that the sides of the highway were respectively in H. and W., but the statute form was correctly followed. On an indictment for non-repair of the part allotted to H.:—Held, that the justices must be taken to have considered the question whether or not part of the highway was in H., and to have decided by their order that it was; and that the fact could not be questioned on the trial of an indictment, the subject-matter being within the jurisdiction of the justices, and their finding of the fact conclusive. *Reg.* v. *Hickling*, 7 Q. B. 880; 2 New Sess. Cas. 117; 14 L. J., M. C. 177; 9 Jur. 1075.

—— **Adjudication that Street is a Highway.**]—An application to justices by a local board under the Public Health Act, 1875, for the recovery of a proportion of the expenses of sewering a street from the owner of premises abutting thereon, was dismissed by the justices, on the ground that the street was a highway repairable by the inhabitants at large. The local board some years afterwards made an application against the same person for the recovery of a proportion of paving expenses subsequently incurred in respect of the same street, and a stipendiary magistrate made an order for the payment of such expenses:—Held, that the adjudication of the justices that the street was a highway repairable by the inhabitants at large on the first application was beyond the jurisdiction of such justices, which was only to make or refuse the order for the expenses claimed, and that, therefore, such adjudication on the first application did not estop the local board from claiming the expenses they claimed on the second application, and consequently that the magistrate might make the order which he made for their payment. *Reg.* v. *Hutchins*, 50 L. J., M. C. 35; 6 Q. B. D. 300; 44 L. T. 364; 29 W. R. 724; 45 J. P. 504—C. A.

—— **Awarding Damages.**]—W. was injured by the furious driving of the defendants' servant. The driver was summoned by the police, and W. attended as a witness. The driver was fined, and was ordered by the magistrate to pay to W. 5*l.* by way of compensation under the provisions of 6 & 7 Vict. c. 86, s. 28. He was asked by the magistrate if that sum would compensate him, and he said it would not, but nevertheless he

took it. In a subsequent action for damages by W. against the driver's employers:—Held, that the order of the magistrate was a bar to the action, inasmuch as W. must be taken to have accepted the 5*l.* in full satisfaction of his claims in respect of his injuries. *Wright* v. *London General Omnibus Co.*, 46 L. J., Q. B. 429; 2 Q. B. D. 271; 36 L. T. 590; 25 W. R. 647.

Enforcement of Order—Order to pay Costs—Default of Distress—Order for Committal.]—B. preferred an information against a company for not keeping a register of members. The charge was dismissed and B. was ordered to pay costs, but made default, and in default of distress, on a judgment summons, upon proof of means, an order was made against him for committal:—Held, that s. 47 of the Summary Jurisdiction Act, 1879, applied, and that the order for committal was rightly made. The fact that at the date of the hearing of the information the company was in voluntary liquidation, that before the date of the order for commitment the liquidators had been removed and no others were appointed, did not invalidate the order of committal. *Reg.* v. *London (Mayor), Boaler, Ex parte*, 63 L. J., M. C. 29; [1893] 2 Q. B. 146; 5 R. 554; 57 J. P. 633.

—— **Vaccination.**]—Sect. 6 of the Summary Jurisdiction Act, 1879, repeals s. 18 of the Summary Jurisdiction Act, 1848, only so far as the latter gives justices jurisdiction to enforce by distress and imprisonment an order directing the payment of money when such order was made on a complaint that a sum of money was claimed to be due. W. was summoned under s. 31 of the Vaccination Act, 1867, to shew cause why he should not have his child vaccinated, and an order was made on the summons directing that he should have the child vaccinated within a given time, and also directing that he should pay the costs of the order, and on his failure to do so that there should be distress, and in default of distress he should be imprisoned. On certiorari to quash this order:—Held, that it was good under s. 18 of the Summary Jurisdiction Act, 1848. *Reg.* v. *Burrows, Wilson, Ex parte*, 77 L. T. 338; 46 W. R. 29; 61 J. P. 724.

8. Convictions.

a. Effect and Nature.

Quashing at Sessions.]—Justices in quarter sessions, having by an order good on the face of it quashed a conviction made under 12 & 13 Vict. c. 92, s. 8, there was a conflict of evidence as to whether the conviction was quashed on a point of form, but it appeared that the order was made after hearing the opening statement of the counsel for the respondent:—Held, that the court could not quash the order. *Reg.* v. *Colam*, 26 L. T. 561; 20 W. R. 331.

—— **Matter of Form.**]—Quashing a conviction on a penal statute, for mere matter of form at sessions, is not an acquittal of the defendant, so as to conclude the case against any further inquiry in the Court of K. B. *Rex* v. *Ridgway*, 1 D. & R. 132; 5 B. & Ald. 527; 1 L. J. (o.s.) K. B. 53.

Amending at Sessions.]—W. was convicted by justices for sending a diseased cow by railway, and fined 20*l.*, and the clerk, in drawing up conviction, inserted a clause, that in default of payment, W. be imprisoned for three months. W. appealed to quarter sessions, the grounds of appeal being, that the justices had no power to order imprisonment for more than two months, and the respondents asked the quarter sessions to amend the conviction and insert two months, which was done:—Held, that the quarter sessions, under 12 & 13 Vict. c. 45, s. 7, if satisfied that the word "three" had been inserted by mistake, had power to direct the amendment. *Reg.* v. *Walker*, 45 J. P. 682.

Defect in—Right of Justices to substitute Fresh Conviction.]—When justices have convicted for an offence unknown to the law, and have returned the conviction to the clerk of the peace, the court will allow a rule for a certiorari to go, notwithstanding that the justices in shewing cause against such rule return a corrected record of the conviction, shewing such conviction to have been properly made. *Austin, Ex parte*, 50 L. J., M. C. 8; 44 L. T. 102; 45 J. P. 302.

—— **Before Filing with Clerk of the Peace.**]—K. was charged with opening his premises for sale of intoxicating liquors on Sunday within the prohibited hours, and was convicted and fined 5*l.*, and also 13*s.* 6*d.* for costs. The conviction, when drawn up, contained no clause of distress, but ordered imprisonment in default of payment. Semble, the justices might draw up a fresh conviction containing the clause of distress, any time before filing it with the clerk of the peace. *Kenyon, Ex parte*, 45 J. P. 303.

—— **After Filing with Clerk of the Peace.**]—Magistrates drew up a conviction and returned it to the clerk of the peace, and an action being brought against them, they put in the conviction returned (which was open to some formal objections) and also another conviction drawn up afterwards in a more formal shape. Semble, that there was no impropriety in their doing so. *Selwood* v. *Mount*, 9 Car. & P. 75.

Change of Opinion.]—Two justices convicted A. of trespass in pursuit of game. B. was afterwards charged with the same offence, and acquitted by two of the magistrates who decided the former case and a third. The former conviction was then reversed by two of the three justices. No conviction having been drawn up:—Held, that there was a locus pœnitentiæ in the justices, which they took advantage of when they changed their opinion. *Jones* v. *Williams*, 46 L. J., M. C. 270; 36 L. T. 559.

Validity—Offence not known to the Law.]—A conviction is bad where the charge does not in terms shew a legal offence, although the meaning of the charge was understood by the party charged, and was in a form used time out of mind in the court before which the party was so charged. *Hopkins, Ex parte*, 61 L. J., Q. B. 240; 66 L. T. 53; 17 Cox, C. C. 444; 56 J. P. 262.

—— **Warrant illegally issued.**]—H., a police constable, procured a warrant to be illegally issued, without a written information or oath, for the arrest of S., upon a charge of "assaulting and obstructing him, H., in the discharge of his duty." Upon such warrant S. was arrested and

brought before justices, and was, without objection, tried by them and convicted. H. was afterwards indicted for perjury committed on the said trial of S., and convicted:—Held, that H. was rightly convicted, notwithstanding that there was neither written information nor oath to justify the issue of the warrant, and that the justices had jurisdiction to hear the charge, though the warrant upon which the accused was brought before them was illegal. *Reg.* v. *Hughes*, 48 L. J., M. C. 151; 4 Q. B. D. 614; 40 L. T. 685.

—— **Two separate Offences charged.**]—On the 11th of March, 1871, an order of justices was made on E. and his partners, in the trade of a dyer, to cease to send forth black smoke from a certain chimney, under the Nuisances Removal Act, 1855, s. 12, with liberty to the informant to enter on default and do what was necessary to execute the order. On the 14th of March, 1874, a further order was made under the same section that they should discontinue the nuisance, and that its recurrence should be prohibited. On the 1st of May, 1875, E. was convicted under s. 13 for disobeying the order of abatement of the 11th of March, 1871, and on the same day was also convicted of disobeying the order of prohibition of the 14th of March, 1874. Both convictions proceeded on the evidence that on one day black smoke issued from E.'s chimney:—Held, that both convictions could not be maintained. *Eddleston* v. *Barnes*, 45 L. J., M. C. 73; 1 Ex. D. 67; 34 L. T. 497.

An adjudication "for the said offence," where there are two distinct offences charged in the information, is bad. *Rex* v. *Salomons*, 1 Term Rep. 249; 1 R. R. 194.

D. was charged contrary to by-laws with emitting smoke and steam from a tramway engine, and contended that these were two separate offences, and the summons was contrary to 11 & 12 Vict. c. 43, s. 1:—Held, that the justices were right in overruling the objection, as emitting smoke was not the less an offence because steam was mixed with it. *Davis* v. *Loach*, 51 J. P. 118.

Where justices had convicted a person in one penalty for two alleged offences, and the conviction was bad as to one of them:—Held, that it was bad altogether. *Bettesworth* v. *Allingham*, 16 Q. B. D. 44; 34 W. R. 296; 50 J. P. 55.

The appellant was charged by two informations with two offences under ss. 3 and 4 of the Indecent Advertisements Act, 1888, at the same time and place, the evidence being substantially the same in both cases. Upon the conclusion of the hearing of the first information the justices reserved their decision until they had heard the charge contained in the second information; and, having done so, proceeded to convict the appellant on both charges, and sentenced him to a separate term of imprisonment on each charge:—Held, that the convictions must be quashed, inasmuch as the justices should have disposed of the charge contained in the first information before proceeding to deal with that contained in the second information. *Hamilton* v. *Walker*, 61 L. J., M. C. 134; [1892] 2 Q. B. 25; 67 L. T. 200; 40 W. R. 476; 17 Cox, C. C. 539; 56 J. P. 583.

Cumulative Penalties and Sentences.]—A conviction under 19 Geo. 2, c. 21, s. 1, that the defendant did "profanely curse one profane curse" (setting it out) "twenty several times repeated," and adjudging him "for his said offence" to forfeit the sum of 2*l.*, being a cumulative penalty at the rate of 2*s.* for each repetition of the oath, is good. *Reg.* v. *Scott*, 4 B. & S. 368; 33 L. J., M. C. 15; 8 L. T. 662.

When a party is summarily convicted at one time of several distinct offences, the justices have power, under 11 & 12 Vict. c. 43, s. 25, to award that the imprisonment under one or more of the convictions shall commence at the expiration of the sentences previously pronounced. *Reg.* v. *Cutbush*, 8 B. & S. 319, sub nom. *Paine, In re*, 36 L. J., M. C. 70; L. R. 2 Q. B. 379; 16 L. T. 282; 15 W. R. 742; 10 Cox, C. C. 489.

Several Offenders.]—A conviction of A. and B. for an offence, several in its nature (as an assault under 9 Geo. 4, c. 31), adjudging that they, A. and B., for their offence, do forfeit the sum of, &c., and in default of payment be imprisoned for the space of, &c., is bad, inasmuch as the penalty ought to be imposed on the parties severally and not jointly. *Morgan* v. *Brown*, 6 N. & M. 57; 4 A. & E. 515; 1 H. & W. 717; 5 L. J., M. C. 77.

A conviction under 1 & 2 Will. 4, c. 32, s. 30, included four persons, and adjudged each of them to forfeit and pay the sum of 2*l.* each, &c., and if the said sums be not paid, that each of them, C., B., W. and S., so making default, should be imprisoned for one month, unless the said several sums, and the costs and charges of conveying each of them, C., B., W. and S., so making default, to the said gaol, should be sooner paid:—Held, that the conviction made each defendant liable to be imprisoned until he had paid the penalty, and the expense of conveying, not only himself, but the other persons convicted, and was therefore bad, and that this was not a case in which to exercise the power of amendment under 12 & 13 Vict. c. 45, s. 7. *Reg.* v. *Cridland*, 7 El. & Bl. 853; 27 L. J., M. C. 28; 3 Jur. (N.S.) 1213; 5 W. R. 679.

Conviction under Statute other than that under which Summons issued.]—A person was summoned under 10 & 11 Vict. c. 89 (Towns Police Clauses Act), s. 29, on a charge of drunkenness and riotous behaviour. The justices held the riotous behaviour not proved, but convicted him of drunkenness, and fined him, under 21 Jac. 1, c. 7, s. 3:—Held, that the conviction was bad, and the defect was not one which could be cured under 11 & 12 Vict. c. 43, s. 1. *Martin* v. *Pridgeon*, 1 El. & El. 778; 28 L. J., M. C. 179; 5 Jur. (N.S.) 894; 7 W. R. 412; 8 Cox, C. C. 170. S. P., *Soden* v. *Cray*, 7 L. T. 324.

Defect in part.]—After a rogue and vagabond had been committed under 17 Geo. 2, c. 5, to the sessions, and they, adjudging him to be a rogue and vagabond, had ordered him to be further imprisoned and kept to hard labour for six months, and to be publicly whipped during that time, and that after the expiration of his imprisonment he should be "sent and employed in his majesty's service, pursuant to the statute," &c.:—Held, that the whole formed one sentence, and such order being defective in the latter part for want of adjudicating whether the party was to serve his majesty by sea or land, as discriminated in the statute, the conviction was quashed, though the former part of the sentence, adjudging the "rogue and vagabond to be whipped," was valid. *Rex* v. *Patchett*, 5 East, 339; 1 Smith, 547.

—— **Excess.**]—A conviction by two justices under 17 Geo. 2, c. 38, upon complaint of the overseers of a parish against the late overseer for refusing and neglecting to deliver over to them a certain book belonging to the parish, convicting him of the offence, and adjudging that "he should be committed to the common gaol, to be safely kept until he should have yielded up all and every the books concerning his office of overseer, belonging to the parish," is void as to the adjudication respecting the imprisonment, for excess, the same extending beyond what was previously required of the person convicted; and a warrant of commitment founded on this conviction, and directing the gaoler to keep him, in the terms of the adjudication, is void in toto. *Groome* v. *Forrester*, 5 M. & S. 314; 17 R. R. 333.

A judgment upon a conviction, to be imprisoned for a month, to ask pardon and advertise it, is void. *Rex* v. *Collier*, 1 Wils. 332.

Collusion—Certificate, effect of.]—Where a maltster had by collusion, and for the purpose of exonerating himself from penalties under the revenue laws, procured a conviction of one of his servants, for the same offence which he had himself committed, and a certificate of two justices, which operated as a discharge of himself, the court, upon certiorari, quashed the conviction. *Reg.* v. *Gillyard*, 12 Q. B. 527; 17 L. J., M. C. 153; 12 Jur. 655.

Award and Distribution of Penalties.]—Where justices are required by a penal statute to distribute the penalty on conviction among certain persons according to their discretion, an adjudication that the forfeiture "be disposed of as the law directs," is bad, and the court will quash the conviction. *Rex* v. *Dimpsey*, 2 Term Rep. 96.

The 42 Geo. 3, c. 119, against illegal lotteries, directing the penalty to be distributed, one-third to the king, one-third to the informer, and one-third to "the person apprehending or securing the offender," a conviction directing the penalty to be distributed as the "law directs," without ascertaining to whom the last third is to be paid (the person being uncertain), was bad. *Rex* v. *Seale*, 8 East, 568.

In summary convictions by justices of the peace, if any discretionary power is reserved to the justices relative to the application of the penalty, the conviction should shew in what manner they have exercised it; but where the application of the penalty is fixed by law, it is enough to say that they award the penalty to be applied as the law directs. *Boothroyd, In re*, 2 New Sess. Cas. 251; 15 M. & W. 1; 15 L. J., M. C. 57; 10 Jur. 117.

A conviction, adjudging a distribution of part of a forfeiture (which a statute says shall be paid to the overseers of the poor of the parish, for the use of the poor of the parish) to the overseers of the poor of a township, cannot be supported. *Rex* v. *Priest*, 6 Term Rep. 538.

Where, in a conviction, the evidence stated that a theatre was in the parish of Lambeth, and the adjudication of the penalty was to the poor of the parish of St. Mary, Lambeth:—Held, to be no variance, it not appearing that there were two distinct parishes so named. *Rex* v. *Glossop*, 4 B. & Ald. 616.

An adjudication by police magistrates, under 12 Geo. 2, c. 28, that the forfeiture shall be distributed as that act directs, i.e. one-third to the informer and the rest to the poor of the parish is good, notwithstanding the 32 Geo. 2, c. 53, s. 5, directs penalties levied before them, except the informer's share, to be paid to an officer appointed by that statute; for it presupposes a conviction under the old act. *Rex* v. *Liston*, 5 Term Rep. 338.

A conviction following the form given in 39 Geo. 3, c. 79, s. 15, was sufficient, though the name of the informer (to whom, by the statute, half the penalty imposed is payable) nowhere appeared therein. *Reg.* v. *Johnson*, 2 New Sess. Cas. 170; 8 Q. B. 102; 15 L. J., M. C. 7; 9 Jur. 1010.

A conviction under 3 Geo. 4, c. 126, s. 41, adjudged that "B. had forfeited for the said offence 2*l.* 2*s.*":—Held, that it was not necessary that payment of the penalty should be adjudged. *Barnes* v. *White*, 1 C. B. 192; 1 New Sess. Cas. 504; 14 L. J., M. C. 65; 9 Jur. 181.

The 9 Geo. 4, c. 31, s. 27, directed that a fine which may be imposed by the convicting justices for the offence against that act shall be paid to some one of the overseers of the poor, or to some other officer of the parish, in which the offence was committed, to be by such overseer or officer paid over to the use of the general rate of the county in which such parish shall be situate:—Held, that a conviction, which directed the fine to "be paid to the treasurer of the county of C., in which the offence was committed, to be by him applied according to the direction of the statute in such case made and provided," was bad. *Chaddock* v. *Wilbraham*, 3 New Sess. Cas. 227; 5 C. B. 645; 17 L. J., M. C. 79; 12 Jur. 136.

A conviction under 1 & 2 Will. 4, c. 32, directing the whole penalty to be paid to the overseer, to be by him applied according to law, is bad. *Griffith* v. *Harries*, 2 M. & W. 335; 6 L. J., M. C. 29.

A conviction for killing a pheasant contrary to 1 & 2 Will. 4, c. 32, s. 3, following the form in schedule (I 2) to 11 & 12 Vict. c. 43, adjudged the offender to forfeit and pay a penalty, "to be paid and applied according to law." By 1 & 2 Will. 4, c. 32, s. 37, and by 5 & 6 Will. 4, c. 20, the penalty is directed to be paid, one-half to the informer and one-half to some one of the overseers of the poor, or to some other officer (as the convicting justice or justices may direct) of the parish in which the offence shall have been committed:—Held, that the conviction was sufficient by virtue of 11 & 12 Vict. c. 43, ss. 17, 32, being in the form given by the schedule referred to in s. 17, though it did not in terms distribute the penalty, nor name the informer or the overseer to whom the penalty was to be paid. *Reg.* v. *Hyde*, 7 El. & Bl. 859, n.; 21 L. J., M. C. 94; 16 Jur. 337.

—— **Borough Justices or County Treasurer.**]—In the borough of O., a borough having a separate commission of the peace, it is provided by a local act that any penalty recovered upon the information or complaint of any peace officer or constable within the borough is to be paid by the treasurer and carried to the borough fund or to the police superannuation fund, as the corporation may decide. In an action by the treasurer of the county of L. to enforce the provisions of 11 & 12 Vict. c. 43 (Jervis's Act), s. 31:—Held, that the effect of the provisions in the local act was, so far as the borough of O. was concerned, to repeal

the provisions of the general act; and that penalties imposed by the borough justices for offences against the general law under statutes containing no directions as to the application of the penalties, were payable to the treasurer of the borough. *Alison* v. *Charlesworth*, 49 J. P. 294.

Committal on Nonpayment.]—The justices need not, upon the conviction, adjudge that if the penalty is not forthwith paid the offender shall be committed, &c., but may, after affirmance of the conviction upon appeal, commit the offender for refusing to pay the penalty. *Rex* v. *Helps*, 3 M. & S. 331.

The penalties imposed by the 1 & 2 Geo. 4, c. 118, s. 40, were directed to be distributed, one-half to the receiver therein mentioned, and the other to such persons as the convicting justices shall direct; and it gave no appeal to the sessions. Where, therefore, a prisoner was committed under a warrant of execution, which recited that he had been convicted, for two months, or until he paid a penalty of 5*l.* for an offence under s. 33, without stating how the penalty was to be distributed and to whom paid, the court refused to discharge him out of custody, as the warrant did not require the same certainty as a conviction; and the court was bound to presume there had been a legal conviction to found the warrant. *Rex* v. *Rogers*, 1 D. & R. 156.

A party was summoned to answer a charge of assault, but did not appear according to the exigency of the summons, and thereupon the justices heard the evidence in support of the charge, and convicted the party, adjudging him to pay a fine and costs immediately. The conviction, which was in the form given in 9 Geo. 4, c. 31, s. 35, ordered the party to pay the fine to the overseer, to be handed over to the county rate. The fine and costs not having been paid, the justices, on the same day, before any demand, ordered him to be committed to the house of correction:—Held, that inasmuch as 9 Geo. 4, c. 31, s. 27, empowered the justices to commit if the fine "shall not be paid either immediately after the conviction, or within such period as the said justices shall appoint," and they had ordered it to be paid immediately, they were authorised, upon nonpayment, to order the committal of the party before any demand, and without a summons to shew cause why he should not be committed. *Arnold* v. *Dimsdale*, 2 El. & Bl. 580; 22 L. J., M. C. 161; 17 Jur. 1157; 1 W. R. 430.

—— **Civil Debt—Wrongful Arrest—Money paid to obtain Release.**]—The plaintiff was arrested on a committal warrant signed and issued by the defendant, a justice of the peace, for nonpayment of a debt made up of a certain sum of money alleged to be due from the plaintiff to the local sanitary authority, under an order made at quarter sessions, and of the costs awarded:—Held, that such warrant was altogether bad, and that the plaintiff was entitled to recover from the defendant, as special damages, the whole amount paid by him to obtain his release from gaol. *Clark* v. *Woods* (17 L. J., M. C. 189) followed. *Norton* v. *Monckton*, 43 W. R. 350.

Imprisonment for Nonpayment—Hard Labour.]—The 5th section of the Summary Jurisdiction Act, 1879, authorises the infliction of imprisonment with hard labour for default in payment of a penalty adjudged to be paid by a summary conviction where the act on which the conviction is founded authorises the infliction of imprisonment with hard labour as a punishment for the offence. *Reg.* v. *Tynemouth JJ.*, 55 L. J., M. C. 181; 16 Q. B. D. 647; 54 L. T. 386; 16 Cox, C. C. 74; 50 J. P. 454.

Whether a statute which authorises the punishment of an offence with a penalty, or in the discretion of the court, with imprisonment with or without hard labour, is an act which authorises the punishment of imprisonment with hard labour within the meaning of the exceptions in s. 5 of the Summary Jurisdiction Act, 1879, quære. *Reg.* v. *Tynemouth JJ.*, supra, not followed. *Reg.* v. *Turnbull*, 16 Cox, C. C. 110.

—— **Fine—Criminal Prisoner.**]—A. was committed to prison in default of distress for nonpayment of a fine of 1*l.* adjudged to be paid by a court of summary jurisdiction on an information under s. 31 of the Vaccination Act, 1867:—Held, that the order imposing the fine was a conviction as distinguished from an order in its technical sense, and that A. was properly treated in prison as a criminal prisoner. *Kennard* v. *Simmons*, 50 L. T. 28; 15 Cox, C. C. 397; 48 J. P. 551.

Drawing up and Filing.]—Justices are bound by 11 & 12 Vict. c. 43, s. 14, to lodge with the clerk of the peace all summary convictions which take place before them, in order that the same may be filed among the records of the quarter sessions. *Hayward, Ex parte, Prall, In re*, 3 B. & S. 546; 32 L. J., M. C. 89; 9 Jur. (N.S.) 820; 7 L. T. 622; 11 W. R. 259.

A mandamus does not lie to their clerk for this purpose, even though he may have received the fees for drawing up such convictions. *Ib.*

A justice cannot draw up and return to the sessions a corrected record of a summary conviction, after the first record has been quashed by the court. *Chaney* v. *Payne*, 1 Q. B. 712; 1 G. & D. 348; 6 Jur. 79.

Effect in Evidence.]—Upon the trial of an indictment for a nuisance at common law in carrying on a trade, a summary conviction under 16 & 17 Vict. c. 128, s. 1, for carrying on the same trade so as to occasion noxious effluvia, "without using the best practicable means of preventing or counteracting the smoke or other annoyance," is not admissible. *Reg.* v. *Fairie*, 8 El. & Bl. 486; 4 Jur. (N.S.) 300; 6 W. R. 56; 8 Cox, C. C. 66.

Trespass for pulling down a cottage. The plaintiff was convicted by justices for an encroachment on a highway. The defendant, who was a surveyor of the highways, pulled down the cottage, which was what the conviction referred to, but which was not in fact an encroachment within the meaning of the act. No warrant issued directing defendant to do the act:—Held, that the 5 & 6 Will. 4, c. 50, s. 69, requires the surveyor to execute a conviction under that act by pulling down the encroachment, though there is no warrant, and that consequently the conviction, though not itself correct, was a defence to this action, as the defendant was shewn to be in the position of a person bound to execute the judgment of a tribunal of competent jurisdiction. *Keane* v. *Reynolds*, 2 El. & Bl. 748; 18 Jur. 242. 2 C. L. R. 245. See also *Reg.* v. *Hickling*, 7 Q. B.

880; 14 L. J., M. C. 177. *Reg.* v. *Hutchins*, 50 L. J., M. C. 35; 6 Q. B. D. 300; 44 L. T. 364; 29 W. R. 724.

b. Form.

Under 11 & 12 Vict. c. 43.]—The forms of convictions given in the schedule of the 11 & 12 Vict. c. 43, apply to all cases, and convictions drawn up in such of the forms as are applicable to the particular case are sufficient. *Reg.* v. *Hyde*, 7 El. & Bl. 859, n.; 21 L. J., M. C. 94; 16 Jur. 337.

Before this Statute.]—The 3 Geo. 4, c. 23, gave a general form for all summary convictions where no form was given by the acts themselves, but it did not cure an omission in a conviction of the statement of a circumstance necessary to constitute the offence. *Rex* v. *Walsh*, 3 N. & M. 632; 1 A. & E. 481; 3 L. J., M. C. 100.

Following Statutes.]—Where an act of parliament gives the form of conviction for any offence prohibited by the act, that form must be followed; and a warrant granted on a conviction drawn up in any other form is illegal, and the justice and those acting under it are trespassers. *Davison* v. *Gill*, 1 East, 64. S. P., *Goss* v. *Jackson*, 3 Esp. 198.

A conviction stated that the defendant "unlawfully by threats endeavoured to force one J., who was then and there a workman hired in his trade and business of a mason by P., to depart from his said hiring, contrary to 6 Geo. 4, c. 129": —Held, that, as the offence was stated in the words of the act creating it, the conviction was valid by 2 & 3 Vict. c. 71, s. 48, and that it need not set out the threats, or shew to whom they were addressed. *Perham, In re*, 5 H. & N. 30; 29 L. J., M. C. 33; 5 Jur. (N.S.) 1221; 1 L. T. 106. S. P. and *S. C.*, 29 L. J., M. C. 31; 5 Jur. (N.S.) 1212; 1 L. T. 91; 8 W. R. 44.

A conviction on a statute, on the face of it not pursuing the provisions of the statute, nor shewing that any offence has been committed, is bad. *Gimbert* v. *Coyney*, M'Clel. & Y. 469.

If a conviction on a penal statute does not negative all the exceptions in the statute by which the defendant might be protected it will be insufficient. *Rex* v. *Mallinson*, 2 Burr. 679; 2 Kenyon, 384.

In an action against a justice for false imprisonment, who justified under a conviction under the Vagrant Act (5 Geo. 4, c. 83):—Held, that the conviction was not vitiated by the omission of the word "part" before "of Great Britain" in the recital of the title of the statute, as directed in the form given by the act. *Nixon* v. *Nanney*, 1 G. & D. 370; 1 Q. B. 747; 10 L. J., M. C. 134; 6 Jur. 389.

Held, also, that pursuing that form, it was not necessary to state the evidence on which the conviction proceeded. *Ib.*

The description of an act in a conviction, as having been passed in the 25th year of the king's reign, when in fact the parliament in which the act was passed was continued by prorogation from the 24th to the 25th year of the reign, is not a misdescription nor a ground of objection. *Rex* v. *Windsor*, 2 Chit. 513.

A conviction is sufficient if it describes the offence in the words of the statute creating it; and a conviction under 5 Geo. 4, c. 83, s. 4, was therefore held good which stated that the defendant "did play in a certain highway (to wit) the river Thames, with certain instruments of gaming (to wit) cards, at a certain game of chance." *Grant, Ex parte*, 5 W. R. 289.

The words of a conviction under a private statute (by which the right to a certiorari was taken away, and by which it was enacted that the burning certain offensive substances should be a nuisance) specifying the substances burnt, were such as might by evidence be shewn to include the substances mentioned in the statute, but left it doubtful whether they were within the act:—Held, that the conviction was good on its face, and did not shew a want of jurisdiction, but that a rule to quash the conviction would be granted if it appeared upon the affidavits that the substances specified in the conviction were not within the statute. *Reg.* v. *Strong*, 3 C. L. R. 76; 3 W. R. 65. *Ib.*, 3 W. R. 73.

"Intent."]—Where an act is made punishable by statute on summary conviction, which act may be lawful if performed under certain circumstances, those circumstances ought to be negatived in the conviction. When the proof must negative such circumstances, the allegation in the conviction ought to do the same; and in such cases a statement of the offence in the terms of the act creating it is not sufficient. *Fletcher* v. *Calthrop*, 1 New Sess. Cas. 529; 6 Q. B. 880; 14 L. J., Q. B. 95; 9 Jur. 205.

The 9 Geo. 4, c. 69, s. 1, gives a summary conviction if any person "shall by night unlawfully enter or be in any land, either open or inclosed, with any gun, &c., for the purpose of taking and destroying game." A conviction setting forth that C. did by night "unlawfully enter certain inclosed land, with a net, for the purpose of taking game, to wit, partridges and pheasants, contrary to the form of the statute," is bad, for not stating the intent to be to take game there *Ib.*

The 39 & 40 Geo. 3, c. 106, enacts that al agreements, in writing or not, by any journeymen manufacturers, for controlling any person carrying on any manufacture, in the conduct thereof, &c., shall be illegal; and it gives a summary form of conviction, in which the offence is required to be stated:—Held, that a conviction alleging generally that the defendants were concerned in entering into a certain agreement for the purpose of controlling A. without stating what the agreement was (even if a departure from the words of the statute in stating the agreement to be "for the purpose of controlling," &c., instead of "for controlling," &c., would not at any rate have been a fatal variance), was bad. *Rex* v. *Neild*, 6 East, 417; 2 Smith, 417.

The 39 & 40 Geo. 3, c. 106, s. 4, enacts that all persons who shall attend any meeting had or held for the purpose of making or entering into any contract, &c., by that act declared to be illegal, or of entering into any combination for any purpose declared by that act to be illegal: —Held, that a conviction for attending a meeting "for the purpose" of carrying on a combination "for the purpose" of obtaining an advance of wages, correctly described the offence by the words "for the purpose," though the description of the offence referred to in the 4th section was described in the 3rd section to be "any combination to obtain," the words "for the purpose" and "to obtain" being synonymous.

Rex v. *Ridgway*, 1 D. & R. 132; 5 B. & Ald. 527; 1 L. J. (o.s.) K. B. 53.

"Knowledge."]—The 36 Geo. 3, c. 60, s. 2, directs that no person shall expose to sale metal buttons marked with the word "gilt" (the same not being really gilt), knowing the same not to be gilt, under a certain penalty; a conviction, charging that the defendants did the act unlawfully and fraudulently, contrary to the form of the statute, was bad, without an express charge that they did it knowingly; and such defect was not aided by a proviso in the statute, "that no conviction for any offence in the act should be set aside for want of form, or through the mistake of any fact, circumstance or other matter, provided the material facts alleged were proved"; for this, in effect, required all material facts to be alleged, and knowledge was a material fact to constitute such an offence. *Rex* v. *Jukes*, 8 Term Rep. 536; 5 R. R. 445.

Uncertainty—Alternative Offences.]—A conviction, stating an offence to have been committed in the alternative, is bad. *Rex* v. *Sadler*, 2 Chit. 519.

Therefore, a conviction on 6 Geo. 4, c. 108, s. 49, for being on board a boat liable to forfeiture by s. 3, and having casks attached thereto, "of the description used, or intended to be used, for the smuggling of spirits," was quashed for uncertainty. *Rex* v. *Pain*, 7 D. & R. 678; 5 B. & C. 251; 29 R. R. 231.

A defendant may be convicted of several offences in the same conviction. *Rex* v. *Swallow*, 8 Term Rep. 284.

A conviction on the excise laws against H. & Co. could not be supported. *Rex* v. *Harrison*, 8 Term Rep. 508; 5 R. R. 424.

A conviction under 48 Geo. 3, c. 143, for selling beer or ale without an excise licence is bad. *Rex* v. *North*, 6 D. & R. 143; 28 R. R. 538.

A by-law of the Board of Trade for the regulation of a steam tramway provided that "no smoke or steam shall be emitted from the engines so as to constitute any reasonable ground of complaint to the passengers or the public," under a penalty:—Held, that an information and conviction for permitting smoke to escape from an engine "contrary to the by-laws of the Board of Trade," was bad. *Cotterill* v. *Lemprière*, 59 L. J., M. C. 133; 24 Q. B. D. 634; 62 L. T. 695; 17 Cox, C. C. 97; 54 J. P. 583.

Surplusage.]—Surplusage does not vitiate a conviction. *Rex* v. *Jefferies*, 4 Term Rep. 767.

If a conviction under 31 Geo. 3, c. 21, s. 4, which enacts that all convictions against that act may be made out "in the form or to the effect following" (giving the form), contain all the substantial parts of that prescribed, it is good though it also contains something more. *Ib.*

If a convicting magistrate gives a proper date to the time of the conviction, upon the face of it, and afterwards adds an impossible date to the time when he set his hand and seal to the conviction (being before the offence committed), the latter may be rejected as surplusage. *Rex* v. *Picton*, 2 East, 195.

Conviction or Order.]—An instrument, in which a magistrate states that a party was brought before him, and is to be punished in pursuance of an act of parliament, is a conviction, and not an order. *Gray, Ex parte*, 1 New Sess. Cas. 354; 8 Jur. 1049.

Conviction or Warrant.]—The return to a habeas corpus to bring up B., shewed as the cause of B.'s detention a warrant by a justice which recited in the past tense that "B. was this day convicted before me" of an offence against the 4 Geo. 4, c. 34, "and I the same justice adjudged that B. should be committed for two months with hard labour," and the warrant then in the present tense commanded the constables to take and the gaoler to receive B. The warrant did not set forth the evidence nor state that it was taken in the prisoner's presence or on oath:—Held, that under the 4 Geo. 4, c. 34, the conviction and warrant might be in one instrument, but might also be separate; that the instrument was not a conviction but a warrant founded on a previous conviction, and was therefore good in form. *Bailey, In re*, 3 El. & Bl. 607; 23 L. J., M. C. 161; 18 Jur. 930.

Statement of Information before 11 & 12 Vict. c. 43.]—It might be stated in a conviction, that the informer "came and gave the justice to be informed," in the past tense. *Rex* v. *Hall*, 1 Term Rep. 320.

It was not necessary, in a conviction under 39 Geo. 3, c. 79, s. 15, that the information should be in the name of the attorney or solicitor general. *Reg.* v. *Johnson*, 2 New Sess. Cas. 170; 8 Q. B. 102; 15 L. J., M. C. 7; 9 Jur. 1010.

On an information for vagrancy, a conviction stated, that the plaintiff, having been brought before a justice of the peace, upon an information charging him with having unlawfully returned to his parish, without a certificate, from which he had been legally removed, confessed himself guilty of the offence:—Held, that the conviction was good upon the face of it, without stating in it an express act of vagrancy, it being necessary for the party convicted to shew in his defence that he had a sufficient excuse for returning, and that he did not return in a state of pauperism. *Mann* v. *Davers*, 3 B. & Ald. 103.

Evidence.]—It was necessary to set out the evidence upon a conviction, that the court might judge whether the justices had done right. *Rex* v. *Killett*, 4 Burr. 2063.

And a conviction was bad, unless it set forth the evidence. *Rex* v. *Read*, 2 Dougl. 486.

And the whole of the evidence both for and against the defendant. *Rex* v. *Clarke*, 8 Term Rep. 220.

But in a conviction under the Vagrant Act (5 Geo. 4, c. 33), which purports to pursue the form given by that act, it is not necessary to set out the evidence. *Nixon* v. *Nanney*, 1 G. & D. 370; 1 Q. B. 747; 10 L. J., M. C. 134; 6 Jur. 389.

The justice is the sole judge of the weight of the evidence given before him; and the court will not examine whether or not he has drawn a right conclusion from the evidence; but if no evidence appeared on the conviction to support a material part of the information, the court would quash the conviction. *Rex* v. *Smith*, 8 Term Rep. 588.

Oaths of Witnesses.]—It was not necessary to state how the witnesses were sworn. *Rex* v. *Selway*, 2 Chit. 522.

The conviction need not state that the magistrate had authority to administer the oath. *Rex* v. *Picton*, 2 East, 195.

A conviction stating, after the appearance and plea of the defendant, that divers credible witnesses, to wit, A., B., C., &c., came before the justices, upon their several oaths to them severally and respectively, and in the presence of the said A., B., C., &c., duly administered, substantially shewed that such oaths were administered to the witnesses in the presence of the justices. *Rex* v. *Glossop*, 4 B. & Ald. 616.

In a conviction for causing to be acted, at the Coburg Theatre, a certain entertainment of the stage called "Richard the Third," for gain and reward, the evidence stated that the defendant was seen once or twice at the rehearsals of that play, that another person was stage-manager, and that the defendant engaged a person to perform that character, and gave him a cheque for the amount of his benefit:—Held, that this was sufficient to warrant the justices to conclude that the defendant caused the play of "Richard the Third" to be performed there. *Ib.*

A conviction, after stating the evidence, stating, "thereupon the defendant, on, &c., at, &c., before me, &c., by the oath of one credible witness, according to the form of the statute, is convicted," is an adjudication of the justice that he was convicted of the offence. *Rex* v. *Thompson*, 2 Term Rep. 18.

Where a conviction under 3 Geo. 4, c. 110, stated that A. was duly convicted before the justice of having been found "carrying and conveying" brandy liable to seizure, without stating that he had been convicted of that offence "upon the oath of a credible witness":—Held, that the conviction was bad. *Aldridge, Ex parte*, 4 D. & R. 83; 2 B. & C. 600.

By 1 Jac. 1, c. 9, s. 2, an innkeeper permitting an inhabitant of the parish to tipple, was liable to be convicted on the oath of two witnesses; that act having expired, it was provided by 21 Jac. 1, c. 7, that the conviction might be made on the oath of one witness; the 1 Car. 1, c. 4, extended the same penalty to the case of strangers, but required proof by two witnesses, as in 1 Jac. 1, c. 9:—Held, that a conviction appearing to have been made on the oath of one witness, against an alehouse-keeper, for suffering tippling in his alehouse, was bad, for not stating whether the persons found tippling were inhabitants of the parish or strangers. *Rex* v. *Dove*, 3 B. & Ald. 596.

Defendant's Presence.]—A summary conviction was bad which did not shew that the evidence was given in the presence of the party charged. *Reg.* v. *Tordoff*, 5 Q. B. 933; D. & M. 693; 13 L. J., M. C. 145.

But if the defendant appeared and pleaded and the evidence was given on the same day, the court would intend that the evidence was given in his presence. *Rex* v. *Thompson*, 2 Term Rep. 18. And see *Rex* v. *Lovet*, 7 Term Rep. 152.

Even though it was stated that the appearance was at A., and that the evidence was given at B. *Rex* v. *Swallow*, 8 Term Rep. 284.

It was also necessary to state that the witnesses were sworn, as well as examined, in the defendant's presence. *Rex* v. *Crowther*, 1 Term Rep. 125; 1 R. R. 162.

It was not sufficient to read over the depositions in his presence. *Ib.*

But if the defendant confessed the charge, the irregularity was cured. *Rex* v. *Hall*, 1 Term Rep. 320.

Statement of Time.]—Where a penalty is to be sued for, before justices of the peace, within a certain time after the offence committed, it must appear on the face of the evidence stated in a conviction for such offence that the prosecution was in time. *Rex* v. *Woodcock*, 7 East, 146; 3 Smith, 286.

Where it appeared on the face of a conviction for an offence against the excise laws, that the plaintiff had been summoned on the 20th September to appear before a justice on the 30th September; and he not appearing on that day, that the magistrate proceeded to hear evidence, and convicted him in a penalty of 5*l.*:—Held, that the conviction was null and void, and the magistrate liable to an action for issuing a distress warrant, as the 4 & 5 Will. 4, c. 51, s. 19, required that "ten days notice at least" should be given to the party to appear; and the rule is inflexible to construe such limitation of time as ten clear days. *Mitchell* v. *Foster*, 4 P. & D. 150; 12 A. & E. 472; 9 D. P. C. 527; 5 Jur. 70.

—— **Where continuing Offence.**]—An information charged A., under 16 & 17 Vict. c. 119, s. 3, for that on the 5th of October, A.D. 1860, and on divers other days and times between the 5th of October and the time of laying the information (November 16), being the occupier of a house, he knowingly and wilfully opened, kept and used the same for the purpose of his betting with persons resorting thereto. He was convicted of opening, keeping and using the house for the purpose aforesaid on the 8th November:—Held, that whether or not the information correctly laid the offence as being done on the 5th of October and on divers days and times, yet that the defect, if any, was cured by 11 & 12 Vict. c. 43, s. 1. *Onley* v. *Gee*, 30 L. J., M. C. 222; 7 Jur. (N.S.) 570; 4 L. T. 338; 9 W. R. 662.

—— **Occupation.**]—A conviction on 42 Geo. 3, c. 38, s. 30, stated that R. P. informed the justices "that, at the time of committing the alleged offence, the defendant was a maltster, and that he, on the 12th May, then last past, surveyed the malthouse of the defendant, and found a floor of malt in operation very wet, &c., and the witness merely said that he surveyed the said malthouse with the said R. P." Upon its being objected that this evidence did not prove the defendant to have been a maltster at the time of the offence committed, inasmuch as the statement that the defendant was a maltster might refer to the day of examination:—Held, that such statement was sufficient primâ facie evidence that the defendant was at that time a maltster, for otherwise it could not properly be called his malthouse, nor had the officer any authority to survey. *Rex* v. *Crisp*, 7 East, 389; 3 Smith, 377.

Statement of Place.]—A conviction purporting to be made by a justice "at the public office in Great Marlborough Street, in," &c., did not sufficiently denote it to have been made by one of the police magistrates under 42 Geo. 3, c. 76. *Rex* v. *Seale*, 8 East, 568.

—— **Jurisdiction.**]—A conviction of a journeyman calico printer upon the 39 & 40 Geo. 3, c. 106

and 41 Geo. 3, c. 106, and 41 Geo. 3, c. 38, for refusing to work, &c., was bad, for want of stating that his refusal to work, &c., was made within the jurisdiction of the convicting magistrates. *Rex* v. *Hazell*, 13 East, 139.

The 12 Car. 2, c. 24, s. 45, giving summary jurisdiction in offences against the excise, committed within the limits of the chief office of excise in London, to the chief commissioners, &c.; and "within all or any other the counties, cities, &c., within this kingdom, &c., to two or more justices of the peace residing near to the place where such offence shall be committed"; must be understood to be confined to justices of the peace of the county, &c., wherein the offence was committed: and therefore, if a person was convicted by two resident justices of the peace under 19 Geo. 3, c. 50, s. 2, for having in his custody and possession a private and concealed still for illicit distillation, and the evidence only shewed that his house was in the county, and that the still was found concealed in the garden of the house, such garden not appearing to be in the same county, the conviction was bad. *Rex* v. *Chandler*, 14 East, 267.

Adjudication.]—If a conviction does not state an adjudication, it cannot be supported whether the punishment is or is not freed by statutes. *Rex* v. *Harris*, 7 Term Rep. 238.

c. Costs.

Payment of Parties.]—The 18 Geo. 3, c. 19, only applied to cases where there was a party complaining and a party complained against, and the complaint had been heard and adjudicated on by the justices. *George* v. *Chambers*, 11 M. & W. 149; 2 D. (N.S.) 783; 12 L. J., M. C. 94; 7 Jur. 836.

Irregular Warrant.]—B. was convicted in a penalty of 2*l.* and costs, and in default of payment two months' imprisonment. He gave notice of appeal and left the court. A conviction and warrant were afterwards drawn up and signed by the magistrates, in which blanks were left for the amount of the costs. The costs having been ascertained by the clerk to the magistrates, and inserted by him, the warrant issued. B. then for the first time became informed of the amount of the costs. In an action by him against the magistrates for false imprisonment:—Held, that the signing the conviction and warrant in blank was an irregularity, not an excess of jurisdiction, and therefore B. was rightly nonsuited. *Bott* v. *Ackroyd*, 28 L. J., M. C. 207; 5 Jur. (N.S.) 1053; 7 W. R. 420.

Default—Setting in Stocks.]—By 29 Car. 2, c. 7, ss. 1, 2, a penalty of 5*s.* is imposed to be levied by distress, and in default of such distress, or in cases of insufficiency or inability to pay the penalty, the offender is to be set publicly in the stocks for two hours. By 11 & 12 Vict. c. 43, s. 18, the amount of costs is to be specified in a conviction, and is to be recoverable in the same manner as any penalty adjudged by such conviction is to be recoverable. A conviction under 29 Car. 2, c. 7, s. 1, adjudged the offender to forfeit and pay 5*s.* and 11*s.* costs, and that the several sums, if not paid, should be levied by distress, and in default of sufficient distress that the party convicted should be set publicly in the stocks by the space of two hours, unless the several sums should be sooner paid:—Held, that the conviction was bad, as the justice was not warranted in adjudging that the offender should be set in the stocks in default of payment of the costs, that not being a method provided by 29 Car. 2, c. 7, for recovering the pecuniary penalty, but a substituted punishment. *Reg.* v. *Barton*, 3 New Sess. Cas. 470; 12 Q. B. 389; 18 L. J., M. C. 56; 13 Jur. 232.

Several Offenders.]—A conviction under 1 & 2 Will. 4, c. 32, s. 30, included four persons and adjudged each of them to forfeit and pay the sum of 2*l.* each, &c., and if the said sums be not paid, that each of them, C., B., W. and S., so making default, should be imprisoned for one month, unless the said several sums and the costs and charges of conveying each of them, C., B., W. and S., so making default, to the said gaol, should be sooner paid:—Held, that the conviction made each defendant liable to be imprisoned until he had paid the penalty, and the expense of conveying not himself only, but the other persons convicted, and was therefore bad, and that this was not a case to exercise the power of amendment under 12 & 13 Vict. c. 45, s. 7. *Reg.* v. *Cridland*, 7 El. & Bl. 853; 27 L. J., M. C. 28; 3 Jur. (N.S.) 1213.

Impecunious Prisoners—Payment by County under Prisons Act, 1877.]—Expenses of conveying impecunious prisoners to prison are payable under s. 4 of the Prisons Act, 1877, by the secretary of state and not by the county. *Mullins* v. *Surrey* (*Treasurer*), 51 L. J., Q. B. 145; 7 App. Cas. 1; 45 L. T. 625; 30 W. R. 157; 15 Cox, C. C. 9; 46 J. P. 276—H. L. (E.)

Of Distress.]—Where an act gives power to a magistrate, on a summary conviction, to award the reasonable charges of taking a distress, he must ascertain the amount in the conviction; and an adjudication that the defendant shall pay the reasonable charges of the levy is bad. *Lex* v. *Symonds*, 1 East, 189.

Under 12 & 13 Vict. c. 14, s. 1, where a warrant of distress is granted for a poor, highway and other rates, the party applying for a distress warrant is the person to whom the costs of such application are to be paid. *Walsh* v. *Southwell*, 6 Ex. 150; 20 L. J., M. C. 165.

9. Commitments.

Before 11 & 12 Vict. c. 43, and 11 & 12 Vict. c. 42.]—General warrants of commitment are illegal. *Money* v. *Leech*, 3 Burr. 1742; 1 W. Bl. 555, 563.

A commitment for treasonable practices is legal. *Rex* v. *Despard*, 7 Term Rep. 736; 4 R. R. 563.

Authority.]—A warrant need not set forth the authority under which it is granted. *Rex* v. *Goodhall*, 1 Ld. Ken. 122.

A warrant of commitment in execution, after a conviction, must shew before whom the conviction was, and the authority to convict. *Rex* v. *York*, 5 Burr. 2684.

A warrant of commitment stated that "H. B., in a certain affidavit, made and sworn to by him before C. C., a competent authority by law to administer the same, did falsely, wickedly, wilfully and corruptly commit wilful and corrupt perjury":—Held, bad, for that it did not state

that the perjury was committed in the course of a judicial proceeding, or before a competent authority to administer an oath in a judicial proceeding. *Reg.* v. *Bartlett*, 1 D. & L. 95; 12 L. J., M. C. 127; 7 Jur. 649.

A warrant of commitment which recites a conviction must shew, on the face of the recited conviction, that the offence was one over which the committing magistrate had jurisdiction. *Reg.* v. *King*, 1 D. & L. 721; 13 L. J., M. C. 43.

Date.]—A warrant issued by justices to enforce the payment of a penalty of which a party had been convicted under 11 Geo. 4 & 1 Will. 4, c. 64, and 4 & 5 Will. 4, c. 85, if not issued too soon, is not bad because it was dated too soon. *Newman* v. *Hardwicke* (*Earl*), 3 N. & P. 368; 8 A. & E. 124; 1 W. W. & H. 284; 7 L. J., M. C. 101.

A warrant of commitment without any date is bad. *Fletcher*, *Ex parte*, 1 D. & L. 726; 13 L. J., M. C. 16; 8 Jur. 146.

In Writing.]—Where a power is given to magistrates to commit by issuing forth their warrant (as under 5 Geo. 4, c. 18, s. 2), such warrant must be in writing; and an imprisonment without a warrant, except during the period necessary to prepare the warrant, is illegal. *Hutchinson* v. *Lowndes*, 1 N. & M. 674; 4 B. & Ad. 118; 2 L. J., M. C. 3.

The irregularity is not cured by a warrant of commitment drawn up on a subsequent day, dated as of the day of commitment. *Ib.*

Contents and Recitals.]—A commitment in execution by a magistrate must state that the party has been convicted; setting forth that he was charged on oath with the offence was insufficient. *Rex* v. *Cooper*, 6 Term Rep. 509.

A commitment is bad if the conviction as stated in the warrant of commitment does not shew jurisdiction. *Peerless*, *In re*, 1 Q. B. 143; 10 L. J., M. C. 67.

If a warrant of commitment in execution, manifestly defective on the face of it, shews that there has been a conviction, the court will not notice the defect until the conviction is returned into court. *Rex* v. *Taylor*, 7 D. & R. 622.

A warrant of commitment, setting out the character in which the prisoner is committed in the disjunctive, is bad. *Rex* v. *Evered*, Cald. 26.

A commitment in execution need not recite the title of the statute, on which the proceeding is founded. *Rex* v. *Harpur*, 1 D. & R. 222.

It is fatal, in a warrant of commitment for a riot, under 7 & 8 Geo. 4, c. 30, s. 8, to state that the defendant began to pull down and destroy "in part" a dwelling-house. *Reg.* v. *Lowden*, 7 D. P. C. 538; 1 W. W. & H. 551.

A commitment for embezzlement is sufficient, if it shews a sufficient offence to warrant the commitment, though it does not state the act to have been done feloniously, or with the precision of an indictment. *Rex* v. *Croker*, 2 Chit. 138.

A commitment need not be drawn with the same precision as an indictment. *Rex* v. *Remnant*, 2 Leach, C. C. 583; 1 East, P. C. 420; 5 Term Rep. 169; Nolan, 205.

In a commitment for felony, it is not necessary to allege that the offence was feloniously done; it is sufficient if enough appears for the court to collect whether the charge is felony or not. *Rex* v. *Judd*, 1 Leach, C. C. 484; 2 East, P. C. 1018; 2 Term Rep. 255.

A warrant of commitment, under 4 Geo. 4, c. 34, s, 3, adjudged that J. G., having contracted to serve J. S. as a collier, and the term of his contract being unexpired, did unlawfully misdemean and misconduct himself in his service, by neglecting and absenting himself from his service without the leave of his master, without having given to his master any notice thereof, and without assigning any sufficient reason for so doing:—Held, that the warrant was bad, as it did not shew that J. G. had absented himself without lawful excuse. *Geswood*, *In re*, 2 El. & Bl. 552; 2 C. L. R. 269; 23 L. J., M. C. 35; 17 Jur. 1163; 2 W. R. 94.

A warrant of commitment under 4 Geo. 4, c. 34, s. 3, recited that complaint had been made to the justice that A. had contracted to serve with B. and C. in their business for a term of one year, to commence from the 4th November last, and that the term of his contract being unexpired, A., on the 2nd June instant, unlawfully misconducted himself in his service by neglecting and absenting himself from his master's service without notice, or assigning a sufficient reason. The warrant adjudged the complaint to be true, and convicted A. of the offence, and sentenced him to be imprisoned for a month:—Held, that A. was entitled to be discharged from custody, as the warrant was bad for not stating either that the contract was in writing, or that A. had entered into the service. *Askew*, *In re*, 2 L. M. & P. 429; 20 L. J., M. C. 241; 15 Jur. 705.

A warrant of commitment which does not state either that the offence was committed, the contract entered into, or the party employed or found within the jurisdiction of the magistrate, is bad. *Johnson* v. *Reid*, 6 M. & W. 124; 9 L. J., M. C. 25.

An affidavit cannot be received on the return to a writ of habeas corpus for the purpose of shewing that the prisoner did not in fact contract within the jurisdiction as stated in the warrant of commitment. *Smith*, *Ex parte*, 3 H. & N. 227; 27 L. J., M. C. 186; 6 W. R. 440.

One offence may be properly described in a warrant of commitment by the words "aid, abet, counsel and procure." *Ib.*

It is no ground of objection to a warrant, that it differs in some particulars from the conviction, so long as it discloses substantially the same offence. *Barnes* v. *White*, 1 New Sess. Cas. 504; 1 C. B. 192; 14 L. J., C. P. 150; 9 Jur. 181.

Under 20 Geo. 2, c. 19, s. 2, for regulating servants in husbandry, artificers and other labourers there mentioned, if a justice of the peace, upon a complaint made to him of the misconduct of such persons in their employment, sentence the offender to be committed to the house of correction for a time not exceeding one calendar month, he must, if he intended to proceed upon that statute, also sentence him there to be corrected and held to hard labour; but the statute gave the justice an option to punish the offender in that manner, or otherwise, by abating part of his wages, or by discharging him from his employment. And the meaning of the terms, "there to be corrected," is to be understood of a correction by whipping. *Rex* v. *Hoseason*, 14 East, 605.

Where the certiorari is taken away from a defendant, but not from the prosecutor, the court will assume that the warrant of commitment contains a true recital of the conviction, unless it is brought before the court by the prosecutor, though the recital shews the conviction to be

bad. *Reg.* v. *Reynolds*, 1 D. & L. 846; 13 L. J., M. C. 65; 8 Jur. 192.

The return to a writ of habeas corpus set out a warrant of commitment, purporting to recite an order of quarter sessions, confirming a conviction under the 9 Geo. 4, c. 69, s. 1 (the Night Poaching Act), which adjudged the offenders "to find sureties by recognizance, that each of them, H. R. and E. H., should not offend again for the space of one year next following":—Held, bad. *Ib.*

A warrant of commitment is not evidence of the facts which it recites. *Stevens* v. *Clark*, 2 M. & Rob. 435; Car. & M. 509.

Where by a statute giving justices a power to commit summarily they are empowered to commit the offender to prison for a certain period with or without hard labour, and in their warrant of commitment nothing is said about hard labour, it is to be taken that they did not mean to give hard labour, and the warrant is not objectionable for omitting to state whether the imprisonment is to be with or without hard labour. *Thompson, Ex parte*, 3 L. T. 318.

Period.]—Under 6 & 7 Vict. c. 75, a secretary of state, upon a requisition in the name of the King of the French to deliver up a person who is accused of having committed certain crimes in the act mentioned, may, by a warrant under his hand and seal, authorise a justice to commit such person to gaol, there to remain until delivered pursuant to such requisition. A warrant of commitment under this statute directed the gaolor to keep the prisoner in his custody until he should be discharged in due course of law:—Held, bad, for not pursuing the authority given by the statute as to the time of commitment. *Besset, Ex parte*, 6 Q. B. 481; 1 New Sess. Cas. 337; 14 L. J., M. C. 17; 9 Jur. 66.

A warrant of two justices, committing the collector of the rates for the parish of Richmond to the county gaol, upon complaint against him for refusing to account and pay over the moneys collected by him, adjudging that he should be committed to the gaol, there to remain until he should have made a true account, and until such money as upon the said account should appear to be remaining in his hands should be paid by him or his sureties, held good, although it concluded by directing the gaoler to keep him until he should be discharged by due course of law. *Goff's Case*, 3 M. & S. 203.

Presence of Accused.]—Where a statute gives a magistrate a power of commitment, without a previous conviction, it should appear on the face of the warrant of commitment that the charge was heard and the evidence taken in the presence of the prisoner. *Reg.* v. *Tordoff* or *Tordoff*, 5 Q. B. 933; D. & M. 693; 1 New Sess. Cas. 171; 13 L. J., M. C. 145.

Where a warrant of commitment, under 6 Geo. 3, c. 25, s. 3, did not recite a conviction, it must appear on the face of it that the examination on which the magistrate has proceeded was on oath, and taken in the presence of the prisoner. *Gray, In re*, 2 D. & L. 539; 14 L. J., M. C. 26.

Place.]—The 16 & 17 Vict. c. 30, empowered two justices of the peace to punish, on summary conviction for assaults committed on females, or children under fourteen years, any person charged before them "sitting at a place where the petty sessions are usually held":—Held, that a warrant of commitment for such offence, in the form given by the 11 & 12 Vict. c. 43, schedule (P 1) was good, although it did not state that the justices, before whom the party was charged, were sitting at a place where petty sessions are usually held. *Allison, In re*, 10 Ex. 561; 3 C. L. R. 319; 24 L. J., M. C. 73; 18 Jur. 1055; 3 W. R. 62. And see *Reg.* v. *Hyde*, 7 El. & Bl. 859, n.; 21 L. J., M. C. 94; 16 Jur. 337. *Eggington* v. *Lichfield Corporation*, 5 El. & Bl. 100; 24 L. J., Q. B. 360; 1 Jur. (N.S.) 908.

Substitutionary.]—The return to a habeas corpus by a gaoler, stated that the prisoner was received by him under a warrant of commitment, reciting a conviction under the Act for the Prevention of Smuggling (3 & 4 Will. 4, c. 53, which authorises justices to amend their warrant of commitment); that on a subsequent day some person came to the gaol, took away the warrant, and left in lieu thereof another warrant, dated the same day, under the hands and seals of the same justices, but which contained no statement of its being a substituted warrant; and that under this warrant he had since detained the prisoner:—Held, that it did not sufficiently appear that the second warrant was substituted by the authority of the justices, and that the prisoner was therefore liable to be discharged. *Rex* v. *Elmy*, 3 N. & M. 733; 1 A. & E. 843; 3 L. J., K. B. 199.

Where an act of parliament authorises magistrates to commit, if a good warrant of commitment is shewn, the court will not inquire into the validity of a previous document, under which a prisoner was in fact committed; since a conviction, if such was necessary at all, may be at any time drawn up to sustain a commitment valid in form. *Reg.* v. *Richards*, 5 Q. B. 926; D. & M. 777; 1 New Sess. Cas. 182; 13 L. J., M. C. 147; 8 Jur. 752. See *Hammond, In re*, 9 Q. B. 92; 15 L. J., M. C. 136; and *Smith, Ex parte*, 3 H. & N. 277; 27 L. J., M. C. 186; 6 W. R. 440.

Where a prisoner has been lodged in gaol under a bad warrant of commitment, even in the nature of a conviction (as where the commitment is under the Vagrant Act, 5 Geo. 4, c. 83, s. 4), a good warrant of commitment subsequently delivered to the gaoler, but before a rule for a habeas corpus has been obtained, is a good answer to that rule. *Cross, Ex parte*, 2 H. & N. 354; 26 L. J., M. C. 201.

10. Disposition and Delivery up of Property.

Application for Disposal of Property.]—The plaintiff was tried and acquitted on a charge of stealing a diamond ring and pin found on his person. The defendant, a superintendent of police, into whose hands the goods had come in the ordinary course of proceedings, did not deliver them to the plaintiff, but within a reasonable time applied to a metropolitan police magistrate under 2 & 3 Vict. c. 71, s. 29, for an order as to how he was to dispose of them. The magistrate, after hearing evidence, including that of the plaintiff, adjourned the hearing to a day not yet expired. In an action for the detention and conversion of the goods:—Held, that the defendant, having within a reasonable time proceeded, in accordance with the provisions of the act, to place the matter in the hands of the magistrate, was not liable. *Bullock* v. *Dunlop*, 46 L. J., Ex.

150 ; 2 Ex. D. 43 ; 35 L. T. 633 ; 25 W. R. 98. Affirmed, 36 L. T. 194 ; 25 W. R. 293 ; 13 Cox, C. C. 367, 581—C. A.

Order for Delivery of Money "charged" to have been fraudulently obtained.]—By 2 & 3 Vict. c. 71, s. 29, "if any money or goods charged to be stolen or fraudulently obtained shall be in the custody of any constable by virtue of any warrant of a justice, or in prosecution of any charge of felony or misdemeanor in regard to the obtaining thereof, and the person charged with stealing or obtaining possession as aforesaid shall not be found, or shall have been summarily convicted or discharged, or shall have been tried or acquitted, or if such person shall have been tried and found guilty, but the property so in custody shall not have been included in any indictment upon which he shall have been found guilty, it shall be lawful for any magistrate to make an order for the delivery of such goods or money to the party who shall appear to be the rightful owner thereof."—An accused person, having been arrested by a police constable, was taken to a police station, where she was searched and a sum of 108*l.* was found upon her, and taken possession of by the police. In the charge-sheet kept at the police station the following charge against her was entered :—"Fraudulently obtaining on the 10th instant, the sum of 5*s.* from Miss M., and also the sum of 5*s.* from Miss B., by representing that she (the prisoner) was collecting subscriptions for the children's treat of St. Peter's, Eaton Square, and further with endeavouring to procure charitable contributions by false pretences." On the following day she was brought before a metropolitan police magistrate who had the charge sheet before him, and convicted her summarily in respect of the two first offences specified therein, and sentenced her to two consecutive terms of imprisonment. At the hearing, in addition to Miss M. and Miss B., three other ladies were called, who proved that she had obtained from them various small sums, amounting to about 2*l.* 5*s.*, by making similar fraudulent representations :—Held, upon those facts, that the money found upon the prisoner was not money "charged" before the magistrate to be stolen or fraudulently obtained within the meaning of s. 29, and therefore that he had, after the conviction, no jurisdiction to make an order under that section for the delivery to her of the whole of the 108*l.* by the constable in whose custody it had remained. The word "charged" in s. 29 is used in its technical legal sense, and imports a formal charge made before a magistrate against an accused person of having stolen or fraudulently obtained specific goods or money, which charge the accused is called upon to answer, and is given an opportunity of answering. *Reg.* v. *d'Eyncourt*, 57 L. J., M. C. 64 ; 21 Q. B. D. 109 ; 37 W. R. 59 ; 52 J. P. 628.

Where Decision a Bar to subsequent Proceedings—Delivery up of Property.]—The plaintiff applied to a magistrate within the metropolitan police district for an order under 2 & 3 Vict. c. 71, s. 40, for the delivery up to him by the defendant of goods alleged to be unlawfully detained from him by the latter. The magistrate, after due inquiry into the title to the goods, refused an order, and the plaintiff thereupon brought an action of trover for the goods :—Held, that the proceedings before the magistrate did not preclude the plaintiff from maintaining his action. *Dover* v. *Child*, 45 L. J., Ex. 462 ; 1 Ex. D. 172 ; 34 L. T. 737 ; 24 W. R. 537.

Illegal Seizure—Permit.]—If goods which have been seized, and brought to the magistrates' office, are afterwards restored as having been seized illegally, and the party cannot remove them back without a permit, it is the duty of the magistrates to procure such permit. *Price* v. *Messenger*, 3 Esp. 100 ; 5 R. R. 559.

And see CRIMINAL LAW.

11. LIMITATION OF TIME FOR COMPLAINTS AND ORDERS.

In what Cases.]—The 11 & 12 Vict. c. 43, s. 11, as to the period of six months does not apply to warrants of distress for rates. *Sweetman* v. *Guest*, 37 L. J., M. C. 59 ; L. R. 3 Q. B. 262 ; 18 L. T. 52 ; 16 W. R. 426.

The commitment by two justices under 11 & 12 Vict. c. 63, s. 39, of a member of the town council and local board of a borough for nondelivery of a rate-book in his possession, by virtue of his office as overseer and collector of the borough rates, is a civil and not criminal proceeding, being in the nature of a distraint. The limitation of six months by s. 11 of Jervis's Act (11 & 12 Vict. c. 43), will therefore not apply. *Mayer* v. *Harding*, 17 L. T. 140.

Semble, that such limitation will only apply when the object of the proceeding is punishment and not merely coercion. Per Lush, J. *Ib.*

By s. 38 of 11 & 12 Vict. c. 43, the act is to commence and take effect seven weeks after its passing :—Held, that a complaint, after the act came into operation, upon matter which arose before, was barred by s. 11, though six calendar months from the time when the matter of complaint arose had elapsed when the statute passed. For, the act having given time for preferring any such complaint before the limitation clause came into operation, no such injustice resulted from giving full effect to s. 11, as would warrant the court in putting upon it a restricted construction. *Reg.* v. *Leeds and Bradford Ry.*, 18 Q. B. 343.

Persuading Seamen to Desert.]—A. had, on the 4th of April, 1867, endeavoured to persuade O. not to join his ship. O. did, however, return to his ship, and sailed with her next morning. He did not return till the end of the following October ; that is, a period of over six months from the commission of the offence by A. An information at the instance of O. was laid on the 14th of November, which was heard on the 19th of the same month, before two justices, when A. was convicted. The Merchant Shipping Act, 1854, s. 257, which creates the offence, provides that proceedings under it must be commenced within six months after the commission of the offence, or, if either or both the parties be during such time out of the United Kingdom, then within two months after they both happen to arrive at or be within the same :—Held, that the information was laid in sufficient time under this section. *Austin* v. *Olsen*, 9 B. & S. 46 ; 37 L. J., M. C. 34 ; L. R. 3 Q. B. 208 ; 17 L. T. 537 ; 16 W. R. 426.

Order for Payment—Lands Clauses Act.]—The adjudication of two justices under the Lands Clauses Act (8 & 9 Vict. c. 18), s. 22, as to the value of an interest in lands required for the

execution of an undertaking within that act, in respect to which no agreement has been come to between the promoters and the party entitled to sell as to the value thereof, is not an order for the payment of money within 11 & 12 Vict. c. 43, s. 11 (Jervis's Act), and the summons to hear and determine such question of compensation is not out of time if issued after six months from the notice to treat given by the promoters of the undertaking. *Reg.* v. *Hannay*, 44 L. J., M. C. 27; 31 L. T. 702; 23 W. R. 164.

An order of two justices under 8 & 9 Vict. c. 18, awarding compensation for damages done to a landowner by the construction of a railway, is within the clause of the 11 & 12 Vict. c. 43. *Reg.* v. *Leeds and Bradford Ry.*, 21 L. J., M. C. 193; 16 Jur. 817. *S. C.*, nom. *Edmundson, In re*, 17 Q. B. 67.

—— **Improvement of Borough—Demolition.**]—The words "order for the payment of money or otherwise," in 11 & 12 Vict. c. 43, s. 1, include orders of every kind which a justice of the peace has authority to make. *Morant* v. *Taylor*, 45 L. J., M. C. 78; 1 Ex. D. 188; 34 L. T. 139; 24 W. R. 461.

Therefore, when a local act for the improvement of a borough provided that if buildings should be erected contrary to any requirement by the corporation, the corporation might make complaint thereof before a justice, who was empowered to make an order directing the demolition of the building:—Held, that pursuant to 11 & 12 Vict. c. 43, s. 11, the complaint upon which an order for demolition was to be founded must be made within six months after the completion of a building erected contrary to the provisions of the local act. *Ib.*

—— **Expenses.**]—The 18 & 19 Vict. c. 122, s. 73, authorises the commissioners under that act, in certain cases, to take down, repair, or otherwise secure, dangerous structures, and enacts that the expenses incurred by them shall be paid by the owner of the structure. No time for making complaint, in respect of the expense, is limited by the act. Sect. 97 enacts that these expenses may be recovered in a summary manner; and s. 103 enacts that expenses directed to be recovered in a summary manner, may be recovered in manner directed by 11 & 12 Vict. c. 43. The commissioners having incurred expense, demanded payment of the owner of the structure, who refused to pay:—Held, that the six months were to be reckoned from the demand and refusal, not from the incurring of the expense. *Labalmondiere* v. *Addison*, 1 El. & El. 41; 28 L. J., M. C. 25; 5 Jur. (N.S.) 433.

In 1854, permanent improvements were completed by a local board of health upon premises. F. was receiver of the rent of the premises, appointed by the Court of Chancery. In 1853 and 1854 F. and the local board agreed that the expenses should be raised by mortgage, and notice of the sum was given to F., who paid 30*l.* in part payment. He afterwards ceased to be receiver, and refused to pay the balance. A demand of payment was made upon him in 1857, and in December he finally refused to pay. A complaint was made by the local board before justices, upon the 19th January, 1858:—Held, that the matter of complaint arose when notice of the amount to be raised by mortgage was given to F., and that the information ought to have been laid within six months from that time. *Eddleston* v. *Francis*, 7 C. B. (N.S.) 568; 3 L. T. 270.

Desertion of Wife.]—To constitute an offence under 5 Geo. 4, c. 83, s. 4, there must be a running away and deserting a wife or child, and a chargeability to a parish by reason of it. Therefore it is sufficient, if the information is laid within six months of the chargeability, although the running away took place more than six months before the information was laid. *Reeves* v. *Yeates*, 1 H. & C. 435; 31 L. J., M. C. 241; 8 Jur. (N.S.) 751; 10 W. R. 779.

Continuing Offence.]—A conviction for a continuing offence (e.g. for acting contrary to a closing order), by which a daily penalty is imposed, is bad if the number of days exceeds the limit of six months provided by s. 11 of the Summary Jurisdiction Act, 1848. *Reg.* v. *Slade, Saunders, Ex parte*, 64 L. J., M. C. 232; [1895] 2 Q. B. 247; 15 R. 499; 73 L. T. 343; 59 J. P. 471.

—— **Penalty imposed in Advance.**]—By s. 8 of the Tramways Orders Confirmation Act, 1873, the promoters of a tramway were to be subject to a penalty not exceeding 5*l.* for every day on which they continued to omit to maintain and keep in good order and condition the rails and roads of their tramways. By an order of justices dated December 15, 1893, they were fined 5*l.* for not keeping the rails in good condition and repair on October 23, 1893, and 1*l.* for every day on which such act of omission should continue. By a subsequent order of justices of February 8, 1895, they were ordered to pay 420*l.* for penalties incurred under the order of December 15, 1893, being 1*l.* per day since the date of that order:—Held, that the order of February 8, 1895, must be quashed as bad under s. 11 of the Summary Jurisdiction Act, 1848, and as being founded on an order bad on the face of it in respect of the continuing penalty. *Reg.* v. *Struve*, 59 J. P. 584.

Computation of Time.]—In computing the one calendar month within which complaint must be made under s. 14 of 12 & 13 Vict. c. 92, the day on which the offence was committed is not to be included. *Radcliffe* v. *Bartholomew*, 61 L. J., M. C. 63; [1892] 1 Q. B. 161; 65 L. T. 677; 40 W. R. 63; 56 J. P. 262.

—— **Mandamus—Time.**]—Justices dismissed an information on the ground that it was too late. No case was applied for within seven days. Upon an application for a mandamus:—Held, that an application for a case to be stated was a more convenient remedy, and the rule for a mandamus was refused. *Reg.* v. *Wisbech JJ.*, 54 J. P. 743.

E. APPEAL.

1. To High Court.

By Special Case—Application to whom.]—An application for a rule calling upon justices to shew cause why a case should not be stated under 20 & 21 Vict. c. 43, should be made to the Court of Queen's Bench Division, and not to the Divisional Court of Appeal. *Ellershaw, In re, Longbottom, Ex parte*, 45 L. J., M. C. 163; 1 Q. B. D. 481.

Semble, that a judge at chambers can grant an order upon justices to state a case. *Smith, Ex parte*, 27 L. J., M. C. 186.

Time of Application to state Case.]—When the last of the three days falls on a Sunday, it is to be computed as one of the days, and an application made on the Monday is too late. *Wynne* v. *Ronaldson*, 12 L. T. 711; 13 W. R. 899. S. P., *Peacock* v. *Reg.*, 4 C. B. (N.S.) 264; 27 L. J., C. P. 224; 6 W. R. 517.

Application for in Writing—Service thereof.]—An application in writing under s. 33 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), and r. 18 of the Summary Jurisdiction Rules, 1886, for the justices to state a case for the opinion of the Queen's Bench Division, must be served on all the justices constituting the Court of Summary Jurisdiction, and it is not sufficient to serve it on two of them only; and under such circumstances the superior court has no jurisdiction to hear the appeal. *Westmore* v. *Paine*, 60 L. J., M. C. 89; [1891] 1 Q. B. 482; 64 L. T. 55; 39 W. R. 463; 17 Cox, C. C. 244; 55 J. P. 440.

Under Summary Jurisdiction Act, 1879, s. 33.]—A court of summary jurisdiction has no power to state a special case under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33, unless an application has been made to the court in writing, and unless a copy of such application has been left with the clerk of the court within seven days from the date of the proceeding to be questioned, according to the Summary Jurisdiction Rules, 1886, r. 18. *South Staffordshire Waterworks Co.* v. *Stone*, 56 L. J., M. C. 122; 19 Q. B. D. 168; 57 L. T. 368; 36 W. R. 76; 16 Cox, C. C. 300; 51 J. P. 662.

When justices stated a case under 20 & 21 Vict. c. 43, they may be taken to have stated it under all their powers, including those of 42 & 43 Vict. c. 49. *Rochdale Building Society* v. *Rochdale Corporation*, 51 J. P. 134.

—— **Oral Demand — Service of Notice on Clerk.**] — There is no right of appeal from justices by case stated under the Summary Jurisdiction Act, 1879, s. 33, unless the directions of the rules made under that section with regard to the mode of application for a case have been observed. Therefore in a case where no notice of application for the case in writing had been given to the justices making the order appealed against, though a notice of application in writing had been served on their clerk:—Held, that there was no power to state a case, and that the appeal must be dismissed. *South Staffordshire Waterworks Co.* v. *Stone* (19 Q. B. D. 168), approved and followed. *Lockhart* v. *St. Albans Corporation*, 57 L. J., M. C. 118; 21 Q. B. D. 188; 36 W. R. 800; 52 J. P. 420—C. A.

—— **"Person Aggrieved"—Leaving Package on Footway in Metropolis—Freeholder.**]—In the metropolis, a tenant of D. left a package on the pavement of a court (in the city) 141 feet long and 25 feet wide, with two foot-pavements, and was charged, under 30 & 31 Vict. c. 134, s. 6, with leaving the package longer than necessary. D., the freeholder, contended that the court was private property for the sole use of the tenants, and was not a street. On the tenant being convicted:—Held, that D. was not "a person aggrieved," and was not entitled to have a special case stated under 42 & 43 Vict. c. 49, s. 33. *Drapers Co.* v. *Hadden*, 57 J. P. 200.

When Granted.]—Justices are not bound to state a case when the application discloses no point on which a case ought to be granted. *Reg.* v. *Rutlandshire, JJ.*, 13 L. T. 722.

The court will not entertain an appeal from a decision of a magistrate, upon a question of fact. *Newman* v. *Baker*, 8 C. B. (N.S.) 200.

Justices under 20 & 21 Vict. c. 43, are not bound to state and sign a case on demand unless they think that it involves some doubtful or difficult point of law. *Crick* v. *Crick*, 6 W. R. 594.

The court refused a rule to justices, ordering them to state a special case for the opinion of the court when the objection was that they had improperly received evidence. To enable the court to interfere it must appear that the determination of the justices was wrong. *Reg.* v. *Macclesfield JJ.*, 2 L. T. 352.

Where a power is given to justices to determine, it is final unless an appeal is expressly given. *Parson* v. *Blundy*, Wightw. 22.

The 129th section of the Metropolitan Management Act, 1855, provides that the justices' decision as to what is or what is not trade refuse, shall be final and conclusive. A metropolitan police magistrate decided that ashes and clinkers from furnaces which supplied an hotel with electric light were not trade refuse, and that the parish vestry was bound to remove them without payment. He refused to state a case, on the ground that the question was one of fact alone and not of law:—Held, that the magistrate was bound to state a case. *Reg.* v. *Bridge*, 59 L. J., M. C. 49; 24 Q. B. D. 609; 62 L. T. 297; 38 W. R. 464; 17 Cox, C. C. 66; 54 J. P. 629.

—— **Where Formal Determination.**] — No case can be stated under 20 & 21 Vict. c. 43, for the opinion of one of the superior courts, unless the determination of the parties was upon an information or complaint; and therefore, where an application was made to justices for a certificate for a licence to keep a beerhouse, and upon their refusal a case was demanded and stated under this act:—Held, that no such case could be stated. *Garatty* v. *Potts*, 23 L. T. 410; 19 W. R. 127.

An appeal lies where the justices have dismissed the information or complaint. *Davys* v. *Douglas*, 4 H. & N. 180; 28 L. J., M. C. 193; 7 W. R. 327.

On an information before justices at petty sessions, the evidence was partly heard, when on objection, the justices decided that they had no jurisdiction, because one of them was interested in the subject-matter, and they stopped the further hearing. They then granted a case for the opinion of a superior court, as to whether such justice was interested or not:—Held, that it was not competent to grant such a case, because there had been no hearing and determination of the information or complaint. *Wakefield Local Board* v. *West Riding and Grimsby Ry.*, 6 B. & S. 794; 35 L. J., M. C. 69; 10 Cox, C. C. 162.

—— **Point not Raised.**]—A magistrate cannot refuse to state a case on a point which, though it has not been formally raised before him, goes to the root of the whole matter, and must have

been considered by him in determining the case. *Markham, Ex parte*, 21 L. T. 748; 18 W. R. 258.

Jurisdiction to Grant.] — The power of appeal to the quarter sessions given by 20 & 21 Vict. c. 83, does not take away the jurisdiction of a magistrate under 20 & 21 Vict. c. 43, to state a case under that act for the opinion of a superior court on a point of law arising under 20 & 21 Vict. c. 83. *Steele* v. *Brannan*, 41 L. J., M. C. 85; L. R. 7 C. P. 261; 26 L. T. 509; 20 W. R. 607.

—— **Of Alderman.**]—The power of an alderman to state a case under 20 & 21 Vict. c. 43, is not taken away by the Metropolitan Building Act (18 & 19 Vict. c. 122), s. 106. *Power* v. *Wigmore*, L. R. 7 C. P. 386; 27 L. T. 148.

—— **Vaccination.**]—A special case may be stated by justices for the opinion of the High Court upon an order made by them to procure vaccination of a child. *Holloway* v. *Coster*, 66 L. J., Q. B. 293; [1897] 1 Q. B. 347; 76 L. T. 57; 45 W. R. 319; 18 Cox, C. C. 487; 61 J. P. 218.

—— **Under Public Health Acts.**] — Where application was made to justices under s. 305 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), for an order authorising the entry, for the purposes of that act, of a local authority upon the lands of a person who had refused to permit such entry, and the justices after hearing declined to make an order:—Held, that the justices had no power to state a case under 20 & 21 Vict. c. 43, s. 2, their decision not being the determination of a complaint within that section, and the application being one wholly within their jurisdiction to grant. *Diss Urban Sanitary Authority* v. *Aldrich*, 46 L. J., M. C. 183; 2 Q. B. D. 179; 36 L. T. 663.

If a party charged with obstructing the works of a local board of health sets up the defence of an assertion of a private right, the justices, under such circumstances, are not warranted in refusing as frivolous an application to state a case. *Reg.* v. *Pollard*, 14 L. T. 599.

—— **Rate under Public Health Act.**] — Justices, sitting as a court of summary jurisdiction to hear an application to enforce payment of rates under s. 256 of the Public Health Act, 1875, have power to state a case in respect of matters arising out of such application under s. 33 of the Summary Jurisdiction Act, 1879. *Sandgate Local Board* v. *Pledge*, 14 Q. B. D. 730; 52 L. T. 546; 33 W. R. 565; 49 J. P. 342.

—— **Surcharge by Surveyor.**]—A refusal by justices to make an order for the disallowance of a particular item in the accounts of a surveyor of highways, is ground for an appeal. *Townsend* v. *Read*, 30 L. J., M. C. 223; 10 C. B. (N.S.) 308; 4 L. T. 447; 9 W. R. 659.

—— **Highway Rate.**]—An appeal does not lie upon the refusal of justices to issue a summons to enforce payment of a highway rate, on the ground that the land assessed was not liable to highway rates. *Walker* v. *G. W. Ry.* 2 El. & El. 325; 29 L. J., M. C. 107.

—— **Validity of Paving Rate.**] — D. was assessed, under 11 & 12 Vict. c. 63, to a special district rate, which was good upon the face of it, and had not been appealed against. Upon a summons for nonpayment, he objected that the rate, which was for paving, was invalid, on the ground that paving was not a work of a permanent nature, within the meaning of s. 86:—Held, upon a case stated by justices, that the justices were not justified in inquiring whether the rate was invalid upon a ground which was matter of appeal to the quarter sessions, and that they ought to have issued their warrant. *Luton Local Board* v. *Davis*, 2 El. & El. 678; 29 L. J., M. C. 173; 6 Jur. (N.S.) 580; 2 L. T. 172; 8 W. R. 411.

—— **Poor Rate.**]—By 6 & 7 Will. 4, c. 96, s. 6, justices hold special sessions to hear objections to the poor rate on the ground of inequality, unfairness, or incorrectness in the valuation; and their decision is binding, unless notice of appeal to the quarter sessions is given within fourteen days:—Held, that a case could not be stated upon the application of a party dissatisfied with their decision. *Wheeler* v. *Burmington Overseers*, 29 L. J., M. C. 175, n.; 6 Jur. (N.S.) 698; 2 L. T. 171; 8 W. R. 412.

On a summons before justices to enforce a contribution order under 2 & 3 Vict. c. 84, s. 1, it was objected that the section was retrospective only, and that the balance from the parish to the union was not within it:—Held, that a case upon this objection could not be stated. *Sparrow* v. *Impington Overseers*, 6 Jur. (N.S.) 953.

—— **Sewers Rate.**] — At the hearing by justices of an information laid against A. for nonpayment of a sewers rate to which he had been assessed by commissioners acting under a local act, which incorporated the 11 & 12 Vict. c. 63, he disputed his liability to the rate, on the ground that the premises in respect of which he was rated were drained by a private sewer, and derived no benefit from the sewers under the control of the commissioners. The justices made an order upon him to pay the rate, and refused his application to them to state a case for an appeal from their decision:—Held, that the justices were right in their refusal; for that 20 & 21 Vict. c. 43, was inapplicable, since an appeal against the order of the justices would in effect be an appeal against the rate; which appeal, by s. 135 of the 11 & 12 Vict. c. 63, lay only to the quarter sessions. *Reg.* v. *Gloucestershire JJ.*, 2 El. & El. 420. *S. C.*, nom. *Reg.* v. *Newman*, 29 L. J., M. C. 117; 6 Jur. (N.S.) 293.

A special case under s. 33 of the Summary Jurisdiction Act, 1879, may, by the operation of s. 7 of the Summary Jurisdiction Act, 1884, and notwithstanding s. 10 of the latter act, be stated by a justice sitting to hear a proceeding for the recovery of a sewers rate under s. 194 of the City of London Sewers Act, 1848. *Reg.* v. *London Corporation*, 57 L. T. 491; 52 J. P. 70.

—— **Benefit Society.**]—The decision of justices under 21 & 22 Vict. c. 101, s. 5, of a dispute which had been referred to them, pursuant to one of the rules of a benefit society, is a determination of a complaint which the justices have power to determine in a summary manner, and

they ought, on application by the unsuccessful party, to state a case. *Reg.* v. *Lambarde*, L. R. 1 Q. B. 388 ; 14 W. R. 680. *S. C.*, nom. *Watts* v. *Kent JJ.*, 35 L. J., M. C. 190 ; 14 L. T. 448. Overruled by *Callaghan* v. *Dolwin*, 38 L. J., M. C. 110 ; L. R. 4 C. P. 288 ; 21 L. T. 827 ; 17 W. R. 733.

—— **Private Act—"Court of Summary Jurisdiction."**]—Justices sitting in special or petty sessions, and hearing and determining an appeal from "the deputies" under s. 46 of the Freemen of the Borough of Leicester Act, 1845, form a "court of summary jurisdiction" within the Interpretation Act, 1889, s. 13, sub-s. 11, from which an appeal by special case under s. 33 of the Summary Jurisdiction Act, 1879, lies to the High Court of Justice. *Leicester Freemen* v. *Hewitt*, 62 L. J., M. C. 51 ; 5 R. 211 ; 68 L. T. 201 ; 57 J. P. 344.

—— **Refusal of Renewal of Licence.**]—Query, whether justices acting as licensing justices have power to state a case under s. 33 of the Summary Jurisdiction Act, 1879. See *Reg.* v. *Glamorganshire JJ.*, 61 L. J., M. C. 169 ; [1892] 1 Q. B. 621 ; 66 L. T. 444 ; 40 W. R. 436 ; 56 J. P. 437 —C. A. *Boulter* v. *Kent JJ.*, 66 L. J., Q. B. 787 ; [1897] A. C. 556 ; 77 L. T. 288 ; 46 W. R. 114 ; 61 J. P. 532—H. L. (E.)

—— **Separation Order—Husband and Wife.**] —There is no power to state a case for the opinion of the Queen's Bench Division on an application by a wife for an order under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895. *Manders* v. *Manders*, 66 L. J., Q. B. 296 ; [1897] 1 Q. B. 474 ; 45 W. R. 287 ; 61 J. P. 105.

From Quarter Sessions.]—Upon an application to enter and respite an appeal, the quarter sessions have no power to state a special case ; and the Court of Queen's Bench will take no notice of the facts of a case so stated. *Reg.* v. *L. & N. W. Ry.*, 43 L. J., M. C. 57 ; L. R. 9 Q. B. 153 ; 29 L. T. 840 ; 22 W. R. 324.

The quarter sessions granted an application to enter and respite appeals against poor-rates, subject to a case for the opinion of the Court of Queen's Bench. The court heard the arguments, but, after consideration, and although no objection was raised by either side, declined to express an opinion in a case reserved on such an order. *Ib.*

The court has no jurisdiction to review the judgment of a court of quarter sessions, unless there is a case sent up for their consideration. *Rex* v. *Carnarvon JJ.*, 4 B. & Ald. 86 ; 22 R. R. 636.

The court will take no cognizance of a special case reserved, upon the trial of an indictment at the sessions. *Rex* v. *Salop*, 13 East, 95 ; 12 R. R. 307.

By 5 & 6 Will. 4, c. 76, s. 90, councils of corporate boroughs are empowered to make by-laws. By s. 91, offences against such by-laws may be punished by summary conviction. By s. 132, the writ of certiorari is taken away. The recorder, upon an appeal against such a conviction for an offence against a by-law, having, with the consent of the parties, stated a case and referred as the only question for the Court of Queen's Bench to determine, the question whether the facts amounted to an offence within the by-law, and the court having granted a certiorari to bring up the case :—Held, that, by virtue of the consent of the parties, the court might receive the case, and determine the question, although the writ of certiorari was taken away. *Reg.* v. *Dickenson*, 7 El. & Bl. 831 ; 26 L. J., M. C. 204 ; 3 Jur. (N.S.) 1076 ; 5 W. R. 654.

The court has power to entertain a special case sent by the quarter sessions for their opinion, they having confirmed a conviction appealed against under 5 & 6 Vict. c. 99, s. 21, subject to the opinion of the court. *Reg.* v. *Handley*, 9 L. T. 827.

Reception of Evidence.]—The Court of Queen's Bench has jurisdiction to review the decision of a court of quarter sessions as to whether sufficient search has been made for a document to render secondary evidence of it receivable. *Reg.* v. *Hinckley Inhabitants*, 3 B. & S. 885 ; 32 L. J., M. C. 158 ; 9 Jur. (N.S.) 1054 ; 8 L. T. 270 ; 11 W. R. 663.

Where the sessions have decided that sufficient search had not been made for an agreement to let in secondary evidence of its contents, the court will not interfere with their decision, unless it sees clearly that the sessions were wrong. *Reg.* v. *Saffron Hill, Liberty*, 1 El. & Bl. 93 ; 22 L. J., M. C. 22.

Where it is the practice of the sessions to allow an appeal to be entered against an order of removal, on filing a copy of the order, the jurisdiction of the sessions to try the appeal cannot be disputed on the ground that the copy has been taken as evidence without accounting for the original. *Reg.* v. *Townstall*, 2 G. & D. 682 ; 3 Q. B. 357 ; 12 L. J., M. C. 72 ; 7 Jur. 463.

When the quarter sessions have improperly decided against an appeal on a preliminary objection, the court will grant a mandamus to them to enter continuances and hear the appeal ; but where an objection has been made during the trial of an appeal, to the reception of a particular piece of evidence, and the sessions have held such objection valid, in consequence of which the appeal has been dismissed, the court will not interfere unless the sessions send up a case. *Rex* v. *Frieston*, 5 B. & Ad. 597.

Entering into Recognizances.]—Where justices convict, and, upon being immediately thereupon applied to for a case, accede at once, it is sufficient that the appellant enters into a recognizance within three days from the determination and before a case is stated and delivered to him, though the recognizance is not entered into "at the time of making such application." *Chapman* v. *Robinson*, 1 El. & El. 25 ; 28 L. J., M. C. 30 ; 5 Jur. (N.S.) 434.

The recognizance need not be given within the three days mentioned in s. 2 ; it is enough if this is done before the case is given out by the justices. *Stanhope* v. *Thorsby*, 1 H. & R. 459 ; 35 L. J., M. C. 182 ; L. R. 1 C. P. 423 ; 12 Jur. (N.S.) 374 ; 14 L. T. 332 ; 14 W. R. 651.

Application to justices to state a case was made on September 21, 1893. The case was not stated till December 20 following, and the appellant did not enter into his recognizance till December 21 :—Held, that there had been no compliance with rule 18 of the rules of 1886 under the Summary Jurisdiction Act, 1879. *Walker* v. *Delacombe*, 63 L. J., M. C. 77 ; 58 J. P. 88.

—— **Company Appellant.**]—Where a limited company appeals against a decision of justices, the recognizance required by s. 3 of the Summary Jurisdiction Act, 1857, before a case is stated, may be entered into by a director or member of the company. *Southern Counties Deposit Bank* v. *Boaler*, 15 R. 566; 73 L. T. 155; 59 J. P. 536.

Respondent to Case—Refusal of Licence.]—Where a case was stated under 42 & 43 Vict. c. 49, s. 33, in reference to the refusal of a licence, the superintendent of police of the division, who had appeared to oppose the licence before the justices, and to whom notice in writing of the appeal had been given by the appellant, in accordance with 20 & 21 Vict. c. 43, s. 2, was rightly constituted respondent. *Price* v. *James*, 61 L. J., M. C. 203; [1892] 2 Q. B. 428; 67 L. T. 543; 41 W. R. 57; 56 J. P. 471—C. A.

—— **Railway Company.**]—In a case stated with reference to the offence of placing stones on a railway and thereby obstructing the free passage of the same, the person lodging the complaint is rightly constituted respondent. *Roberts* v. *Preston*, 9 C. B. (N.S.) 208.

Service of Case and of Notice of Appeal.]—The sending notice, with a copy of the case, to the respondent, is a condition of the right to appeal. *Woodhouse* v. *Wood*, 29 L. J., M. C. 149; 6 Jur. (N.S.) 421; 1 L. T. 59.

Service upon the respondent of a copy of the case stated for the superior court is not sufficient notice of appeal under 20 & 21 Vict. c. 43, s. 2; notice in writing of the appeal should be given. *Little* v. *Donnelly*, Ir. R. 5 C. L. 1.

The notice of appeal, together with a copy of the case, must be given to the respondent before the case is transmitted to the superior court. *Ashdown* v. *Curtis*, 31 L. J., M. C. 216; 8 Jur. (N.S.) 511; 6 L. T. 331; 10 W. R. 667.

A case was delivered to an appellant on the 7th February. On the 8th he transmitted it to the crown office, and on the same day sent by post to the respondent a notice of appeal, with a copy of the case, which was received in due course of post on the 9th:—Held, that the notice of appeal, with a copy of the case, was given too late. *Ib.*

The respondent not being to be found, notice of appeal and a copy of the case were served on the attorney within three days after the appellant received the case, and they afterwards, and before hearing, came to his hand:—Held, a sufficient compliance with the statute. *Syred* v. *Carruthers*, El. Bl. & El. 469; 27 L. J., M. C. 273; 4 Jur. (N.S.) 949; 6 W. R. 595.

By s. 2 of the Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), it is provided that "the appellant shall within three days after receiving such case transmit the same to the court named in his application, first giving notice of such appeal with a copy of the case . . . to . . . the respondent." The appellant entered a special case stated by justices under the above section, and on the following day sent a copy of the case and notice of appeal to the respondent:—Held, that the section had not been complied with, and that the case must be struck out. *Edwards* v. *Roberts*, 60 L. J., M. C. 6; [1891] 1 Q. B. 302; 55 J. P. 439.

Copy sent to Respondents' Solicitors and not to Respondents.]—An appeal from justices was brought by way of case stated. A copy of the case had been sent by the appellants to the respondents' solicitors, but not to the respondents themselves:—Held, that the provisions of s. 2 of 20 & 21 Vict. c. 43 (which requires that a copy of the case shall be sent to the respondent) had not been complied with, and that therefore the court could not hear the appeal. *Hill* v. *Wright*, 60 J. P. 312.

—— **Waiver.**]—By 20 & 21 Vict. c. 43, the transmitting the case to the court, and the giving notice with a copy of the case to the respondent within the time named, are conditions precedent to the right of the appellant to have the case heard; and an objection arising from the omission to do so cannot be waived. *Morgan* v. *Edwards*, 5 H. & N. 415; 29 L. J., M. C. 108; 6 Jur. (N.S.) 379.

Transmission of Case.]—A party convicted by justices, on an information, applied to them for a case for a superior court. The case was delivered by the justices' clerk to the appellant's attorney on the 31st December, 1862, who gave notice of appeal and a copy to the opposite attorney; and on the 1st January, 1863, sent by post the original to his London agent, to be lodged in court. The London agent received the case the next day, but did not lodge it until the 10th:—Held, that the case had not been duly transmitted to the court. *Banks* v. *Goodwin*, 3 B. & S. 548; 32 L. J., M. C. 87; 9 Jur. (N.S.) 891; 7 L. T. 740; 11 W. R. 309.

After a case has been stated and signed by the justices, and delivered to the appellant, it becomes wholly inoperative, and no appeal can be had upon it, unless the appellant transmits it to the court within three days after he has received it from the justices. If after the expiration of the three days the case remains in the appellant's hands, and he takes it back to the justices, the justices have no power of amending it; and if they do so in fact, the appellant does not gain a further period of three days from the date of the amendment for transmitting the case to the court. *Gloucester Local Board* v. *Chandler*, 32 L. J., M. C. 66; 7 L. T. 723.

Sunday is to be included in the three days within which, after receiving a case, the appellant is to transmit it to the court named in his application. *Pennell* v. *Uxbridge Overseers*, 31 L. J., M. C. 92; 8 Jur. (N.S.) 99; 5 L. T. 685; 10 W. R. 319.

An appellant's London attorneys instructed a country attorney to appear for the appellant at the hearing before the justices in the country. The appellant himself applied to the justices to state and sign a case. A case being granted, it was sent to the country attorney:—Held, that the three days must be calculated from the time the country attorney received it. *Ib.*

An appellant having applied to justices to state a case, received the case from them on Good Friday, and transmitted it to the proper court on the following Wednesday:—Held, that, as the offices of the court were closed from Friday until Wednesday, the appellant had transmitted the case as soon as it was possible to do so, and therefore had sufficiently complied with the requirements of the statute, which directs that the case shall be transmitted by the appellant within three days after he has received it. *Mayer* v. *Harding*, 9 B. & S. 27, n.; L. R. 2 Q. B. 410; 16 L. T. 429; 15 W. R. 816.

A case stated by justices under s. 2 of the Summary Jurisdiction Act, 1857, and s. 33 of the Summary Jurisdiction Act, 1879, must, in order to satisfy the provisions of s. 2 of the former act, be lodged at the crown office within three days after its receipt by the appellant. *Aspinall* v. *Sutton*, 63 L. J., M. C. 205; [1894] 2 Q. B. 349; 10 R. 465; 58 J. P. 622.

Time of Delivery by Justices — Condition precedent.] — The appellant demanded from justices a special case under s. 33 of the Summary Jurisdiction Act, 1879, on September 29. On getting a draft case, he asked for alterations, and, without any fault on his part, the case was not finally stated till February 19, when he duly lodged the case in the crown office. The respondents moved to strike out the case as it had not been stated within three months, pursuant to rule 18 of the Summary Jurisdiction Rules, 1886:—Held, that the three months for stating the case were not a condition precedent, but only directory, and the court had jurisdiction to hear the case. *Hughes* v. *Wavertree Local Board*, 58 J. P. 654.

Settling Case.]—Where it has been referred to the chairman at sessions to state a case, and a case has afterwards, on certiorari, been returned to the court by the clerk of the peace, purporting to be signed by the chairman, the court will not send it back to be restated, or quash the certiorari, on the ground of the chairman having said that he did not recollect signing the case, and upon a suggestion by the attorney for one of the litigating parties, in an affidavit, that such case does not agree with the facts proved, and that deponent believes the chairman did not settle the case. *Rex* v. *Matlock*, 5 B. & Ad. 883.

Special cases should be drawn by counsel. *Rex* v. *Woolpit*, 5 N. & M. 526; 1 H. & W. 483.

Form.]—The quarter sessions should state the conclusion of fact which they draw from the evidence, and not the evidence itself. *Rex* v. *St. Cuthbert, Wells*, 3 N. & M. 100; 5 B. & Ad. 939; 3 L. J., M. C. 35.

The court will entertain no objection to an order of sessions which upon the face of it does not appear to be necessarily bad, unless the particular facts are brought before the court by a special case. *Rex* v. *Cottingham*, 4 N. & M. 215; 2 A. & E. 250; 4 L. J., M. C. 65.

The sessions ought not to direct, that, in any particular event or mode suggested, the case shall be sent back to the sessions for final determination. *Reg.* v. *Worth*, 4 Q. B. 132; 3 G. & D. 376. S. P., *Reg.* v. *Kesteven, JJ.*, 3 Q. B. 810; D. & M. 113; 1 New Sess. Cas. 151; 13 L. J., M. C. 78; *Reg.* v. *Marton-cum-Grafton*, 10 Q. B. 971; 16 L. J., M. C. 159.

The court refused to hear a case which concluded thus, "If the court shall be of opinion, &c., then the order to be confirmed; but if the court shall be of a contrary opinion, then the appeal to stand respited until the next sessions after the judgment of the court," because the sessions had at the same time asked the court to decide the case, and had reserved the power of afterwards deciding it themselves. *Reg.* v. *Wistow*, 1 G. & D. 681.

Justices ordered an appeal to be entered and respited subject to a case for the opinion of the Court of Queen's Bench. The case left for the decision of the court whether the sessions were right in making the order; if not, the appeal was to be struck out. The court refused to look at a case reserved on such an order, on the ground that its decision would not finally dispose of the appeal, and that a point not finally disposing of an appeal ought not in any form to be brought before the court on a case. *Reg.* v. *L. & N. W. Ry.*, 43 L. J., M. C. 57; L. R. 9 Q. B. 153; 29 L. T. 840; 22 W. R. 324.

Where the quarter sessions, without hearing the merits, quashed a conviction under 39 & 40 Geo. 3, c. 106, s. 4, for a defect in form, subject to the opinion of the court upon the point of form:—Held, that the order quashing the conviction might be quashed, and the appeal sent down to be tried on the merits; although there was nothing on the face of the proceedings to shew that the conviction was quashed for form, or that the sessions desired the opinion of the court upon the point. *Rex* v. *Ridgway*, 1 D. & R. 132; 5 B. & Ald. 527.

The sessions ought to decide provisionally with reference to what the opinion of the court may be upon the question submitted to it. *Reg.* v. *Stoke-upon-Trent*, 13 L. J., M. C. 41; 8 Jur. 34.

The sessions ought not simply to state facts, and ask the opinion of the court, as a jury, upon them; but, having drawn their own conclusions from the facts, they may ask whether, in the opinion of the court, the facts will warrant their finding. *Reg.* v. *Pilkington*, 1 New Sess. Cas. 90; 13 L. J., M. C. 61; 8 Jur. 267.

But they should not ask questions with a view to a rehearing of the case. *Reg.* v. *West Houghton*, 13 L. J., M. C. 41; 8 Jur. 106.

Agreement for Entry of Judgment according to the Opinion of the Court.]—A case stated for the opinion of the Queen's Bench Division, under s. 11 of 12 & 13 Vict. c. 45, should contain a statement of the agreement of the parties that judgment in conformity with the decision of the court may be entered at quarter sessions in the manner provided by the section. *Peterborough Corporation* v. *Thurlby Overseers*, 8 Q. B. D. 586.

Setting down Special Case—Practice as to.]—The practice as to setting down special cases stated by justices is the same as that in setting down demurrers under Ord. XXVII. r. 6; and if the special case is not set down for argument within ten days after it is lodged, it cannot afterwards be set down or appear in the list for argument. *South Dublin Union* v. *Jones*, 12 L. R., Ir. 358.

The proper place for the delivery of paper books is judges' chambers; and where a party delivered his paper books duly as regards the time for delivery, but unduly as regards the place (he delivering them to the judges' clerks at Westminster), the court visited him with the penalty inflicted by the rule, making him pay for the copies delivered in his default by the other side. *Howells* v. *Wynne*, 32 L. J., M. C. 241; 8 L. T. 577; 11 W. R. 807.

Hearing and Argument—Right to begin.]—On an appeal against the determination of justices, the party in support of the information or complaint is entitled to begin. *Bennett* v. *Blackpool Local Board*, 4 H. & N. 127; 28 L. J., M. C. 203. S. P., *Shackell* v. *West*, 29 L. J., M. C. 46, n.

The appellant begins in the Common Pleas,

though it is otherwise in the Queen's Bench and Exchequer. *Gardner* v. *Whitford*, 4 C. B. (N.S.) 665.

By the practice of the Common Pleas (unlike that of the Queen's Bench and Exchequer), an appellant, upon the hearing a case stated, under 12 & 13 Vict. c. 45, s. 11, is entitled to begin. *Sheppard* v. *Bradford Overseers*, 16 C. B. (N.S.) 369; 33 L. J., M. C. 182; 10 Jur. (N.S.) 799; 10 L. T. 421; 12 W. R. 867.

On an appeal against the decision of justices dismissing the complaint, the appellant begins. *Ellis* v. *Kelly*, 6 H. & N. 222; 30 L. J., M. C. 35; 6 Jur. (N.S.) 1113; 3 L. T. 331. S. P., *Jones* v. *Taylor*, 1 El. & El. 20; 28 L. J., M. C. 204, n.

A case from quarter sessions comes before the Court of Queen's Bench on a rule to quash the order of sessions, and the party supporting the order of sessions, therefore, begins by shewing cause against the rule to quash. *Reg.* v. *Whitby Union*, 39 L. J., M. C. 97; L. R. 5 Q. B. 325; 22 L. T. 336; 18 W. R. 785.

Where a case is stated under 12 & 13 Vict. c. 45, s. 11, and argued on concilium, the counsel supporting the order of the magistrates is entitled to begin and reply. *Reg.* v. *Holbeck*, 16 Q. B. 404; 15 Jur. 271, n.

The parties supporting the affirmative are entitled to begin. *Bedford Union* v. *Bedford Improvement Commissioners*, 7 Ex. 777; 21 L. J., M. C. 224.

But the party supporting the order complained of is not entitled to reply. *Wigton Overseers* v. *Snaith Overseers*, 16 Q. B. 496.

In cases stated under 20 & 21 Vict. c. 43, the respondent is to begin. *Crick* v. *Crick*, 6 W. R. 594.

Hearing Counsel.]—The court refuses to hear more than one counsel upon either side. *Bedfordshire JJ.* v. *St. Paul, Bedford*, 7 Ex. 650.

Upon the argument of a case stated by justices, one counsel only is heard on each side, except when the case is stated upon an order of sessions, when it is brought before the court on an order nisi to quash. *Spurling* v. *Bantoft*, 60 L. J., Q. B. 745; [1891] 2 Q. B. 384; 65 L. T. 584; 40 W. R. 157; 17 Cox, C. C. 372; 56 J. P. 132.

—— **Counsel appearing for Justices.**]—The justices have no right to be heard in support of their decision, upon the argument of a case stated by them for the opinion of the court under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49). *Smith* v. *Butler*, 16 Q. B. D. 349; 34 W. R. 416.

—— **Absence of Respondent.**]—If an appellant, within three days of his obtaining the case from the justice, seeks to find the respondent, but cannot do so, and within such three days gives notice to the attorney who represented the respondent before the magistrate, and after the expiration of the three days gives notice to the respondent, who does not object, under such circumstances, the court will hear the appellant, though the respondent does not appear. *Syred* v. *Carruthers*, El. Bl. & El. 469; 27 L. J., M. C. 273; 4 Jur. (N.S.) 949; 6 W. R. 595.

—— **On what Points.**]—The court will hear and determine questions of law arising on the facts stated by justices under 20 & 21 Vict. c. 43, s. 6, although they were not taken before the justices, or expressly reserved for the consideration of the court. *Knight* v. *Halliwell*, 43 L. J., M. C. 113; L. R. 9 Q. B. 412; 30 L. T. 359; 22 W. R. 689.

The court will not enter into a discussion of the facts on which the quarter sessions have arrived at a conclusion on a question of mere fact. *Rex* v. *St. Columb Minor*, 6 L. J. (O.S.) M. C. 18.

Points of law not raised before the justices may be considered by the court on a case stated. *Karanagh* v. *Glorney*, Ir. R. 10 C. L. 210.

Upon the argument of an appeal from justices, no point can be argued which was not taken before them. *Marshall* v. *Smith*, 42 L. J., M. C. 108; L. R. 8 C. P. 416; 28 L. T. 538.

The court has no power to give an opinion on a question asked by the parties to a case, but which the magistrates, by whom the case is stated, have not submitted for the opinion of the court. *St. James, Westminster* v. *St. Mary, Battersea*, 6 C. B. (N.S.) 878; 29 L. J., M. C. 26; 6 Jur. (N.S.) 100.

The duty of the court is simply to answer the question of law put to them by the magistrates. *Buckmaster* v. *Reynolds*, 13 C. B. (N.S.) 63.

Where certain persons were summoned at petty sessions for maliciously injuring a dwelling-house, and the magistrates deeming the injury trifling, proceeded to deal with the case in a summary manner, although no regular complainant appeared on the summons, and it was not proved that the injury was less than 5*l.*, that being the extreme amount of injury with which the magistrates had power to deal in a summary manner:—It was held, that the defendants not having raised the objection to the magistrate's want of jurisdiction in the court below, the conviction was good, and should not be reversed. *Reg.* v. *Galway JJ.*, 14 Cox, C. C. 386.

No objection can be relied upon which was not taken before the justices. *Motteram* v. *Eastern Counties Ry.*, 7 C. B. (N.S.) 58. S. P., *Purkis* v. *Huxtable*, 1 El. & El. 780; 28 L. J., M. C. 221; 5 Jur. (N.S.) 790.

When a case had been granted, and the case and certain orders set out therein, and the order of sessions had been brought up by certiorari, the court would not entertain any objection, although it went to the jurisdiction of such orders, which was not raised by the case itself. *Reg.* v. *Heyop*, 2 New Sess. Cas. 270: 15 L. J., M. C. 70. S. P., *Reg.* v. *Hartpury*, 2 New Sess. Cas. 648; 8 Q. B. 566; 16 L. J., Q. B. 105.

The party at whose instance the case is granted must either proceed with the case received, waiving any other objections to the order of removal, or must abandon the case, and rely on any other objections which may be raised when the order is brought up by certiorari. *Reg.* v. *St. Anne's, Westminster*, 2 New Sess. Cas. 517; 8 Q. B. 561; 16 L. J., M. C. 33.

Where fraud is not expressly found by the sessions, the court cannot infer it from any state of facts. *Rex* v. *Llanfihangel-Abercowin*, 4 N. & M. 355.

On the argument of the case, it is too late to object, that the order brought up varies from the order required by the certiorari. *Reg.* v. *Fordham*, 3 P. & D. 95; 11 A. & E. 73; 9 L. J., M. C. 3.

—— **Question of Fact.**]—The question whether a person has been guilty of "behaving in a riotous or indecent manner" within the meaning of s. 3 of the Vagrant Act (5 Geo. 4, c. 83), is a question

of fact for the justices to determine, and when the justices in quarter sessions have determined the same no appeal lies to the high court. *Bonner* v. *Lushington*, 5 R. 180; 68 L. T. 91; 57 J. P. 168.

Sending back Case.]—Where justices omitted to set out a material document, which, as appeared by affidavit, was in evidence before them, the court sent the case back to them for amendment, before the case came on for argument. *Yorkshire Tyre and Axle Co.* v. *Rotherham Local Board*, 4 C. B. (N.S.) 362; 27 L. J., C. P. 235; 6 W. R. 443.

The court will not, before argument, send the case to be amended on the ground that it is defectively stated. *Christie* v. *St. Luke, Chelsea, Union*, 8 El. & Bl. 992; 27 L. J., M. C. 153; 4 Jur. (N.S.) 734, n.; 6 W. R. 261.

The court will not, on a mere suggestion by an appellant at the argument that there has been misconduct or negligence in drawing a case, send it back to be restated or amended. *Townsend* v. *Read*, 10 C. B. (N.S.) 308; 30 L. J., M. C. 223; 4 L. T. 447; 9 W. R. 659.

When justices have deliberately and advisedly adjudicated upon a case before them at petty sessions, the court will not, in exercise of the jurisdiction conferred by the 12 Vict. c. 16, s. 5, send the case back to them, to rehear and determine it. *Reg.* v. *Dublin JJ.*, Ir. R. 5 C. L. 548.

The justices having, in a case stated by them, omitted inadvertently to set out some documentary evidence which was shewn to have been read before them, the court, on motion, previously to the argument, sent the case back to them to be amended, although no application had been made to the justices to amend. *Unkles* v. *Att.-Gen.*, Ir. R. 7 C. L. 462.

Where the facts were such as to render it almost certain that the decision of the justices must have proceeded on the ground of fraud, the court sent back the case to be amended. *Rex* v. *Llanfihangel-Abercowin*, 4 N. & M. 355.

The court will not send a case down to the sessions to be restated, on a mere formal objection, if enough appears to enable them to decide according to the merits of the case. *Rex* v. *Middlezoy*, 2 Term Rep. 41.

—— **Duty of Sessions.**]—A case sent back to the sessions to be restated must be reheard; and the sessions may receive further evidence, and make a new order on such rehearing. *Rex* v. *Bloxam*, 1 A. & E. 386; 3 N. & M. 385; 3 L. J., M. C. 115.

When an order of justices has been quashed on appeal, subject to a case, and the court directs the case to be restated, the sessions have no jurisdiction to hear evidence thereon, or to confirm or quash the order without a notice by one of the parties to the other of an intention to proceed at such sessions, which notice may in such a case be given by the respondents. *Reg.* v. *Barnes*, 2 G. & D. 233; 3 Q. B. 437; 6 Jur. 945.

Decision.]—If there is any evidence tending to prove an offence over which a magistrate has a summary jurisdiction by conviction, the court cannot judge of the degree of it, or control the determination of the magistrate upon that evidence. *Rex* v. *Davis*, 6 Term Rep. 177.

And if justices of the peace acquit a person against whom an information is laid before them for a penalty, the court cannot reverse the judgment, though the justices state (on a return to a certiorari to remove the proceedings) evidence which, primâ facie, is sufficient to convict, and no contradictory or explanatory circumstances. *Rex* v. *Reason*, 6 Term Rep. 375.

The court, however, will not, in such a case, grant costs in obtaining a rule to state a case. *Ib.*

On an appeal against a conviction under 20 & 21 Vict. c. 43, there being no evidence set forth by the case to support the conviction, it was held that the court had power to quash it. *Watkin* v. *Fenwick*, 7 W. R. 16.

If the facts in a case stated under 20 & 21 Vict. c. 43 reasonably warrant the inference that an offence has been committed, the court will not set aside a conviction for such offence although if stated in a special verdict the facts would not support a conviction. *Blackpool Local Board* v. *Fenwick*, 4 H. & N. 127; 7 W. R. 382.

—— **Power to amend Order.**]—On a case stated, by justices who made an order against a pawnbroker, for refusing to deliver up a pledge, the court declined to exercise a power to amend the order, because it would deprive the pawnbroker of his right to appeal to the quarter sessions. *Shackell* v. *West*, 2 El. & El. 326; 29 L. J., M. C. 45; 6 Jur. (N.S.) 95; 1 L. T. 28; 8 W. R. 22.

—— **Power to reduce Penalty.**]—The high court of justice has no power under 20 & 21 Vict. c. 43, s. 6, to reduce a penalty on a case stated by justices. *Evans* v. *Hemingway*, 52 J. P. 134.

A sentence, depending upon time, passed for a period longer than the law authorises, cannot be reduced so as to carry it into effect for the prescribed legal time, it must be reversed. *Rex* v. *Ellis*, 5 L. J. (O.S.) M. C. 3.

—— **Form of.**]—The form of judgment on a case sent from sessions is simply to make absolute or discharge the rule for quashing the order of sessions; but, if the rule is discharged, the effect of the judgment is to confirm the order of sessions, and to fix the costs on the party bringing up the case, under 5 Geo. 2, c. 19, s. 2. *Reg.* v. *Latchford*, D. & M. 290; 6 Q. B. 567; 8 Jur. 1094.

—— **Finality of.**]—The 20 & 21 Vict. c. 43, s. 6, enacts that the decision of the superior court on the question of law raised by a special case stated by justices "shall be final and conclusive on all parties":—Held, that, notwithstanding these words, the Irish court of chancery had jurisdiction to order the party, at whose instance the special case had been stated, to declare in prohibition. *Devonshire (Duke)*, *In re*, 3 Ir. Eq. R. 412.

Appeal to Court of Appeal—Case stated by Quarter Sessions,]—Where the queen's bench division in the exercise of its original common law jurisdiction affirms or quashes an order of sessions an appeal lies to the court of appeal, although no leave to appeal be given. *Reg.* v. *Savin*, 6 Q. B. D. 309; 29 W. R. 638—C. A.

An appeal lies from the judgment of the queen's bench division on a case stated for its opinion by a court of quarter sessions. *Walsall Overseers* v. *L. & N.-W. Ry.*, 48 L. J., M. C. 65; 4 App. Cas. 30; 39 L. T. 453; 27 W. R. 189.

—— **Costs — Jurisdiction.**]—The practice in proceedings on the crown side of the queen's bench division is unaltered by the Judicature Act, 1890, and there is, therefore, no power to give costs to a successful appellant in a case stated by quarter sessions. *London County Council* v. *Woolwich Union*, [1893] 1 Q. B. 210; 57 J. P. 292—C. A. See *London County Council* v. *West Ham* (No. 2), 61 L. J., M. C. 210; [1892] 2 Q. B. 173; 67 L. T. 363; 40 W. R. 662; 56 J. P. 662—C. A. See also *Otter* v. *Edgley*, 57 J. P. 457.

—— **Case stated by Petty Sessions.**] — The court of appeal has no jurisdiction to hear an appeal from a decision of the high court of justice upon a case stated by justices as to an information for contravening the by-laws of a school constituted under the Elementary Education Act, 1874. *Mellor* v. *Denham*, 49 L. J., M. C. 89; 5 Q. B. D. 467; 42 L. T. 493; 44 J. P. 472.

An appeal lies to the court of appeal from the judgment of the queen's bench division upon a special case stated under s. 33 of the Summary Jurisdiction Act, 1879, in proceedings before justices for the non-repair of a highway. *Loughborough Highway Board* v. *Curzon*, 17 Q. B. D. 344; 55 L. T. 50; 50 J. P. 788—C. A.

And see APPEAL—TO THE COURT OF APPEAL—CRIMINAL LAW—ERROR AND APPEAL.

Costs.]—Where justices of petty sessions have stated a case, the divisional court upon the hearing does not give to the successful party the costs before the justices. *Slaughter* v. *Sunderland Corporation*, 55 J. P. 519.

—— **Of Appellant.**]—When upon a case stated, a conviction is quashed, the court has jurisdiction to award costs to the appellant. *Walsh* v. *Reg.*, 16 Cox, C. C. 435.

Quære as to the effect of a superior court deciding in favour of the appellant on a case stated under 20 & 21 Vict. c. 43, when the appellant was the complainant below, and the justices dismissed his complaint. *Potter* v. *Berry*, 6 W. R. 71.

—— **Respondent not appearing.**] — If the respondent does not appear costs are not given to the appellant. *Lee* v. *Strain*, 28 L. J., M. C. 221; 5 Jur. (N.S.) 846; 7 W. R. 432.

The respondent did not appear upon the argument. The court decided in favour of the appellant:—Held, without laying down any general rule, but qualifying the decision in *Lee* v. *Strain* (supra), that the appellant was entitled to the costs of the appeal. *Wednesbury Local Board* v. *Stephenson*, 33 L. J., M. C. 111; 10 Jur. (N.S.) 151; 9 L. T. 731; 12 W. R. 414.

—— **Laches.**]—The court will not entertain an application for the costs of an appeal in the term after that in which judgment is pronounced. *Burdenberg* v. *Roberts*, L. R. 2 C. P. 292.

Semble, that application for costs should be made immediately upon the disposal of the case. *Ib.*

In an appeal under 20 & 21 Vict. c. 43, from a decision of justices, the court gave judgment for the appellant with costs. Four terms afterwards the successful appellant applied to the court to amend, by allowing him the costs of the proceedings in the court below:—Held, that the application was too late. *Cook* v. *Montague*, 28 L. T. 494; 21 W. R. 670.

—— **Of Respondent.**]—The statute 20 & 21 Vict. c. 43, s. 6, does not give the court power to award costs to the justices. *Luton Local Board* v. *Davis*, 2 El. & El. 678; 29 L. J., M. C. 173; 6 Jur. (N.S.) 580.

The court will not give a respondent costs on dismissing an appeal, where the question is fairly arguable. *Caswell* v. *Cook*, 12 C. B. (N.S.) 242.

Where the effect of an order is to decide that an appeal is not properly before the court, costs cannot be given against the appellant. *Little* v. *Donnelly*, Ir. R. 5 C. L. 1.

—— **Excise Officer.**]—On appeal against a conviction of the appellant by two justices on an information laid before them by an officer of the excise, on behalf of the crown for an offence under one of the excise acts:—Held, that the court, on confirming the conviction, had jurisdiction to award costs to the officer, as the statute includes cases in which the crown is, directly or indirectly, a party. *Moore* v. *Smith*, 1 El. & El. 597; 28 L. J., M. C. 126; 5 Jur. (N.S.) 892; 7 W. R. 206. See *Reg.* v. *Beadle*, 7 El. & Bl. 492; 26 L. J., M. C. 111; 3 Jur. (N.S.) 863; 5 W. R. 498.

—— **When Case not Lodged.**]—When an appellant has neglected to lodge a case stated by justices within the time specified by 20 & 21 Vict. c. 43, s. 2, the court has power to grant the costs of a rule to shew cause why it should not be struck out from the list. *G. N. and L. & N.-W. Joint Committee* v. *Inett*, 46 L. J., M. C. 237; 2 Q. B. D. 284; 25 W. R. 584.

—— **On Objection not raised below.**]—Where a conviction was quashed upon an objection which was not brought to the notice of the magistrates, costs were not given to the successful party. *Stinson* v. *Browning*, 1 H. & R. 263; 35 L. J., M. C. 152; L. R. 1 C. P. 321; 12 Jur. (N.S.) 262; 13 L. T. 799; 14 W. R. 395. And see *Markham, Ex parte*, 21 L. T. 748; 18 W. R. 258.

—— **To follow the Event.**]—The quarter sessions, on appeal, quashed an order made against the defendant by the petty sessions, subject to a case for the consideration of the queen's bench division, and further ordered that the costs of the appeal then before it should abide the event of the decision of that court. The case, which was dated and signed by the chairman of the quarter sessions, after stating the question submitted to the queen's bench division, contained (inter alia) the following clause: "The court are . . . in all respects to exercise the power of the sessions to confirm, amend, alter, vary, modify, or reverse their decision in such manner and to such extent as to such court shall seem expedient and proper; costs to follow the event." At the hearing of the case, the queen's bench division quashed the order of the quarter sessions, but the judgment was silent as to costs. In an action brought to recover the costs incurred in the argument of the case, and also the costs of certain applications made to the quarter sessions from time to time until the judgment of the queen's bench division in the plaintiff's favour was obtained:—Held, that the words "costs to follow the event"

referred, and were intended to refer, to costs such as were claimed by the plaintiff in the action. *Lear* v. *Botting*, 44 L. T. 58; 45 J. P. 240.

Held, also, that these words, although contained in a case stated and signed only by the chairman of the quarter sessions, amounted to an agreement which was binding on the parties to the case, and that the defendant was therefore liable to pay the costs so incurred. *Ib.*

Where points are raised in favour of both sides, and the court confirms the order of sessions, and decides against all the points raised, neither party is entitled to costs, under 5 Geo. 2, c. 19, s. 2. *Reg.* v. *Southampton Dock Co.*, 17 Q. B. 83; 20 L. J., M. C. 228; 15 Jur. 859.

—— **Against Prosecutor.**]—On an appeal against a conviction by justices, the court quashed the conviction:—Held, that the costs were to be paid by the party prosecuting. *Venables* v. *Hardman*, 1 El. & El. 79; 28 L. J., M. C. 33; 4 Jur. (N.S.) 1108.

—— **Against Justices—Ordinary Rule.**]—The usual practice is not to give costs against the justices on a case stated by quarter sessions on appeal from the petty sessions. *Reg.* v. *Abergavenny Union*, 29 W. R. 304.

—— **Between Party and Party.**]—Where a case is stated for the opinion of a superior court, under 12 & 13 Vict. c. 45, s. 11, the practice is to give costs as between party and party. *Clarendon (Earl)* v. *St. James, Westminster (Rector)*, 10 C. B. 806; 20 L. J., M. C. 213; 15 Jur. 492.

—— **Appeal against Poor-rate.**]—Where a case is stated by sessions upon appeal against a poor-rate, the proceeding is a civil proceeding on the crown side of the queen's bench division, within the Rules of 1880, Ord. LXII. r. 2, and the costs are in the discretion of the court under Ord. LV. *Clark* v. *Fisherton-Angar Overseers* or *Alderbury Union*, 50 L. J., M. C. 33; 6 Q. B. D. 139; 29 W. R. 334; 45 J. P. 358.

Where, upon a case reserved on a poor-rate appeal, the order of quarter sessions is quashed, there is no power to give the successful party costs. *London County Council* v. *West Ham Churchwardens* (No. 2) ([1892] 2 Q. B. 173) followed. *Halkyn District Mines Drainage Co.* v. *Holywell Union*, 9 R. 779; 69 L. T. 705—C. A. *See* 57 & 58 Vict. c. 16, s. 2.

—— **Against Convictions.**]—Ord. LVII. does not enable the court to give costs in criminal proceedings on the crown side of the queen's bench division on appeal from sessions. So that where the appeal was from a conviction under the Weights and Measures Act, the court was unable to make any order as to costs. *Reg.* v. *Baxendale*, 50 L. J., M. C. 35, n.; 6 Q. B. D. 144, n.; 29 W. R. 335.

—— **Rule not mentioning.**]—A rule calling on justices to shew cause why a case should not be stated was made absolute, nothing being said about costs:—Held, that the party applying was not entitled to costs on taxing the costs of the case. *Wakefield Local Board* v. *West Riding and Grimsby Ry.*, 6 B. & S. 794.

—— **Case sent back and amended.**]—A case was sent back to be restated, and ultimately judgment was given for the appellant, with costs. The master allowed to the appellant the costs of preparing the case beyond the fees allowed to the clerk of the justices by s. 3, and schedule (A.), and also the costs of amending the case:—Held, that the taxation was right. *Glover* v. *Booth*, 2 B. & S. 807; 31 L. J., M. C. 270; 9 Jur. (N.S.) 76.

Appeal from Conviction at Quarter Sessions.]—*See* CRIMINAL LAW (CROWN CASES RESERVED).

2. To Quarter Sessions.

a. What Sessions.

In Middlesex.]—The justices of Middlesex, in addition to the four quarter and four general sessions which they had been in the habit of holding, appointed other original intermediate sessions:—Held, that they had a right so to do. *Rex* v. *Mullaney*, 6 Car. & P. 96.

The 7 & 8 Vict. c. 71, s. 2, enacts that the adjourned sessions in Middlesex "shall be general sessions of the peace," and "shall have power to try and determine all appeals, and all other powers which" "belong to the general quarter sessions":—Held, that the jurisdiction thus given was optional only, and that a putative father was not bound to appeal to those sessions, but might wait and appeal to the general quarter sessions. *Reg.* v. *Middlesex JJ.*, 5 D. & L. 580; 17 L. J., M. C. 111.

In London and Middlesex (which have four general and four quarter sessions), an appeal against an order of removal must be to the quarter sessions. *Reg.* v. *Middlesex JJ.*, 4 Q. B. 807; 12 L. J., M. C. 134; 7 Jur. 669.

In Boroughs—Separate Court of Quarter Sessions.]—When a pauper becomes chargeable in union, which includes a borough having a separate court of quarter sessions, the guardians may obtain an order for the removal of such pauper to his place of settlement from the justices of the borough, although the particular parish from which he is to be removed is not within the borough, and, in such case, the proper tribunal to hear an appeal against the order is the quarter sessions for the borough, and not the quarter sessions for the county. *Reg.* v. *Staffordshire JJ.*, 41 L. J., M. C. 78; L. R. 7 Q. B. 288; 25 L. T. 829; 20 W. R. 366.

Where a separate court of quarter sessions has been granted to a borough under 5 & 6 Will. 4, c. 76, the recorder, under s. 105, has, in such court, exclusive jurisdiction of appeals against orders of removal made by the borough justices. *Reg.* v. *Suffolk JJ.*, 2 Q. B. 85; 10 L. J., M. C. 138. S. P., *Reg.* v. *St. Edmund's, Salisbury*, 2 Q. B. 72; 1 G. & D. 137.

An order was made by two justices of the borough of B., which is a borough having its own court of quarter sessions, adjudging the settlement of a lunatic pauper to be in the parish of A., the order being obtained by the churchwardens and overseers of the parish of B.:—Held, that an appeal against the order lay under 16 & 17 Vict. c. 97, s. 108, to the quarter sessions of the county in which the borough was situated. *Reg.* v. *Warwickshire JJ.*, 7 W. R. 529.

The parish of R. was subject to the jurisdiction of quarter sessions of S., but not to those of the county in which it was situate. In 1878 R., with a part of the county called the "added

area," was put under commissioners for paving, &c., by a local act, which provided that if a charter were granted to the whole district, the quarter sessions of S. should have jurisdiction over the "added area," and that the "added area" should cease to be liable to county rates. In 1884 a charter was granted, which incorporated the whole district, as the borough of R.:—Held, that the borough of R. was a borough having a separate court of quarter sessions, and that the "added area" was no longer liable to county rates. A separate court of quarter sessions in s. 150 of the Municipal Corporations Act, 1882, means a court separate from that of the county. *St. Lawrence Overseers* v. *Kent JJ.*, 51 J. P. 262.

The court of queen's bench have not the power of ordering an appeal against an order of removal to be heard at the sessions of a county next adjoining a city and county of itself, even though all the justices of the latter are interested in the event of the appeal. *Rex* v. *Kent JJ.*, 5 L. J. (O.S.) M. C. 45.

Date.]—The 54 Geo. 3, c. 84, which enacts that the Michaelmas quarter sessions shall be holden in the week after the 11th of October, is merely directory, and those sessions may be legally holden at another time. *Rex* v. *Leicester JJ.*, 5 D. & R. 772; 7 B. & C. 6; 5 L. J. (O.S.) M. C. 95; 31 R. R. 135.

Next Practicable Sessions.]—*See cases*, post, col. 652.

Presumption as to Intervening Sessions.]—If a court of general quarter sessions, next after an order of bastardy, quashes the order, the court will not intend that a court of general sessions intervened; and unless that appears, the order of sessions will be confirmed. *Rex* v. *Chichester*, 3 Term Rep. 496.

Order Altering Arrangement of Parishes.]—Where an order for altering the arrangement of the parishes, townships, &c., of any county for the convenience of holding special sessions, has been made under 9 Geo. 4, c. 43, ss. 2, 4, there is no appeal against it; ss. 8 and 9 apply to orders made under the authority of s. 7 only. *Rex* v. *Derbyshire JJ.*, 1 D. P. C. 386.

b. Who may Appeal.

Assessment Committee may Appeal in Name of Guardians.]—The assessment committee for the parish of N. raised the gross estimated rental and ratable value of certain property, and, having heard the objection of the occupier, decided against him. The occupier then appealed to the special sessions, under 6 & 7 Will. 4, c. 96, s. 6, and, at the hearing, the assessment committee appeared as respondents in the name of the guardians, as provided by 27 & 28 Vict. c. 39, s. 2. The justices at special sessions reduced the gross estimated rental and the rateable value of the property. The assessment committee then gave notice of appeal, in the name of the guardians, to the next general quarter sessions, when the justices refused to hear the appeal, on the ground that the assessment committee had no right of appeal:—Held, that the assessment committee had a right to appeal, such right of appeal being one of the "incidents" of other appeals within the words of 27 & 28 Vict. c. 39, s. 2. *Llanidloes and Newtown Union* v. *Price Jones*, or *Reg.* v. *Montgomeryshire JJ.*, 50 L. J., M. C. 52; 44 L. T. 310; 29 W. R. 806; 45 J. P. 407.

"Party Aggrieved."]—By an improvement act an appeal to the quarter sessions was given to any person who should think himself aggrieved by any order made by virtue of the act. At a meeting of the owners of property to consider an application to parliament for an act for the purpose of a better supply of water for the town, the chairman stated that the expenses of such application could not be charged on the rates under the improvement act; but a resolution was passed, in which A. concurred, empowering the commissioners, out of the town's funds, to prosecute such application. An order was afterwards made by the commissioners on the treasurer for the payment of certain sums of money for expenses incurred in such application:—Held, that A. was not a party aggrieved within the act, and therefore could not appeal against the order. *Harrop* v. *Bayley*, 6 El. & Bl. 218; 25 L. J., M. C. 107; 2 Jur. (N.S.) 882; 4 W. R. 461.

Any rated inhabitant of the parish to which an order of removal is made may as a party aggrieved appeal against the order under 13 & 14 Car. 2, c. 12, s. 2, and 3 W. & M. c. 18, s. 9. *Rex* v. *Denbighshire JJ.*, 9 L. J. (O.S.) M. C. 109.

Neglect to repair Highway—Order for Expenses.]—A complaint having been made to justices that certain roads alleged to be highways under the jurisdiction of a highway board were out of repair, a summons was issued against such board. Upon the hearing, a land surveyor was appointed to view and report on the state of the roads in question. The report was duly made, and the justices, upon the evidence and admissions before them, ordered the highway board to do the repairs. The highway board neglected to obey this order; and the justices appointed such land surveyor to put the highway in repair, and ordered the board to pay the expenses. At several hearings before the justices the highway board never denied that they were liable to repair the roads in question. The board appealed to quarter sessions against the order upon them for the expenses of repairing the roads. The following were the grounds of appeal:—"1. That the said justices had no jurisdiction to make the said order. 2. That the said order is contrary to law. 3. That the said order is contrary to the evidence. 4. That the justices wrongfully admitted evidence of witnesses other than the person appointed by them under s. 18 of 25 & 26 Vict. c. 61. 5. That at the time of the making of the said order the said highways had been put into a state of complete and effectual repair. 6. That the sum mentioned in the said order to be spent in putting the said roads into repair is excessive. 7. That the said highway board was and is not liable to repair the said highways, and that the liability to repair the said highways was at all the hearings before the said justices recited in the said order, and also at the time of the hearing when the said order was made, and at the time of the making thereof, disputed." Upon the appeal it was contended on behalf of the board that the roads in question were not highways, and the order was quashed on that ground:—Held, that the highway board were entitled to appeal to

quarter sessions against the order, but were not entitled on the appeal to raise the question whether the roads were highways—(1) because they were estopped by their admissions before the justices: (2) because their grounds of appeal gave no notice that the point would be taken; and (3) because the question was not open to them when the order appealed against was made. *Illingworth* v. *Bulmer East Highway Board*, 52 L. J., Q. B. 680; 48 J. P. 37.

Held, also, that the quarter sessions, by deciding the question, did not thereby necessarily decide that it was open to the highway board to raise it. *Ib.*

Right of Appeal—Notwithstanding certain Admissions.]—The fact that the appellant, when charged, admitted an act of assault, but asked for the charge to be heard on the ground of mitigating circumstances, is not a simple plea of guilty, debarring him from the right of appeal given under s. 19 of the Summary Jurisdiction Act, 1879. *Reg.* v. *Essex JJ., Stark, Ex parte*, 61 L. J., M. C. 120.

Summary Conviction of Consenting Adult—Imprisonment without option of Fine.]—Where under s. 12 of the Summary Jurisdiction Act, 1879, an adult consents to be dealt with summarily by a court of summary jurisdiction, and is convicted and adjudged to be imprisoned without the option of a fine, there is no appeal under s. 19 of the act to quarter sessions against such conviction. *Reg.* v. *London JJ., Lambert, Ex parte*, 61 L. J., M. C. 104; [1892] 1 Q. B. 664; 66 L. T. 678; 40 W. R. 575; 17 Cox, C. C. 526; 56 J. P. 421.

c. In what Cases.

Refusal of Guardians to determine.]—By a local act, the management of the poor was vested in the churchwardens, overseers, governors and directors of the poor, and an appeal to them was given to any person thinking himself aggrieved by anything to be done by virtue of the act; and if the appellant should be dissatisfied with their determination, then appeal was given to the quarter sessions. A parishioner, having applied for relief against a rate to the churchwardens, overseers, governors and directors, they, at a meeting, resolved to take no further notice of his application:—Held, that, as they had not come to any determination on the subject-matter of his complaint, the parishioner could not appeal to the quarter sessions, but that he ought first to have applied for a mandamus to compel the churchwardens, overseers, governors and directors to hear the appeal. *Rex* v. *Kent JJ.*, 9 B. & C. 283.

Within Limited Time.]—Guardians and directors of the poor were incorporated by statute, and were ordered to hold certain courts and meetings, at which any ratepayer might object to their proceedings or accounts, and such objection should be taken into consideration; and if the matter could not at that time be settled to the satisfaction of the complaining party, it should be adjourned to the next court, to be there finally heard and determined. A subsequent clause provided that any person aggrieved by anything done in pursuance of the act, and for which no particular method of relief was already appointed, might appeal to the quarter sessions to be holden within four calendar months next after the cause of complaint should have arisen. A ratepayer appealed to the sessions against an order of the directors for the payment of sums due on annuities, and as interest on loans. The order had been made less than four months back, but the debts had not been incurred, nor the annuities granted within four months:—Held, that the appellant was not confined to the remedy pointed out by the first-mentioned clause of the act, and that the cause of complaint had arisen within four months. *Rex* v. *Salop JJ.*, 2 B. & Ad. 145; 9 L. J. (O.S.) M. C. 111.

Amount of Penalty.]—The 12 & 13 Vict. c. 92, s. 14, enacts that, a party convicted by a justice under the act shall pay such penalty, damage or compensation, as the justice shall adjudge, order or award, together with the costs of conviction, to be settled by such justice; and s. 25 gives an appeal to quarter sessions in all cases where the sum adjudged to be paid on any conviction shall exceed 2*l.*:—Held, that this gives an appeal only where the sum adjudged to be paid as penalty, damage, or compensation, exclusive of the costs, exceeds 2*l.* *Reg.* v. *Warwickshire JJ.*, 6 El. & Bl. 837; 25 L. J., M. C. 119; 2 Jur. (N.S.) 930; 4 W. R. 650.

Licences.]—No appeal lies against a refusal by justices to grant a billiard licence under 8 & 9 Vict. c. 109, s. 10. *Chamberlain, Ex parte*, 8 El. & Bl. 644; 4 Jur. (N.S.) 477; 6 W. R. 75.

And see INTOXICATING LIQUORS.

Demolition of Building.]—An appeal to quarter sessions will not lie against the order of a justice directing the demolition of buildings under s. 75 of the Metropolis Local Management Amendment Act, 1862. By s. 231 of the Metropolis Local Management Act, 1855, any person aggrieved by any adjudication of a justice "with respect to any penalty or forfeiture under the provisions of the act" may appeal to quarter sessions. By s. 75 of the Metropolis Local Management Amendment Act, 1862 (which, by s. 110, is to be construed as one act with the act of 1855), where a building is erected beyond the general lines of building in a street without the consent of the Metropolitan Board of Works, a justice of the peace is empowered, upon complaint made and after inquiry held as the act directs, to order the owner or occupier to demolish the building, and in default of compliance with the order, the vestry of the parish or board of works for the district shall demolish the building, and may remove and sell the materials, and recover the expenses of so doing from the owner or occupier:—Held, that the order of a justice directing the demolition of a building under s. 75 of the act of 1862, was not an adjudication "with respect to a penalty or forfeiture" within s. 231 of the act of 1855, and therefore that no appeal to quarter sessions would lie against the order. *Reg.* v. *Middlesex JJ., Elsdon, Ex parte*, 51 L. J., M. C. 94; 9 Q. B. D. 41; 30 W. R. 657; 46 J. P. 551.

Bastardy.]—An appeal against an order in bastardy may be brought, either on the conditions prescribed by the bastardy acts or on those prescribed by the Summary Jurisdiction Act, 1879. Sect. 54 of the Summary Jurisdiction Act, in applying that act to "an appeal from an order in bastardy," amongst other things,

does not apply the appeal sections of that act exclusively of previously existing appeal sections in the bastardy acts, but applies the act generally to orders in bastardy, so as to remove doubts whether they are "orders or convictions." *Reg.* v. *Montgomeryshire JJ.*, 51 L. J., M. C. 95; 46 J. P. 517.

d. Notice of Appeal.

Time for.]—By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 48, a court of summary jurisdiction may, under certain circumstances, order the local authority to cleanse offensive ditches and execute permanent or structural works. By s. 269, where any person deems himself aggrieved by any rate made under the provisions of the act, or by any order, conviction, judgment or determination of or by any matter or thing done by any court of summary jurisdiction, he may appeal, subject to the conditions following: 1. The appeal shall be made to the next court of quarter sessions for the county, division, or place in which the cause of appeal has arisen, holden not less than twenty-one days after the demand of the rate or the decision of the court from which the appeal is made. 2. The appellant shall, within fourteen days after the cause of appeal has arisen, give notice to the other party, and to the authority or court of summary jurisdiction by whose act he deems himself aggrieved, of his intention to appeal. An order was made on the appellants under s. 48 on the 6th of September, and served on them on the 24th. They, on the 2nd of October, served on the respondents notice of appeal to the sessions:—Held, that the time for notice of appeal ran from the date of the decision, and not from the service of the order of justices; and, consequently, that the notice was too late. *Reg.* v. *Barnet Rural Sanitary Authority*, 45 L. J., M. C. 105; 1 Q. B. D. 558; 35 L. T. 362.

Where a statute empowers justices, on information laid at a special sessions, to make orders on specified parties for the payment of money, notice of the intended information being first given to such parties, and empowers them to appeal, giving notice of such appeal, "within six days after such order" shall be made or given, the time for notice of appeal runs from the making of the order, not from the service. *Reg.* v. *Derbyshire JJ.*, 7 Q. B. 193; 1 New Sess. Cas. 645; 14 L. J., M. C. 84; 9 Jur. 551.

Fraudulent Removal of Goods.]—An appeal from an order of justices under 11 Geo. 2, c. 19, ss. 4, 5, by a person adjudged guilty of fraudulently removing goods to prevent a distress, is subject to the conditions and regulations prescribed in the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31, sub-s. 2, and s. 32, and therefore notice of appeal must be given within seven days after the decision appealed against. *Reg.* v. *Shropshire JJ.*, 50 L. J., M. C. 72; 6 Q. B. D. 669; 29 W. R. 567.

Removal of Pauper.]—By 11 & 12 Vict. c. 43, s. 35, orders for the removal of paupers are excepted from the provisions of that act, and therefore the seven days' notice of appeal prescribed by s. 31 of 42 & 43 Vict. c. 49 (which by s. 54 is to be construed as one with 11 & 12 Vict. c. 43, and by 47 & 48 Vict. c. 43, s. 6, is made applicable to appeals from convictions or orders made in pursuance of the Summary Jurisdiction Acts), is not required on an appeal against an order of removal. *Reg.* v. *Somersetshire JJ.*, 58 L. J., M. C. 155; 22 Q. B. D. 625; 60 L. T. 834; 37 W. R. 492; 53 J. P. 470.

Excise Law—Appeal from Conviction.]—The act of 1827 for consolidating and amending the excise laws (7 & 8 Geo. 4, c. 53), s. 83, required notice of appeal from a conviction under that act to be given "at and immediately upon the giving of the judgment appealed against." By the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31, persons authorised to appeal from a court of summary jurisdiction may appeal subject to the condition of giving notice of appeal, if no time is prescribed, within seven days after the day of the decision.—By the Summary Jurisdiction Act, 1884 (48 & 49 Vict. c. 43), s. 6, a person authorised to appeal by any act before the Summary Jurisdiction Act, 1879, from a conviction or order of a court of summary jurisdiction made in pursuance of the Summary Jurisdiction Acts, shall appeal subject to the conditions and regulations contained in the act of 1879.—A person convicted of an offence against the excise laws gave notice of appeal four days after the decision:—Held, making absolute a rule for a mandamus to justices to hear the appeal, that the effect of the summary jurisdiction acts was to repeal by implication the provision requiring notice of appeal at and immediately upon the giving of the judgment, and therefore no time was prescribed within the meaning of s. 31 of the Summary Jurisdiction Act, 1879, so that by that section the time was seven days, and the notice given was sufficient. *Reg.* v. *Glamorganshire JJ.*, 58 L. J., M. C. 93; 22 Q. B. D. 628; 60 L. T. 536; 37 W. R. 493; 16 Cox, C. C. 593; 53 J. P. 294.

Next practicable Quarter Sessions.]—The true meaning of appealing to the "next sessions" is the next sessions at which, according to the practice of the particular sessions, a notice of trial can be given to try at that sessions. *Rex* v. *Southampton JJ.*, 7 L. J. (o.s.) M. C. 77; *Rex* v. *Devon JJ.*, 7 L. J. (o.s.) M. C. 78.

A poor-rate for the parish of L. was made and allowed on Saturday, the 20th of March, and published on the following day. S. & Son., who are the occupiers of bookstalls at certain railway stations in the parish, were included in the rate. The quarter sessions next after the publication of the rate were held on the 6th of April. A party desirous of appealing against the rate would, therefore, if bound by law to bring his appeal to such April sessions, have had to give notice of appeal upon the 22nd of March, the day immediately succeeding that of the publication of the rate, in accordance with the provisions of 12 & 13 Vict. c. 45, s. 1, which requires fourteen clear days' notice to be given to the overseers. S. & Son gave notice of appeal against the rate on the 7th of June for the then next sessions, which were held on the 5th of July. The court of quarter sessions refused to hear the appeal, on the ground that it ought to have been brought to the April sessions:—Held, that an appellant against a poor-rate is entitled to a reasonable time before giving notice of appeal, to allow of his considering whether he shall appeal, and the grounds on which his appeal shall be based, and that one day is not a reasonable time for that purpose; and that, consequently, S. & Son were not bound to give notice

of appeal for the April sessions. *Reg.* v. *Surrey JJ.*, 50 L. J., M. C. 10; 6 Q. B. D. 100; 43 L. T. 500; 29 W. R. 260; 45 J. P. 93.

Held, further, that, under the circumstances, they were not even bound to enter and respite their appeal at the April sessions. *Ib.*

B., being dissatisfied with the decision of an assessment committee given on 16th June, resolved to appeal to the Kirkdale Sessions of the county of Lancashire. Fourteen days' notice of appeal is required to be given to the overseers, and twenty-one days to the assessment committee. The next quarter sessions for the county of Lancaster were held on the 28th June, and by adjournment at Kirkdale on 13th July. B. duly served his notice of appeal for the Michaelmas quarter sessions, which commenced at Lancaster on 18th October, and were held at Kirkdale by adjournment on 2nd November. The justices having refused to hear the appeal on the ground that B. should have given the requisite notices for the sessions held at Kirkdale on the 13th July:—Held, that the justices were wrong, inasmuch as time for giving notice of appeal must be calculated in reference to the first day of the commencement of the sessions at Lancaster and not to the first day of the adjournment thereof at Kirkdale. *Reg.* v. *Lancashire JJ.*, 34 L. T. 124.

The Pilot Act, 52 Geo. 3, c. 39, enacted, that persons convicted of offences against the act might within three calendar months after such conviction appeal to the sessions, first giving ten days' notice of appeal to the persons appealed against, and within fourteen days next after such notice entering into a recognizance:—Held, that the party convicted had three calendar months within which to give notice of his intention to appeal to the then following sessions, which were held more than three calendar months after the conviction, and need not appeal to the next immediate sessions after the conviction. *Rex* v. *Middlesex JJ.*, 6 M. & S. 279.

—— **Practice as to.**]—Where a district court of quarter sessions is held in each division of a county by adjournment, from one to the other, and the rules of practice made by the court of each division, for the conduct of business in it, assume that the day when the court for that division begins its sittings is the first day of the sessions for that division, an appeal belonging to one of such divisions should be governed by the rules of practice for that division; and it is sufficient, if the grounds of appeal are delivered fourteen clear days before the first day of the sitting of the court for the division in which the appeal is to be tried. *Reg.* v. *Sussex JJ.*, 4 B. & S. 966; 34 L. J., M. C. 69; 11 Jur. (N.S.) 300; 11 L. T. 740; 13 W. R. 471—Ex. Ch.

Calculation of Time.]—The 4 Geo. 4, c. 95, s. 87, requires notice of appeal to be served within six days after the cause of complaint shall arise:—Held, that, when the last of the six days was a Sunday, notice on the Monday following was too late. *Reg.* v. *Middlesex JJ.*, 2 D. (N.S.) 719; 12 L. J., M. C. 59; 7 Jur. 396.

A notice of appeal was, according to the regular and ordinary course of post, delivered on a Sunday, and if delivered on Monday there would not have been fourteen days before the first day of the sessions:—Held, that the notice of appeal was void. *Asprell* v. *Lancashire JJ.*, 16 Jur. 1067, n.

By a statute an appellant was required to give "seven days' notice, at least, of his intention to bring an appeal." Notice of appeal was served on the 31st of December, at half-past nine o'clock a.m. The sessions commenced on the 7th of January, at ten a.m., on which day appeals were to be entered, though, by the practice of the sessions, they were not heard till the 30th January:—Held, insufficient, for that the seven days must be reckoned exclusively both of the entire day of giving the notice and the first day of the sessions, as the fraction of the day is not to be considered in such calculation, and the day of bringing an appeal is the day on which it is entered, not heard. *Reg.* v. *Middlesex JJ.*, 2 New Sess. Cas. 73; 3 D. & L. 109; 14 L. J., M. C. 139.

Under 7 & 8 Vict. c. 101, s. 4, requiring notice of appeal to be given within twenty-four hours after the adjudication, and making of any order on the putative father, the time for appealing must be calculated from the signature of the order by the justices. *Reg.* v. *Flintshire JJ.*, 3 D. & L. 537; 15 L. J., M. C. 50; 10 Jur. 475.

The twenty-four hours begin to run from the time of the oral adjudication and order of the justices, and not from the time of the formal drawing up and signature thereof. *Johnson, Ex parte*, 3 B. & S. 947; 32 L. J., M. C. 193; 9 Jur. (N.S.) 1128; 8 L. T. 275; 11 W. R. 620.

Absence of Notice.]—Upon a rule for a mandamus to compel the quarter sessions to enrol an order of petty sessions for stopping up a footway, there being fair ground for believing that many persons had been misled by the published description of the footway, and had therefore neglected to give notice of appeal, the court made a rule to let in the appeal. *Rex* v. *Suffolk JJ.*, 5 L. J. (O.S.) M. C. 27.

Mode of Service—On Justice.]—Notice of appeal against a conviction under 5 & 6 Will. 4, c. 50 (Highway Act), s. 72, is well served on the justice under s. 105, if delivered at his dwelling-house, though not to him personally. *Reg.* v. *Yorkshire, North Riding JJ.*, 1 New Sess. Cas. 574; 7 Q. B. 154; 14 L. J., M. C. 91; 9 Jur. 425.

Where there is some evidence on the face of a written notice that it was served in due time, the court will not interfere with the decision of the sessions that it was so served. *Reg.* v. *Gloucestershire JJ.*, 16 L. J., M. C. 57; 11 Jur. 764.

—— **On one of several Respondents.**]—A. was adjudged, by justices acting under a local dock act to pay 50*l.* to B., for and on behalf of the owners of a vessel, for an injury caused to such vessel by A. A. thereupon appealed, and gave notice of appeal to all the part owners of the vessel at different times between the 23rd September and the 5th October. On the 25th September he entered into the recognizance as required by the act. At the hearing the appeal was dismissed because the recognizance was not entered into within three days after all the notices had been served:—Held, that service on one of the joint owners was good service for all, and that the recognizance therefore was properly entered into. *Reg.* v. *Liverpool Recorder*, 31 L. J., M. C. 127; 8 Jur. (N.S.) 642; 5 L. T. 361; 10 W. R. 78.

—— **On Solicitor who appeared for Respondent at Petty Sessions.**]—In a bastardy case,

notice of appeal to quarter sessions having been served upon the solicitor who appeared for the respondent at petty sessions, the solicitor accepted service on her behalf :—Held, that he ceased to be the respondent's solicitor when the proceedings at petty sessions had determined, and that the service was bad. *Reg.* v. *Oxfordshire JJ.*, 62 L. J., M. C. 156 ; [1893] 2 Q. B. 149 ; 4 R. 482 ; 69 L. T. 368; 41 W. R. 615 ; 57 J. P. 712—C. A.

—— **Statutory Notice of Appeal sent, but returned through Dead Letter Office.**]—An appeal to quarter sessions from an order made at petty sessions can be brought by the person seeking to appeal, only after a proper notice setting out the general grounds of the appeal has been duly served on the other party as required by s. 31, sub-s. 2 of the Summary Jurisdiction Act, 1879. *Reg.* v. *Essex JJ.*, 43 W. R. 378.

Reasonableness of.]—Semble, that where no notice is prescribed by an act giving an appeal, there must, on principles of common law, be reasonable notice given to the respondents before the appellants are entitled to be heard, though any mode of giving the information on which the respondents could act may be sufficient. *Blues, In re*, 5 El. & Bl. 291 ; 24 L. J., M. C. 138 ; 1 Jur. (N.S.) 541 ; 3 W. R. 516.

Return to a habeas corpus setting out a conviction by two justices, under 6 Geo. 4, c. 129, whereby A. was sentenced to six weeks' imprisonment, and an order of sessions, purporting to be made on dismissing an appeal against the conviction, whereby he was ordered to be imprisoned pursuant to the conviction. By affidavits it appeared that he was convicted on a Saturday ; that he entered into recognizances before the convicting justices, which were forfeited on the Friday next after the conviction ; that on the ensuing Monday the sessions were held, and the appeal called on. By a rule of the sessions, in all cases of appeals not otherwise directed by law, notice in writing must be given on or before Saturday se'nnight preceding the sessions. Counsel appeared for the convicting justices as respondents, and on their objection, the sessions dismissed the appeal because the rule was not complied with :—Held, that the sessions, if they thought the notice given not sufficient for a trial then, might have entered and respited the appeal, but were not justified in refusing to hear it under the circumstances. *Ib.*

After entering into Recognizances.] — The 50 Geo. 3, c. 48, s. 25, provided that a party grieved by any conviction under that act, who shall enter into a recognizance to appear at the next sessions, shall be at liberty to appeal to such sessions :—Held, that this dispensed with the necessity of any notice of appeal, and if the party duly entered into the recognizance, the sessions were bound to hear the appeal. *Rex* v. *Essex JJ.*, 4 B. & Ald. 276.

By One of Several.]—A., B. and C. were convicted under 7 & 8 Geo. 4, c. 23, s. 34 ; under s. 72, they gave a joint notice of appeal ; at the sessions a separate conviction of A. was produced, and on the objection taken, that the notice of appeal should have been separate, the justices dismissed the appeal :—Held, that the justices were wrong, that the variance was immaterial, and that the justices were bound to have heard the appeal. *Reg.* v. *Oxfordshire JJ.*, 12 L. J., M. C. 40 ; 7 Jur. 195.

By Solicitor for Appellants.]—Notice of appeal against an order of removal signed by the attorney for the overseers of the appellant parish is sufficient. *Rex* v. *Monmouth JJ.*, 7 L. J. (O.S.) M. C. 95.

By Trustees.]—By a local act it was provided, that if any person should think himself aggrieved by certain assessments, he might appeal to the quarter sessions, first giving notice and entering into a recognizance to prosecute such appeal. By another act, giving powers to certain road trustees, it was enacted, that they might sue and be sued in the name of any one or more of them ; that no action or prosecution so commenced should abate by the death, &c., of such trustee ; and that such trustee, in whose name any action or suit should be commenced or prosecuted in pursuance of the act, should be reimbursed his costs thereby incurred, and also the costs of prosecuting an indictment or other proceedings whatsoever commenced or prosecuted against any person by order of the trustee. A single trustee gave notice by appeal against a rate, beginning "I, A. B., one of the trustees, &c., for and on behalf of myself and the others of the trustees, hereby give you notice, that an appeal will be entered and prosecuted on behalf of the trustees against a certain rate," &c. He also entered into a recognizance (in which no other trustee joined), with the condition "that A. B., or the trustees appointed under a certain act, do appear at the next general quarter sessions, &c., and prosecute an appeal, &c., and abide the order," &c. It did not appear whether A. B. was or was not authorised by the trustees to take these steps, but they had made no disclaimer :—Held, that there was a sufficient notice and recognizance within the first-mentioned statute ; and mandamus issued commanding the sessions to hear the appeal. *Rex* v. *Surrey JJ.*, 5 A. & E. 701.

Sufficiency of—Grounds of Appeal.]—A notice of appeal against an order for the stopping up of footway under 55 Geo. 3, c. 68, s. 3, must state that the party intending to appeal is injured or aggrieved by the order. *Rex* v. *Essex JJ.*, 5 L. J. (O.S.) M. C. 65 ; *Rex* v. *West Riding of Yorkshire JJ.*, 1 M. & Ry. 547 ; 6 L. J. (O.S.) M. C. 59 ; 7 B. & C. 678 ; 31 R. R. 278.

A notice of appeal must state that the appellant is a party aggrieved or must set out facts which shew that he is so. *Rex* v. *Blackawton (Inhabitants)*, 8 L. J. (O.S.) M. C. 123.

A notice of appeal against overseers' accounts need not state that the party appealing is aggrieved, but it must state the grounds of objection which he is about to take to the accounts. *Rex* v. *Somerset JJ.*, 6 L. J. (O.S.) M. C. 116 ; 7 B. & C. 681.

Notice of appeal pursuant to 57 Geo. 3, c. 94, s. 2, against a county rate need not state the grounds of objection to the rate. *Rex* v. *Westmoreland JJ.*, 8 L. J. (O.S.) M. C. 70.

It is sufficient for a vagrant convicted under 5 Geo. 4, c. 83, s. 4, to state as his ground for appeal that he is not guilty. *Rex* v. *Newcastle-upon-Tyne JJ.*, 1 B. & Ad. 933 ; 9 L. J. (O.S.) M. C. 117.

Where an appeal to the quarter sessions is given by a statute against any conviction under it, to any person aggrieved by such conviction, provided he gives to the respondent a notice in writing of such appeal, and of the cause and

matter thereof, and the court of quarter sessions is directed to hear and determine the matter of the appeal, that court can adjudicate only on the matter stated in the notice. *Rex* v. *Boultbee*, 6 N. & M. 26; 4 A. & E. 498; 1 H. & W. 713.

A complaint having been made to justices that certain roads alleged to be highways under the jurisdiction of a highway board were out of repair, a summons was issued against such board. Upon the hearing, a land surveyor was appointed to view and report on the state of the roads in question. The report was duly made, and the justices, upon the evidence and admissions before them, ordered the highway board to do the repairs. The highway board neglected to obey this order; and the justices appointed such land surveyor to put the highway in repair, and ordered the board to pay the expenses. At several hearings before the justices, the highway board never denied that they were liable to repair the roads in question. The board appealed to quarter sessions against the order upon them for the expenses of repairing the roads. The following were the grounds of appeal:—"1. That the said justices had no jurisdiction to make the said order. 2. That the said order is contrary to law. 3. That the said order is contrary to the evidence. 4. That the justices wrongfully admitted evidence of witnesses other than the person appointed by them under s. 18 of 25 & 26 Vict. c. 61. 5. That at the time of the making of the said order the said highways had been put into a state of complete and effectual repair. 6. That the sum mentioned in the said order to be spent in putting the said roads into repair is excessive. 7. That the said highway board was and is not liable to repair the said highways, and that the liability to repair the said highways was at all the hearings before the said justices recited in the said order, and also at the time of the hearing when the said order was made, and at the time of the making thereof, disputed." Upon the appeal it was contended on behalf of the board that the roads in question were not highways, and the order was quashed on that ground:—Held, that the highway board were entitled to appeal to quarter sessions against the order, but were not entitled on the appeal to raise the question whether the roads were highways—(1) because they were estopped by their admissions before the justices; (2) because their grounds of appeal gave no notice that the point would be taken; and (3) because the question was not open to them when the order appealed against was made. *Illingworth* v. *Bulmer East Highway Board*, 52 L. J., Q. B. 680; 48 J. P. 37.

Held, also, that the quarter sessions, by deciding the question, did not thereby necessarily decide that it was open to the highway board to raise it. *Ib.*

Signing.]—By 12 & 13 Vict. c. 45, s. 1, a notice of appeal to a court of quarter sessions "shall be in writing, signed by the person or persons giving the same, or by his, her or their attorney on his, her or their behalf":—Held, that a notice of appeal signed in the appellant's name by the clerk to his attorney with the appellant's authority was sufficient. *Reg.* v. *Kent JJ.*, 42 L. J., M. C. 112; L. R. 8 Q. B. 305; 21 W. R. 635.

To Whom to be given.]—In the case of an appeal against a borough rate under 5 & 6 Will. 4, c. 76, s. 92, notice of appeal ought to be given to the town clerk, and not to the clerk of the peace. *Reg.* v. *Carmarthen Recorder*, 3 N. & P. 19; 7 A. & E. 758; 1 W. W. & H. 222; 7 L. J., M. C. 17.

The addressing of a notice of appeal under s. 31 of the Summary Jurisdiction Act, 1879, to the clerk to the justices, instead of to the justices personally from whose decision the appeal is laid, is a sufficient and valid form for the notice. *Reg.* v. *Essex JJ., Stark, Ex parte*, 61 L. J., M. C. 120; [1892] 1 Q. B. 490; 66 L. T. 676; 40 W. R. 446; 17 Cox, C. C. 521; 56 J. P. 375.

Determination as to Sufficiency of.]—When the quarter sessions have refused to hear an appeal on the ground of the insufficiency of the notices, and a mandamus is applied for to compel them to hear, the court will, upon the argument against the rule, determine the question of the sufficiency or insufficiency of the notices. *Curtis* v. *Buss*, 47 L. J., M. C. 35; 3 Q. B. D. 13; 37 L. T. 533; 26 W. R. 210.

The consideration of a notice of appeal is merely preliminary to a hearing of the appeal; therefore if, upon objection taken to the notice, the sessions decide that it is bad, and dismiss the appeal, the court will, if the decision is erroneous, award a mandamus to enter continuances and hear. *Reg.* v. *Surrey JJ.*, 2 New Sess. Cas. 245; 3 D. & L. 573; 1 B. C. Rep. 12; 15 L. J., M. C. 46; 10 Jur. 410.

Two Notices of Appeal.]—Upon the hearing on an appeal to quarter sessions under the Summary Jurisdiction Act, 1879, it appeared that two notices of appeal had been given within the time limited by the act, and the appellant had elected to proceed upon the second, which was found to be bad for want of the prescribed recognizance:—Held, that the first notice remained good, and that the appellant was entitled to proceed upon it after failing upon the second. *Reg.* v. *Wolverhampton Recorder*, 35 W. R. 650.

When Appeal Respited—Practice as to.]—Where a statute gives a party aggrieved a right of appeal, on giving security to a specified amount, he may enter and respite his appeal at the next sessions, after having given such security, without notice to the other side; but after the appeal has been respited, if he does not give the usual notice of trying it, the sessions will be authorised to dismiss it altogether. *Rex* v. *Salop JJ.*, 2 B. & Ad. 694.

Notice was given of appeal against a poor-rate, and the respondents attended at the sessions and prayed a respite, alleging that they had not had time to prepare their defence to the matters stated as grounds of appeal. The appellant opposed the respite; but it was granted, no notice of appeal having been proved or expressly admitted. An order of respite was made out, embodying the grounds of appeal stated in the notice:—Held, that, at the following sessions, the appellant was entitled to be heard without proving any notice of appeal. *Rex* v. *Hertfordshire JJ.*, 4 B. & Ad. 561; 1 N. & M. 331; 2 L. J., M. C. 41.

A pauper was removed under an order in March, within fourteen days of the Easter sessions, and the appellants entered and respited an appeal, ex parte, without giving notice to the respondents at the Midsummer sessions, and served notice and grounds of appeal for the October sessions:—Held, that, as the Midsummer sessions had jurisdiction to receive the appeal, the propriety of their adjournment could not be considered. *Reg.* v. *Surrey JJ.*, 15 L. J., M. C. 1; 10 Jur. 72.

If a regular notice of appeal has been given for one sessions, and the appeal is adjourned at the instance of the appellants, after hearing counsel on both sides, it is not necessary to give a strictly regular notice of trial for the following sessions. *Rex* v. *Gloucestershire JJ.*, 3 D. P. C. 298.

A rule of practice of the sessions, that whenever an appeal against an order of removal shall be entered respited, due notice thereof shall be given by the appellant to the respondent parish, is void. *Reg.* v. *Surrey JJ.*, 3 New Sess. Cas 531.

After an appeal entered and respited, and notice of an intention to try at the second sessions, at which sessions the appeal is again respited at the instance of the appellant, the appellant is not bound to give notice of his intention to try at the following sessions, unless such notice is required by the rules of the particular sessions. *Rex* v. *Yorkshire, W. R., JJ.*, 2 N. & M. 390 ; 5 B. & Ad. 667 ; 3 L. J., M. C. 21.

Where appellants were required to give respondents twenty-eight days' notice of trial in the case of respited appeals, and a respited appeal was dismissed at those sessions, on the ground that the appellants had only given fourteen days' notice of trial, the court refused to grant a mandamus, as the rule, though unnecessary, did not appear to be so unreasonable as to call for its interference. *Reg.* v. *Montgomeryshire JJ.*, 2 New Sess. Cas. 78 ; 3 D. & L. 119 ; 14 L. J., M. C. 142 ; 9 Jur. 927.

An appeal after hearing at one sessions was respited until the following sessions, in consequence of an equal division of opinion on the bench as to the merits :—Held, that no fresh notice of trial was necessary for the following sessions, although in practice the rule is otherwise as to respited appeals. *Rex* v. *Buckinghamshire JJ.*, 6 D. & R. 142.

—— **Necessity of Notice.**]—Fourteen clear days before the sessions next after making a poor-rate, a notice, accompanied by grounds of appeal, was served on the parish officers, of an intention to enter an appeal at those sessions, but not then to try, but to petition for a respite to the next sessions. The respondents informed the appellant that they should oppose a respite. At the sessions the respite was opposed, and the sessions called on the appellant to proceed, and on his declining dismissed the appeal with costs : —Held, that the sessions acted within their jurisdiction, and were not bound to respite after this notice of appeal had been given. *Reg.* v. *Eyre*, 7 El. & Bl. 609 ; 26 L. J., M. C. 121 ; 3 Jur. (N.S.) 910 ; 5 W. R. 532.

Proof of Notice.]—An appeal came on to be heard, when it was adjourned by reason of the press of business at the sessions : on the next appeal day it was again adjourned "by consent of counsel" :—Held, that the respondents, on a subsequent appeal day, were nevertheless entitled to call for proof of the original notice of appeal, or to object that the notice given was insufficient. *Reg.* v. *Middlesex JJ.*, 2 D. (N.S.) 719 ; 12 L. J., M. C. 59 ; 7 Jur. 396.

Upon an appeal being called on at the sessions, the respondents required the appellants to prove their notice of appeal, and a witness was accordingly examined, who proved service of notice of appeal, which was objected to as improperly signed, and the sessions accordingly dismissed the appeal :—Held, that a mandamus might issue, commanding the justices to hear the appeal, as the decision on the validity of the notice of appeal was only preliminary to the right of the appellants to be heard. *Reg.* v. *Surrey JJ.*, 1 B. C. Rep. 12 ; 2 New Sess. Cas. 245 ; 3 D. & L. 573 ; 15 L. J., M. C. 46 ; 10 Jur. 410.

e. Recognizances.

Before what Court to be entered into.]—The recognizance required by s. 31, sub-s. 3, of the Summary Jurisdiction Act, 1879, need not be entered into before the justices from whose decision the appeal is being taken ; it can be entered into before any court of summary jurisdiction which has before it the notice of appeal in the case. *Reg.* v. *Durham JJ., Newton, Ex parte*, 64 L. J., M. C. 187 ; [1895] 1 Q. B. 801 ; 15 R. 319 ; 72 L. T. 465 ; 43 W. R. 423 ; 59 J. P. 264.

Time of Entering into.]—Under s. 31, sub-s. 3, of the Summary Jurisdiction Act, 1879, an appellant is required to enter into a recognizance within three days after giving notice of appeal, or the court before whom the appellant offers to enter into the recognizance may order a deposit of money with the justices' clerk instead of entering into a recognizance. Where, therefore, a court, on the same day that a case is heard, and before proper notice of appeal is given, allows a deposit to be made in lieu of a recognizance, the provisoes of s. 31, sub-s. 3, have not been complied with, and the Court of Quarter Sessions has no jurisdiction to hear the appeal, *Reg.* v. *Anglesey JJ.*, 61 L. J., M. C. 143 ; [1892] 2 Q. B. 29 ; 67 L. T. 322 ; 17 Cox, C. C. 563 ; 56 J. P. 552.

Justices in quarter sessions are right in declining to hear an appeal where the appellant first entered into a recognizance and then gave notice of appeal. *Reg.* v. *Anglesey JJ.* ([1892] 2 Q. B. 29) followed. *Reg.* v. *Cheshire JJ.*, 60 J. P. 585.

Where a statute requires that a recognizance shall be entered into forthwith, after notice of appeal, it means within a reasonable time ; and, therefore, a period of nine days without cause assigned for the delay is too long. *Reg.* v. *Worcester JJ.*, 7 D. P. C. 789.

Where a party was convicted at a petty sessions, and sentenced to three months' imprisonment for an offence under 6 Geo. 4, c. 129, which, by s. 12, enacts that the person so convicted shall be at liberty to appeal against such conviction, and provides that the execution of such judgment so appealed against shall be suspended in case the person so convicted shall "immediately" enter into recognizances, with sureties, to prosecute such appeal : —Held, that it was not necessary that the required recognizances should be entered into at the time of the conviction, and that the prisoner is entitled to his discharge, if application is made within a reasonable time. *Reg.* v. *Aston*, 1 L. M. & P. 491 ; 4 New Sess. Cas. 283 ; 19 L. J., M. C. 236 ; 14 Jur. 1045.

Out of Time—Estreat.]—By s. 31 of the Summary Jurisdiction Act, 1879, it is provided that, "where any person is authorised by this act or by any future act to appeal from the conviction or order of a court of summary jurisdiction to a court of general or quarter sessions, he may appeal to such court, subject to the conditions and regulations following": (3) "The appellant

shall, within the prescribed time, or, if no time is prescribed, within three days after the day on which he gave notice of appeal, enter into a recognizance . . . conditioned to appear at the said sessions and to try such appeal, and to abide the judgment of the court of appeal thereon, and to pay such costs as may be awarded by the court of appeal" :—Held, that a recognizance which has been entered into by the appellant after the expiration of the three days, is not void, and that the court of quarter sessions, although by reason of the recognizance being out of time it has no jurisdiction to hear the appeal, has jurisdiction to estreat the recognizance for non-payment of such costs as may have been awarded upon the dismissal of the appeal. *Reg.* v. *Glamorganshire JJ.*, 59 L. J., M. C. 150; 24 Q. B. D. 675; 62 L. T. 730; 38 W. R. 640; 17 Cox, C. C. 45; 55 J. P. 39.

f. Hearing and Judgment.

Hearing—Order for Removal made without Corroboration, but Corroboration given on Appeal to Sessions.]—An order for removal was made by justices in respect of an alleged settlement under 39 & 40 Vict. c. 61, s. 34, which provides that an order of removal in respect of a settlement acquired under that section shall not be made upon the evidence of the person to be removed without such corroboration as the justices or court think sufficient. There was no corroboration before the justices who made the order. Upon appeal to quarter sessions against the order corroborative evidence was tendered on behalf of the respondents, and received by the court, who considered the same sufficient :—Held, that the sessions were right in receiving the corroborative evidence. *Reg.* v. *Abergavenny Union*, 50 L. J., M. C. 1; 6 Q. B. D. 31; 43 L. T. 602; 44 J. P. 780.

—— **Rehearing.**]—On appeal from an order of removal the respondents cannot call in aid any of the depositions taken on making the order. The case must be entirely reheard. *Rex* v. *Wisbeach St. Peter* (*Inhabitants*), 5 L. J. (o.s.) M. C. 101.

Amendment of Summary Conviction imposing Imprisonment in default of Distress—Striking out "Hard Labour."]—On an information under the Public Health (London) Act, 1891, for disobeying a closing order, the conviction imposed a fine and imprisonment with hard labour in default of distress. The defendant appealed to quarter sessions without paying the fine. The quarter sessions, on evidence that the mention of hard labour in the conviction was due to an oversight on the part of the magistrate's clerk in drawing it up, amended the conviction under Baines's Act, affirmed the conviction as amended, and dismissed the appeal :—Held, on certiorari, that the decision of quarter sessions was right. *Reg.* v. *London JJ., Saunders, Ex parte*, 64 L. J., M. C. 273; 72 L. T. 568; 59 J. P. 279.

Appeal against Excessive Punishment—No Appearance by Respondent—Whole Conviction quashed.]—The respondent was convicted before a court of summary jurisdiction for causing a horse to be cruelly ill-treated, and was sentenced to fourteen days' imprisonment with hard labour. He gave notice of his intention to appeal to quarter sessions upon the ground that the punishment was excessive. No one appeared on behalf of the prosecution at the sessions, and the respondent (the then appellant) having proved the service of his notices of appeal, the court quashed the conviction :—Held, that the court of quarter sessions was right in quashing the conviction, as there was no evidence before it upon which it could decide what punishment was right, and it could not leave the conviction standing without some judgment thereon. *Reg.* v. *Surrey JJ.*, 61 L. J., M. C. 200; [1892] 2 Q. B. 719; 67 L. T. 266; 41 W. R. 79; 17 Cox, C. C. 547; 56 J. P. 742.

Judgment—Division of Opinion.]—If the justices at sessions are equally divided, and no order is made, nor the sessions adjourned, no order can be made at a subsequent sessions. *Bodmin* v. *Warligne*, 2 Bro. P. C. 733.

The court will not presume that every justice qualified to attend the quarter sessions was actually present there when any particular order was made. *Reg.* v. *Cartworth*, 5 Q. B. 204.

When the justices at quarter sessions being equally divided in opinion, the chairman gave a casting vote in favour of the order, which was confirmed accordingly; and, on the following day, the appellants' counsel protested against the legality of the decision; and the question was then argued on both sides, and the justices then present determined to adhere to the former decision :—Held, that, although the proceeding on the first day was irregular, the court would not assume that the decision on the second day was not a judgment upon the merits. *Reg.* v. *Fladbury*, 10 A. & E. 706; 2 P. & D. 471.

In case of an equality of votes, the order of the justices would stand. *Ib.*

Where it was alleged that the assistant judge had given his own opinion on an appeal as the decision of the sessions, though it was contrary to the opinion of the majority of justices present :—Held, that after the order of sessions had been duly recorded it was too late to inquire whether it did or did not represent the opinion of the majority of justices. *Reg.* v. *Middlesex JJ., Slade, In re*, 46 L. J., M. C. 225; 2 Q. B. D. 516; 36 L. T. 403; 25 W. R. 610.

The court will not grant a mandamus to the justices at sessions to rehear an appeal against an order of removal after judgment given by them and entered by the clerk of the peace for quashing the order, upon the ground that the justices were divided in opinion and that the judgment was entered by mistake, instead of an adjournment of the appeal. *Reg.* v. *Leicestershire JJ.*, 1 M. & S. 442; 14 R. R. 494.

The justices at sessions may alter their judgment during the continuance of the sessions. *Ib.*

Upon an appeal against an order of removal the justices at sessions were equally divided in opinion upon a question of fact on which the settlement of the pauper depended. The sessions, thinking that it lay on the respondent parish to establish their case to the satisfaction of a majority of the court, quashed the order of removal. The court refused a mandamus. Query, whether the sessions ought to have adjourned instead of quashing the order. *Reg.* v. *Monmouthshire JJ.*, 4 B. & C. 844; 7 D. & R. 334; 28 R. R. 478.

—— **Enforcing.**]—The provisions of the 12 & 13 Vict. c. 48, s. 18, for removal by judge's order into queen's bench, apply only to orders properly

so called, and not to judgments of the court of quarter sessions on indictments tried before them. *Reg.* v. *Bateman*, 8 El. & Bl. 584; 27 L. J., M. C. 95; 4 Jur. (N.S.) 301; 6 W. R. 63.

When an order or a rule is made under this provision for the removal of an order of sessions for the purpose of enforcing it, it is not necessary that a certiorari should issue to remove the order. *Hawker* v. *Field*, 20 L. J., M. C. 41. Overruling *Reg.* v. *Devonshire JJ.*, 1 L. M. & P. 520.

An order for the payment of the costs of an appeal against the poor-rate under 17 Geo. 2, c. 38, s. 4, is valid, though it directs the costs to be paid directly to the appellants, and may be removed and enforced under 12 & 13 Vict. c. 48, s. 18. *Reg.* v. *Huntley*, 3 El. & Bl. 172; 2 C. L. R. 246; 23 L. J., M. C. 106; 18 Jur. 745.

—— **Finality of.**]—Upon the hearing of an appeal to quarter sessions against an order of affiliation, it appeared that the respondent and her witnesses were not present, having mistaken the day of hearing, and her counsel applied for an adjournment till the following morning, offering to pay the costs of the day. The appellant having declined to accede to this proposal, the sessions directed the case to proceed, and quashed the order, no evidence having been adduced on the part of the respondent:—Held, that the order of quarter sessions was not a decision upon the merits, and that fresh proceedings in respect of the same matter might be taken before justices. *Reg.* v. *May* or *Essex JJ.*, 49 L. J., M. C. 67; 5 Q. B. D. 382; 42 L. T. 772; 28 W. R. 918.

Where an appeal given by parliament is to be final, no other mode of trial can be admitted, unless there is a refusal to admit the appeal when duly offered, in which case the court will give relief. *Anon.*, Lofft, 184.

By 17 Geo. 3, c. 106, a power of appeal is given on certain conditions from a conviction by a justice of the peace to any quarter sessions to be holden within six months from such conviction; if the appellant lodges his appeal, and the court dismisses it without entering into the merits, because the previous conditions have not been regularly complied with, and confirms the conviction, such judgment is conclusive, and the party cannot lodge a second appeal from the same conviction, though within the six months. *Rex* v. *Yorkshire, W. R., JJ.*, 3 Term Rep. 776.

An appeal to the quarter sessions does not preclude an action. *Leader* v. *Moxon*, 2 W. Bl. 926.

Nor is a party appealing to the sessions thereby concluded from afterwards disputing its jurisdiction in the particular case. *Lowther* v. *Radnor* (*Earl*), 8 East, 113. *See* 20 R. R. 542, n.

When the sessions have decided an appeal without any reservation, they cannot at a subsequent session enter a continuance of the appeal on the ground of perjury having been committed on the hearing, and then proceed to rehear the appeal. Having once finally decided, they cannot at a subsequent session review the decision. *Rex* v. *Middlewich* (*Inhabitants*), 9 L. J. (O.S.) M. C. 44.

Justice disqualified from Hearing Appeal.]—*See* supra, col. 543 et seq.

Operation of Appeal.]—When a person who has been committed under a judgment of imprisonment, appeals against it, he is not entitled to be discharged pending the appeal, because the appeal does not suspend the effect of the judgment. *Reg.* v. *Willmott*, 1 B. & S. 27; 30 L. J., M. C. 161; 7 Jur. (N.S.) 1053; 4 L. T. 208; 9 W. R. 633.

g. Adjournment.

General Power to Adjourn.]—When a matter is properly before justices at quarter sessions they have a general power to adjourn the consideration of it to a subsequent sessions, and such subsequent sessions need not be the sessions next following. *Reg.* v. *Westmoreland JJ.*, 9 B. & S. 288; 37 L. J., M. C. 115; L. R. 3 Q. B. 457; 18 L. T. 326; 16 W. R. 753; 11 Cox, C. C. 172.

Although a statute, giving an appeal to the sessions within four months after the cause of complaint shall arise, directs the justices at the said sessions to determine the matter of such appeal, yet it seems they have an incidental power of adjourning it to another sessions upon lawful cause, such as the absence of a material witness, of the sufficiency of which they are to judge. *Rex* v. *Wilts JJ.*, 13 East, 352.

The general power of a court of quarter sessions to adjourn to the next sessions the hearing of an appeal, where the particular act giving the appeal does not limit the hearing and determination of it to one sessions only, extends to cases where the hearing of the appeal has commenced, and the evidence is partly before the court. The sessions have power, in such a case, to adjourn the further hearing to the next sessions, for the purpose of additional evidence being procured, or for any cause which, in their discretion, may render the adjournment expedient. *Reg.* v. *Cambridge Union*, 1 B. & S. 61; 30 L. J., M. C. 137; 7 Jur. (N.S.) 1073; 4 L. T. 212; 9 W. R. 599.

—— **Where Time for Hearing Limited.**]—By 9 Geo. 4, c. 61 (the Licensing Act), s. 27, any person who thinks himself aggrieved may appeal to the next general or quarter sessions of the peace, unless such sessions should be holden within twelve days next after such act shall have been done, and in that case to the next subsequent sessions holden as aforesaid, and not afterwards; and the court at such sessions shall hear and determine the matter of such appeal, and shall make such order therein, with or without costs, as to the court shall seem meet. An appeal against a refusal of justices to grant a licence was heard at the sessions within the time specified by the statute, and the licence refused with costs; but, in order to ascertain the amount of costs, the court adjourned the appeal to the ensuing sessions, when the judgment dismissing the appeal and the order for costs were formally given:—Held, that the power of hearing and adjudicating on the appeal was by this statute confined to one particular sessions, and that such sessions had, therefore, no power of adjourning the appeal, notwithstanding the general power of adjournment at common law inherent in courts of quarter sessions. *Reg.* v. *Belton*, 2 New Sess. Cas. 77; 11 Q. B. 379; 17 L. J., M. C. 70; 12 Jur. 392.

An act required by statute to be done at a particular quarter sessions must be perfected at such sessions. The general power of adjournment possessed by courts of quarter sessions does

not apply in such a case. *Bowman* v. *Blyth*, 7 El. & Bl. 26; 26 L. J., M. C. 57; 3 Jur. (N.S.) 359; 5 W. R. 86. Affirmed on appeal, 7 El. & Bl. 47; 27 L. J., M. C. 21—Ex. Ch.

Refusal to Adjourn.]—Justices are entitled to refuse to enter and adjourn or appeal except on terms. *Rex* v. *Monmouthshire JJ.*, 9 L. J. (O.S.) M. C. 116.

By whom.]—The adjournment of a session must be made by the same number of justices as are necessary to hold it. *Rex* v. *Westrington*, 2 Bott's P. L. 733.

A court of quarter sessions cannot be adjourned by the crier without the presence of the justices. *Rex* v. *Middlesex JJ.*, 3 N. & M. 110; 5 B. & Ad. 1113.

Effect of.]—An adjournment of quarter sessions to a subsequent sessions is a continuation of the original sessions. *Rawnsley* v. *Hutchinson*, 40 L. J., M. C. 97; L. R. 6 Q. B. 305; 23 L. T. 843; 19 W. R. 436.

Therefore, where, at the general quarter sessions holden in October, an appeal under 32 & 33 Vict. c. 27, and 9 Geo. 4, c. 61, s. 27, was dismissed with costs, but the amount of such costs was not ascertained by the clerk of the peace until the sessions holden in November:—Held, that an order of sessions for the payment by the appellant of such ascertained amount of costs was good. *Ib.*

The quarter sessions, whether held before a recorder or ordinary justices, is not an inferior court within the meaning of the rule which prevents issuing a venire de novo to inferior courts, and it is in such case a continuing court, from session to session. *Campbell* v. *Reg.*, 11 Q. B. 799; 17 L. J., M. C. 89; 12 Jur. 117.

Where the sessions have a power of adjourning, the postponement of the adjournment cannot be impeached. *Reg.* v. *Surrey JJ.*, 15 L. J., M. C. 1; 10 Jur. 72.

Respiting Judgment.]—The quarter sessions have power to respite a judgment from one session to another, without adjourning the session. *Keen* v. *Reg.*, 10 Q. B. 928; 3 New Sess. Cas. 25; 16 L. J., M. C. 180; 11 Jur. 1060; 2 Cox, C. C. 342.

Notice—Practice as to.]—*See* supra, col. 658.

h. Rules of Practice at Sessions.

Discretion as to.]—The court of quarter sessions has a discretionary power to make rules for the governance of the practice of the sessions, but the court of queen's bench, for the purposes of justice, will interfere to control that discretion. *Rex* v. *Lancashire JJ.*, 7 B. & C. 692. S. P., *Rex* v. *Wilts JJ.*, 10 East, 404.

A rule of practice at the sessions will not control the express words of an act of parliament. *Rex* v. *Lincolnshire JJ.*, 5 D. & R. 347; 3 B. & C. 548.

The sessions are the judges of their own rules of practice; and the court will not interfere with their determination respecting them, unless the rules on which they have acted are so unreasonable as to be illegal, manifestly wrong or unjust. *Reg.* v. *Montgomeryshire JJ.*, 3 D. & L. 119; 2 New Sess. Cas. 78. *Rex* v. *Essex JJ.*, 2 Chit. 385.

Entry of Appeal.]—On an application for a mandamus to the sessions to enter continuances and hear an appeal, it appeared from the affidavits, that an application to enter the appeal was made on the second day of sessions, and not before, and was refused. It not appearing what the practice was, nor that the sessions had refused on any ground, except that of the practice, the court discharged the rule for a mandamus. *Reg.* v. *Warwickshire JJ.*, 6 Q. B. 750; 14 L. J., M. C. 39.

Where the sessions have a discretion, the court has no jurisdiction to control it. *Reg.* v. *Derbyshire JJ.*, 1 B. C. C. 113; 22 L. J., M. C. 31; 16 Jur. 1071.

When, therefore, the sessions have by their practice a discretion as to allowing or refusing the entry of appeals after the time fixed by their rules, and in the injudicious exercise of that discretion refuse to allow an appeal to be entered, the court will not order them to receive it. *Ib.*

When, however, it was left in doubt what the practice of the sessions on the subject was, and whether it had been acted upon in the particular case, the court granted a rule for a mandamus to the justices to receive the appeal. *Ib.*

Semble, that the practice of entering an appeal against a rate and adjourning it to the next sessions as a matter of course without notice to either party is not in strict conformity with 17 Geo. 2, c. 38, s. 4, but the court will not disturb the practice, or at least will not allow a party to be precluded from having his appeal heard after he has acted in conformity with the practice. *Rex* v. *Wilts JJ.*, 6 L. J. (O.S.) M. C. 97.

Notice of Appeal.]—Semble, where notice is given that no business will be transacted on the day usually fixed for holding the sessions, but that the sessions will be adjourned for business until a future day, a notice of appeal given in time for that future day according to the practice of the sessions will be sufficient, and even if a notice of appeal should be held insufficient by the sessions, the court will exercise a discretionary power over the sessions, and if they think it reasonable, will order the appeal to be heard. *Rex* v. *Hampshire JJ.*, 7 L. J. (O.S.) M. C. 9.

Hearing of Appeal—Right to begin.]—The court will not interfere with a rule of practice at sessions, whereby the appellant in a rating appeal who disputes only the amount of the rate is called upon to begin. *Rex* v. *Suffolk JJ.*, 6 M. & S. 57.

Rule of Sessions imposing Condition.]—A certificate for a licence having been refused at licensing sessions, all the preliminaries to an appeal to the next quarter sessions required by 9 Geo. 4, c. 61, s. 27, were duly observed; but at the sitting of the court the quarter sessions refused to allow the appeal to be entered on the ground that by a rule of the sessions an appeal must be entered and grounds of appeal deposited with the clerk of the peace three clear days before the first day of the sessions; and the sessions made an order for 10*l.* costs to the respondents under 12 & 13 Vict. c. 45, s. 6, as on an appeal which had not been entered or prosecuted. This order having been brought up and a rule to quash it obtained:—Held, that the rule of sessions amounted to imposing an additional

condition to the appeal which the statute had not imposed, and was more than a mere rule of practice, which it was incompetent to the sessions to make; and that the order for costs must be quashed. *Reg.* v. *Pawlett*, 42 L. J., M. C. 157; L. R. 8 Q. B. 491; 29 L. T. 390.

The sessions are not warranted in refusing to hear an appeal against an order of removal because the appellants do not produce the pauper. *Rex* v. *Cornwall JJ.*, 9 L. J. (O.S.) M. C. 82.

A rule of practice of the sessions, that whenever an appeal against an order of removal shall be entered respited, due notice thereof shall be given to the respondent by the appellant, is void. *Reg.* v. *Surrey JJ.*, 3 New Sess. Cas. 531.

Return setting out a conviction by two justices, under 6 Geo. 4, c. 129, whereby A. was sentenced to six weeks imprisonment, and an order of sessions, purporting to be made on dismissing an appeal against this conviction, whereby he was ordered to be imprisoned pursuant to the conviction. By affidavits it appeared that he was convicted on a Saturday, that he entered into recognizances before the convicting justices, which were perfected on the Friday next after the conviction, that on the ensuing Monday the sessions were held, and the appeal called on. By a rule of the sessions, in all cases of appeals, not otherwise directed by law, notice in writing must be given on or before Saturday se'nnight preceding the sessions. Counsel appearing for the convicting justices, as respondents, and on their objection the sessions dismissed the appeal, because the rule was not complied with:—Held, that the sessions, if they thought the notice given not sufficient for a trial then, might have entered and respited the appeal, but were not justified in refusing to hear it under the circumstances. *Blues, In re*, 5 El. & Bl. 291; 24 L. J., M. C. 138; 1 Jur. (N.S.) 541; 3 W. R. 516.

Held, also, that the recognizances having been entered into with reasonable promptitude, the execution was suspended until the appeal was heard, or finally dismissed through the appellant's fault; and that, neither of these events having happened, the conviction did not afford a ground for detention. *Ib.*

Costs.]—Where it appeared that the sessions, on an application by the successful party for costs of an appeal, considered themselves bound by a former order of sessions, that 40*s.* costs only should be allowed on appeals, and acted thereon, and awarded only 40*s.* costs:—Held, that such general rule was unreasonable, and that the sessions were bound to consider the question of costs irrespectively of the former order of sessions, and to award to the successful party a fair and reasonable sum for the costs incurred in supporting the appeal. *Reg.* v. *Glamorganshire JJ.*, 4 New Sess. Cas. 110; 1 L. M. & P. 336; 19 L. J., M. C. 172; 15 Jur. 679.

An appeal against an order of settlement was brought before sessions. The hearing of the appeal was adjourned from time to time, till ultimately the appellant declined to proceed, and gave notice of countermand. The justices then, acting upon a rule of their sessions, refused to allow the respondent his costs:—Held, that a mandamus would lie to compel them, as such a refusal, under the circumstances, amounted to a declining of jurisdiction. *Reg.* v. *Montgomeryshire JJ.*, 19 L. T. 397.

A standing order of a court of quarter sessions, that costs of appeal should follow the event, unless the court should otherwise interfere in any case, may be good as a rule of practice notwithstanding 11 & 12 Vict. c. 43, s. 27, and 12 & 13 Vict. c. 45, s. 5, although it directs such costs to be paid to the parties. *Freeman* v. *Read*, 9 C. B. (N.S.) 301; 30 L. J., M. C. 123; 7 Jur. (N.S.) 546; 3 L. T. 369; 9 W. R. 141.

Barristers.]—The court will not question an order made by the sessions, granting exclusive audience to barristers. *Evans, Ex parte*, or *Reg.* v. *Denbighshire JJ.*, 2 New Sess. Cas. 422; 9 Q. B. 279; 15 L. J., Q. B. 335; 10 Jur. 544.

i. Costs.

Against whom—Crown.]—Upon appeal against an acquittal upon an information by an excise officer under 2 & 3 Will. 4, c. 120, s. 27, the quarter sessions confirmed the acquittal, with costs. Held, that the quarter sessions had no jurisdiction to order costs to be paid to the respondent by the excise officer, either under 12 & 13 Vict. c. 45, s. 5, because the crown was not named in it, or under 18 & 19 Vict. c. 90, s. 2, because it was confined to informations to which the attorney-general was a party. *Reg.* v. *Beadle*, 7 El. & Bl. 492; 26 L. J., M. C. 111; 3 Jur. (N.S.) 863; 5 W. R. 498. See *Moore* v. *Smith*, 1 El. & El. 597; 28 L. J., M. C. 126; 5 Jur. (N.S.) 892; 7 W. R. 206.

—— **Justices.**]—Three labourers having been convicted by justices of an offence under 34 & 35 Vict. c. 32, appealed to the quarter sessions under s. 3 (repealed), which enacts that any party aggrieved by a conviction made by a court of summary jurisdiction may appeal, subject to certain conditions: (2.) The appellant shall, within seven days after the cause of appeal arose, give notice to the other party and to the court of summary jurisdiction of his intention to appeal, and the ground of it. (5) The court of appeal may make such order as to costs to be paid by either party as the court thinks just. The appellants gave due notice to the prosecutor and to the convicting justices, and the justices, as well as the prosecutor, were named respondents in the appeal; but the justices did not appear. The quarter sessions quashed the conviction, and ordered the respondents, or some or one of them, to pay the appellants' costs. The appellants having brought up the conviction by certiorari, under 12 & 13 Vict. c. 45, s. 18, in order to enforce the payment of costs, a rule was obtained to quash so much of the order as ordered the justices to pay costs:—Held, that the quarter sessions had no power to award costs against the convicting justices; and the court made the rule absolute with costs. *Reg.* v. *Goodall*, 43 L. J., M. C. 119; L. R. 9 Q. B. 557.

An information was laid by M., who was the surveyor of a local board of health, but without reference to his official position, against H., for the violation of a by-law of such local board; and upon the hearing, he was convicted and ordered to pay 7*l.* 10*s.* to the local board for costs. H. thereupon gave notice of appeal to the convicting justices and to M. Both the justices and M. handed their notices over to the attorney for the local board, and he conducted the defence on the behalf of the board. The

quarter sessions quashed the conviction with costs; and the clerk of the peace directing the costs to be paid by the respondents, the costs were taxed, and being unpaid, an application was made to justices for a warrant against the goods of M. for the amount:—Held, first, that the order of the quarter sessions was bad in ordering the costs to be paid by the respondents, who were the convicting justices, and M., for that it should have been made upon the local board, who were the parties appealed against. *Reg.* v. *Davidson*, 24 L. T. 22.

Held, secondly, that as the order was valid, except as to that part which related to costs, it should be quashed as to that part only. *Ib.*

By the Criminal Law Amendment Act (34 & 35 Vict. c. 32), s. 3, an appeal to sessions is given against any conviction under the act. By sub-s. 2 the appellant shall, within seven days after the cause of appeal has arisen, give notice to the other party and to the court of summary jurisdiction of his intention to appeal, and of the ground thereof. By sub-s. 5, the court of appeal may make such order as to costs to be paid by either party as the court thinks just. Defendants, having been convicted under the act, gave notice of appeal to the prosecutor and the justices at petty sessions, and made the justices and prosecutor respondents. The justices did not appear, and the conviction was quashed. In drawing up the order of sessions directing the respondents, or some of them, to pay the appellant's costs, the justices were named as respondents:—Held, that a rule to strike out so much of the order as ordered the justices to pay costs must be made absolute, as it was quite clear that under the circumstances there was no power to order them to pay costs. *Reg.* v. *Goodall*, 43 L. J., M. C. 119; L. R. 9 Q. B. 557.

W. was charged before justices with selling for new milk an article not of the nature, substance, and quality demanded, contrary to s. 6 of the Food and Drugs Act, 1875. A sergeant of police, acting under H.'s orders, who was an inspector under the act, purchased the milk from W., who, when he was asked for new milk, sold skimmed, and charged a penny a pint, the usual price for skimmed. The justices differed—one being of the opinion that only a penny a pint being asked, the purchaser must have been aware it was skimmed milk he was buying:—Held, that the knowledge of the purchaser was immaterial, and case remitted to the bench to convict. The respondent W. did not appear, but the magistrates did:—Held, that costs in such a case could be given against them. *Heywood* v. *Whitehead*, 76 L. T. 781.

—— **Prosecutor.**]—The 12 & 13 Vict. c. 45, s. 5, authorises the quarter sessions on appeal against a conviction under 5 Geo. 4, c. 83 (Vagrant Act), to find that the original complainant was the real respondent in the appeal, and to direct him to pay the costs, although by 5 Geo. 4, c. 83, notice of appeal is required to be given to the justices alone, and their names were entered as the formal respondents on the appeal. *Reg.* v. *Smith*, 29 L. J., M. C. 216; 2 L. T. 437; 8 W. R. 589.

Upon an appeal to the quarter sessions against the conviction of an appellant as a rogue and vagabond under 5 Geo. 4, c, 83, the sessions have power to give costs against the prosecutor; and the justices who have convicted the appellant, and who do not appear to support the conviction, are not the parties against whom an order for costs can be made. *Reg.* v. *Purdey*, 5 B. & S. 909; 34 L. J., M. C. 4; 11 Jur. (N.S.) 153; 11 L. T. 309; 13 W. R. 75.

Licensing Law—Non-appearance of Objector—Jurisdiction to give Costs against Objector.]—Licensing justices are not a court of summary jurisdiction, and where on appeal to quarter sessions from their refusal, at the instance of an objector, to renew the licence, a renewal has been granted, there is no jurisdiction to give costs against the objector. *Reg.* v. *Glamorganshire JJ.* (61 L. J., M. C. 169; [1892] 1 Q. B. 621) overruled. *Boulter* v. *Kent JJ.*, 66 L. J., Q. B. 787; [1897] A. C. 556; 77 L. T. 288; 46 W. R. 114; 61 J. P. 532—H. L. (E.)

Nature of Order for.]—At the hearing of a respited appeal against a poor-rate, the appeal was dismissed on the non-appearance of the appellants, and the sessions made the following order:—"Surrey, to wit. At the general quarter sessions of the peace, holden at St. Mary, Newington, on &c.: whereas, at the last general quarter sessions of the peace, holden in and for the county of Surrey, appeal was then made at this court." The appeal was then recited, and the entry and respite thereof until the next general quarter sessions to be holden in and for the county of Surrey. It then ordered the appeal to be dismissed, and further that the appellants do forthwith pay to the respondents 115*l.* costs:—Held, that the order was good, although no notice had been given that more than nominal costs would be asked for; that it sufficiently shewed that it was made at the quarter sessions holden in and for the county of Surrey; and that the term "costs" shewed with sufficient certainty that they were costs of the appeal. *L., B. & S. C. Ry., Ex parte*, 2 B. C. Rep. 265; 5 D. & L. 597; 17 L. J., M. C. 119.

The quarter sessions made an order confirming an order of justices, subject to a case. The order of sessions was silent as to costs. The appellants abandoned the case; the respondents applied to a subsequent session, who made an order, stating that the original order was confirmed, and giving the respondents costs:—Held, that the subsequent sessions had no jurisdiction to deal with the order made by the prior sessions. *Reg.* v. *Staffordshire JJ.*, 7 El. & Bl. 935; 26 L. J., M. C. 179; 3 Jur. (N.S.) 1148.

On an appeal against a conviction under the Alehouse Licensing Act, 9 Geo. 4, c. 61, the sessions affirmed the conviction, and ordered that the appellant should forthwith pay to the respondent justices a certain sum for costs and in case of default should be committed to the house of correction until such sum should be paid:—Held (though conformable to 9 Geo. 4, c. 61, s. 29), a bad order since 11 & 12 Vict. c. 43, which by s. 27, enacts that if on appeal against "such conviction or order" as is there mentioned, the sessions shall award costs, their order shall direct the costs to be paid to the clerk of the peace, to be by him paid over to the party entitled, and shall state within what time payment shall be, and that on non-payment within the time and in default of distress the party may be committed for any time not exceeding three months, unless the costs be sooner paid. For the words "such order" apply generally to all orders of magistrates out of sessions and appeals against such orders (unless

in cases excepted by the act), and s. 36 repeals all statutes inconsistent with it. *Reg.* v. *Hellier*, 17 Q. B. 229; 21 L. J., M. C. 3; 15 Jur. 901.

The 17 Geo. 2, c. 38, s. 4, empowering the quarter sessions upon an appeal against a poor-rate to order costs to be paid to the party in whose favour the appeal is decided, is not affected by 12 & 13 Vict. c. 45, s. 5, and the 11 & 12 Vict. c. 43, s. 27. *Reg.* v. *Huntley*, 3 El. & Bl. 172; 2 C. L. R. 246; 23 L. J., M. C. 106; 18 Jur. 745.

On Countermand of Notice.]—The respondents, having received a notice of appeal against an order of removal for the next sessions, and countermand of such notice having been given too late, according to the rules of the sessions, entered the appeal and applied for costs. The sessions confirmed the order of removal, and ordered costs for attending to support the same:—Held, that the confirmation of the order of removal was bad, and that the order for costs, being ancillary to the confirmation, was bad also. *Reg.* v. *Stoke Bliss*, D. & M. 135; 6 Q. B. 158; 13 L. J., M. C. 151; 8 Jur. 536. See *Reg.* v. *Green*, 20 L. J., M. C. 168.

The justices for the borough of L. made an order for the removal of a pauper from L. to A.; notice of appeal was given by the overseers of A. to the sessions of the county in which L. was situate instead of the borough sessions, and on discovering their error, a letter was written one day before the holding of the borough sessions, abandoning the notice, whereupon the respondents attended at the last-named sessions and obtained an order for their costs:—Held, that the recorder of the borough had jurisdiction to make such order, and that under the circumstances the respondents were entitled to their costs. *Reg.* v. *Leeds Recorder*, 3 El. & El. 561; 30 L. J., M. C. 86; 7 Jur. (N.S.) 210; 3 L. T. 699; 9 W. R. 270.

When an appeal against a rate is abandoned, the sessions may confirm the rate quoad the subject-matter of the appeal and award costs (to be taxed by the clerk of the peace) to the respondents to the time of the abandonment. *Reg.* v. *Norfolk JJ.*, 9 L. J. (O.S.) M. C. 73.

Dismissing Appeal for want of Jurisdiction.]—An inhabitant of a parish gave notice of appeal to quarter sessions against the allowance of the surveyor's accounts. At the sessions the court dismissed the appeal for want of jurisdiction, under 5 & 6 Will. 4, c. 50, and ordered the appellant to pay the costs:—Held, that the sessions had, under 12 & 13 Vict. c. 45, s. 5, jurisdiction to order the payment of costs. *Reg.* v. *Padwick*, 8 El. &. Bl. 704; 27 L. J., M. C. 113; 4 Jur. (N.S.) 360; 6 W. R. 224.

To whom Payable.]—A mistake in ordering costs to be paid directly to the party to the appeal, instead of to the clerk of the peace, under 11 & 12 Vict. c. 43, s. 27, is not a defect of jurisdiction, but merely erroneous procedure. *Reg.* v. *Binney*, 1 El. & Bl. 810; 1 C. L. R. 236; 22 L. J., M. C. 127; 17 Jur. 854.

An order under 12 & 13 Vict. c. 45, s. 5, for payment of the costs of appeal made in a court of quarter sessions, directing that the costs be paid to the clerk of the peace instead of the successful party, is good. *Gay* v. *Matthews*, 4 B. & S. 425; 32 L. J., M. C. 58; 9 Jur. (N.S.) 716; 7 L. T. 504; 11 W. R. 89. Affirmed on appeal, 4 B. & S. 440; 33 L. J., M. C. 14; 8 L. T. 674; 11 W. R. 922—Ex. Ch.

A party who had applied for a beer licence under 9 Geo. 4, c. 61, which was refused, appealed against the refusal to the October quarter sessions, and entered into a recognizance to try the appeal, abide the judgment of the court, and pay such costs as the court might award. The appeal was dismissed, and the court ordered the appellant to pay costs to the respondent forthwith. A blank was left in the order, as to the sum which the clerk of the peace had not time to fix before the sessions adjourned. The sessions adjourned to the next November. Before the adjournment day, the clerk of the peace fixed the costs and filled up the order. After the adjourned sessions had terminated, but before the next sessions, payment was demanded of the appellant, who did not pay:—Held, that it was not necessary that the order should direct the costs to be paid to the clerk of the peace, under 11 & 12 Vict. c. 43, s. 27. *Reg.* v. *Ely JJ.*, 5 El. & Bl. 489; 25 L. J., M. C. 1; 1 Jur. (N.S.) 1017; 4 W. R. 5.

Taxation of Costs.]—On an appeal to quarter sessions, under 9 Geo. 4, c. 61, s. 27, the sessions in October dismissed the appeal with costs. After the court had risen a clerk in the office of the clerk of the peace taxed the costs under protest of the appellant's attorney. The sessions had been adjourned, and before the day of adjournment the costs were certified, and the amount was inserted in the order of sessions. The order was removed into the queen's bench in March, for the purpose of enforcing it:—Held, that the order of sessions purporting on the face of it to be drawn up by the court in the absence of any direct statement that it was not so drawn, will be presumed to have been rightly made; and that there had been a sufficient adoption of the taxation by the adjourned sessions, although no mention of the amount was made in court. *Reg.* v. *Phillips*, 29 L. T. 100.

If a court of quarter sessions on hearing an appeal directs costs to be given and adjourns the court, it is sufficient to have the costs taxed by the clerk of the peace between the day of hearing and the adjournment day, and on the adjournment day to draw up the order, inserting a direction to pay the amount of costs ascertained on the taxation. *Reg.* v. *Hampshire JJ.*, 33 L. J., M. C. 104; 9 L. T. 730; 12 W. R. 441.

If, on the hearing of an appeal against an order of removal, a court of sessions for a borough orders a parish to pay costs, under 4 & 5 Will. 4, c. 76, s. 82, the court must fix the amount of such costs in their order, before the close of the sessions. *Reg.* v. *Long*, 1 Q. B. 740; 1 G. & D. 367; 10 L. J., M. C. 124; 6 Jur. 98.

The quarter sessions have no power to make a general order for the costs of an appeal, though they may refer the taxation of the amount to their officers, provided they, during the sessions, adopt his decision, and incorporate it in the order. This rule is equally applicable, whether the sessions have a discretion to award costs or not. *Sellwood* v. *Mount*, 1 G. & D. 358; 1 Q. B. 726; 10 L. J., M. C. 121; 6 Jur. 78.

Where the costs of an appeal quashed are directed to be paid by a particular party, but the exact sum is not ascertained during the sitting of the court, but is afterwards taxed by the clerk of the peace, such taxation is not irregular. *Reg.* v. *Westmoreland JJ.*, 1 D. & L. 178; 12 L. J., M. C. 113; 7 Jur. 898.

An order for costs made by quarter sessions must be taxed and completed before the sessions are ended. *Reg.* v. *Budden*, 6 W. R. 213.

Where a court of quarter sessions has confirmed a rate with costs, the taxation of such costs after the end of the sessions is irregular, and payment cannot be enforced. *Ib.*

It is not necessary that costs should be taxed in court; the justices may adopt the taxation of the clerk of the peace, and insert it in their order, provided all be done by the court before the end of the sessions. *Freeman* v. *Read*, 9 C. B. (N.S.) 301; 30 L. J., M. C. 123; 9 Jur. (N.S.) 546; 9 W. R. 141.

If the party against whom costs are given consents that the taxation shall take place after the sessions are over, and the justices give judgment for costs nunc pro tunc, the party so consenting will be precluded from afterwards objecting to their want of jurisdiction. *Ib.*

Where it appears that the parties to an appeal have consented that the costs of the appeal shall be taxed by the clerk of the peace, the court will not interfere, though the order for payment of costs may not have been made until after that court of quarter sessions has ceased to exist. *Reg.* v. *Shrewsbury Ry.*, 3 W. R. 373.

The quarter sessions can only order costs of an appeal as ancillary to the giving of final judgment; and where upon a special case nothing of a judicial nature remains to be done by the court, it has no longer power to tax the costs. *Reg.* v. *Hampshire JJ.*, 32 L. J., M. C. 46; 8 Jur. (N.S.) 1212; 7 L. T. 391; 11 W. R. 122.

The court of quarter sessions is a continuing court, and has jurisdiction to construe an order made at a previous sessions. Consent to tax costs out of sessions may be implied from the general practice of quarter sessions and from the conduct of the parties. Semble, the court will not grant a rule to quash an order unless the error is apparent on the face of the order. *Midland Ry.* v. *Edmonton Union*, 63 L. J., M. C. 38; 10 R. 604; 70 L. T. 355; 17 Cox, C. C. 731.

Costs awarded by a court of quarter sessions must be taxed in court, unless there is a direction of the court or a consent of the parties to tax out of court (per Lord Halsbury and A. L. Smith, L.J.). The court of quarter sessions is not a continuing court so as to give a court sitting in a subsequent sessions jurisdiction to order taxation of costs awarded by the court at a previous session (per Lord Halsbury and A. L. Smith, L.J.). *Midland Ry.* v. *Edmonton Union*, 64 L. J., Q. B. 113; [1895] 1 Q. B. 357; 14 R. 281; 72 L. T. 206; 43 W. R. 309—C. A.

—— **Waiving Objections to.**]—Where a party objects to an order on the ground that the amount of costs inserted in the order was ascertained after the sessions had expired, he should protest against the taxation before the taxing officer; otherwise, if he attends on and proceeds with the taxation without protesting, he waives the objection. *Watkins, Ex parte*, 5 L. T. 605; 10 W. R. 249. S. P., *Reg.* v. *Mortlock*, 7 Q. B. 459; 14 L. J., M. C. 153; 9 Jur. 621.

Imprisonment for Nonpayment of Costs.]—Upon an appeal to quarter sessions against an affiliation order, the order was quashed, with costs, and the respondent, in default of distress, committed to prison:—Held, that as the word "recoverable" was used by 12 & 13 Vict. c. 45, in alluding to the proceedings under 11 & 12 Vict. c. 43, s. 27, for enforcing the payment of costs, the right to these costs must be taken to be a right to a sum of money recoverable summarily before a justice of the peace, within the exception in the Debtors Act, and the respondent was therefore not protected from imprisonment. *Reg.* v. *Pratt*, 39 L. J., M. C. 73; L. R. 5 Q. B. 176; 21 L. T. 750; 18 W. R. 626.

Action for Costs—Taxation by Clerk of Peace—Abandonment of Order.]—An action lies to recover costs which have been taxed by the clerk of the peace, and which arise out of an order made by justices in the case of a pauper lunatic under 16 & 17 Vict. c. 97, s. 97, and subsequently abandoned after notice of appeal to quarter sessions has been given. *Dewsbury Union* v. *West Ham Union*, 56 L. J., M. C. 89; 52 J. P. 151.

j. Reference to Arbitration.

Effect of.]—An appeal to the quarter sessions against a rate was referred by consent under 12 & 13 Vict. c. 45 (Baines' Act), s. 13. By the order of reference the costs of the appeal and reference were to be in the discretion of the arbitrator. The arbitrator determined the matter of the appeal in favour of the respondents, and awarded them the costs of the appeal and reference. The award was thereupon entered as the judgment of the sessions under 12 & 13 Vict. c. 45, s. 13, and the costs having been taxed after the sessions, an order of sessions was subsequently drawn up confirming the rate, and ordering the appellants to pay the costs so ascertained by taxation. The appellants objecting that the order was made without jurisdiction, because the costs had not been taxed in sessions:—Held, that it was implied in the terms of the reference that the costs should be taxed out of sessions, and that the order was therefore valid. *Southampton Gaslight and Coke Co.* v. *Southampton Union*, 46 L. J., M. C. 238; 2 Q. B. D. 371; 36 L. T. 548; 25 W. R. 671.

Before 12 & 13 Vict. c. 45, s. 12, the validity of rates was not a subject-matter of arbitration. *Thorp* v. *Cole*, 1 M. & W. 531.

An appeal against a poor-rate was referred to an arbitrator, with a discretion as to costs. The arbitrator having directed the appellant to pay the costs, without ascertaining the amount, the court referred back the award to him to ascertain the amount. The arbitrator declined to hear fresh evidence, and made another award, differing from the original only in the insertion of the amount of costs:—Held, that the arbitrator was justified in refusing to hear the evidence. *Huntley* v. *Binbrook Overseers*, 1 El. & Bl. 787; 22 L. J., Q. B. 277; 17 Jur. 571; 1 W. R. 305.

Costs of.]—On an appeal to the quarter sessions it was ordered, under 12 & 13 Vict. c. 45, s. 13, that the matter in dispute should be referred to arbitration. The arbitrator awarded that the appeal be dismissed, and that the appellants do pay to the respondents their costs of the appeal:—Held, that as the order of reference was silent as to costs, the arbitrator had no power to award costs. *West London Extension Ry.* v. *Fulham Union*, 39 L. J., Q. B. 178; L. R. 5 Q. B. 361; 22 L. T. 523.

On a reference to an arbitrator of an appeal at quarter sessions, under 12 & 13 Vict. c. 45, s. 13, no mention being made of costs, the appeal having been regularly adjourned from sessions to sessions, on the award being made, the subsequent sessions have no power to award any costs either of the reference or of the appeal; their duty being simply to enter the award of the arbitrator as the judgment of the court. *Reg.* v. *Middlesex JJ.*, 40 L. J., M. C. 109; L. R. 6 Q. B. 220; 24 L. T. 131; 19 W. R. 744.

When an order of reference made by a court of quarter sessions is silent as to costs, the subsequent sessions, whose duty it is to enter the award as the judgment of the sessions in the appeal, have no power to deal with the question, but must leave each party to bear his own costs. *Reg.* v. *Yorkshire, W. R., JJ.*, 6 B. & S. 531; 34 L. J., M. C. 142; 11 Jur. (N.S.) 810; 12 L. T. 380; 13 W. R. 738.

k. Records.

Correcting.]—Where the sessions have jurisdiction over an appeal against an order of removal, and having quashed the order, make a special entry on their records, "quashed, not on the merits," the court will not interfere and direct a mandamus to erase such entry, although the order was quashed on an objection which went to the merits. *Ackworth Overseers, Ex parte*, 1 New Sess. Cas. 64; 1 D. & L. 718; 13 L. J., M. C. 38; 8 Jur. 291.

Where the sessions have made a false entry on their records, a mandamus lies to compel the erasure of it, and will be granted where it is essential to the furtherance of justice. *Reg.* v. *Yorkshire, W. R., JJ.*, 3 G. & D. 170; 3 Q. B. 397; 12 L. J., M. C. 148.

A party found guilty by a jury at a sessions irregularly holden, is entitled to have the record of the proceedings correctly made up according to the fact; and the court will grant a mandamus to the justices to make up such record. *Rex* v. *Middlesex JJ.*, 3 N. & M. 110; 5 B. & Ad. 1113; 3 L. J., M. C. 32.

The court will not issue a mandamus to a court of criminal jurisdiction, to alter the minutes of a verdict according to the fact, or to cancel an alteration in such minutes, on a representation that the verdict was erroneously entered at the trial. *Rex* v. *Hewes*, 3 A. & E. 725; 5 L. J., M. C. 45.

Judgment quashed for Informality.]—Where an order is quashed for informality by the sessions, the court will not compel them to make a special entry of that fact upon the minutes of their proceedings; though it is very convenient that they should do so. *Reg.* v. *Lancashire JJ.*, 2 G. & D. 714; 3 Q. B. 367; 12 L. J., M. C. 76, 244; 7 Jur. 327.

Compulsory Purchases.]—An act having given power to the trustees of public works to take, on payment of reasonable compensation, lands belonging to an individual, with a clause that, in the event of any disagreement about the price, either party might, after complying with certain preliminaries, cite the other before the court of quarter sessions, where an inquisition relative to the value of the land should be taken by a jury, and an order of sessions should be made and entered on record for its enforcement:—Held, that it was not requisite that such record of sessions should state on the face of it that the preliminaries required by the act had been complied with, as in favour of such order the compliance will be presumed. *Reg.* v. *Swansea Harbour Trustees*, 1 P. & D. 512; 8 A. & E. 439; 8 L. J., Q. B. 69; 3 Jur. 85.

F. COMPELLING JUSTICES TO DO THEIR DUTY.

Remedy by Rule—Under 11 & 12 Vict. c. 44, s. 8.]—The remedy by rule is not simply for the benefit of justices, and confined to cases in which the jurisdiction is doubtful, but extends to all cases in which they refuse to do an act relating to the duties of their office. *Reg.* v. *Aston*, 1 L. M. & P. 491; 19 L. J., M. C. 236; 14 Jur. 1045.

The statute does not give the court power to grant a rule, where before the court could not issue a mandamus. *Reg.* v. *Bristol JJ.*, 18 Jur. 426, n.; 2 W. R. 154.

Where the object of removing an order of a court of quarter sessions into the Court of Queen's Bench is to enforce such order, the proper course is to apply for a rule under 12 & 13 Vict. c. 45, s. 18; but if it is sought to quash the order the application should be for a certiorari. *Binbrooke Appeal, In re*, 1 W. R. 318.

Where justices heard an information and dismissed it on the ground that they had no jurisdiction, at the same time offering to grant a case, the court refused to grant a rule directing them to hear and determine. *McLeod, Ex parte*, 3 L. T. 700.

—— **Need of Protection.**]—Under 11 & 12 Vict. c. 44, s. 5, it is only when justices would need protection if they proceeded to do "any act relating to the duties of their office," that a rule, calling upon them to shew cause why such act should not be done, can be granted. *Reg.* v. *Percy*, 43 L. J., M. C. 45; L. R. 9 Q. B. 64; 22 W. R. 72.

Therefore, when justices had refused to hear a summons against a person for having a board over his door, stating that he was licensed to retail beer, he not being so licensed, contrary to 35 & 36 Vict. c. 74, s. 11, the court refused a rule against the justices under 11 & 12 Vict. c. 44, but granted a rule for a mandamus. *Ib.*

—— **Not where Justices have acted.**]—The statute does not authorise the court to order justices to draw up one joint conviction instead of two separate convictions against each of two persons against whom a joint information has been laid, and heard and determined by the justices. *Clee, In re*, 1 B. C. C. 31; 21 L. J., M. C. 112.

It applies only to cases where justices have refused to act; and not where they have acted, although erroneously. *Ib.*

Refusal to hear Application.]—If on application to justices for a summons for an indictable offence, they have heard and determined the application, and, on the merits, have declined to grant it, the court will not grant a mandamus to compel them to review their decision. Secus, if they have refused to hear the application, or if, after hearing, have refused to grant it from a mistaken view of their duty, amounting to a declining of jurisdiction. *Reg.* v. *Fawcett, Hodson, Ex parte*, 11 Cox, C. C. 305; 19 L. T. 396.

Erroneous Construction of Statute.]—Where justices have placed an erroneous construction upon a statute, the court will grant a mandamus to hear and determine the matter. *Reg.* v. *Cloete*, 64 L. T. 90; 55 J. P. 310.

Refusal to issue Summonses.]—Upon an application to justices for summonses against certain persons to answer a charge of conspiracy to break the peace and do grievous bodily harm at a public meeting, evidence was given that a disturbance had arisen at the meeting in which the defendants took part, and that one or other of them had previously offered money to different persons if they would commit acts of violence at the meeting. The justices, after hearing the evidence, declined to issue the summonses, and a rule nisi for a mandamus having been obtained, they stated in their affidavit that upon the facts brought before them they did not feel justified in granting the application, but did not say that they thought the witnesses unworthy of credit:—Held, that the rule must be made absolute, for although under 11 & 12 Vict. c. 42 (Jervis's Act), s. 9, the justices are to issue their summons "if they shall think fit," it was here evident that they had not exercised a discretion. *Reg.* v. *Adamson*, 45 L. J., M. C. 46; 1 Q. B. D. 201; 33 L. T. 840; 24 W. R. 250.

Refusal to issue Warrant.]—Justices have no power in issuing a distress warrant for the recovery of poor-rates to order that there shall be any delay in the execution of the warrant. *Reg.* v. *Handsley*, 7 Q. B. D. 398.

And where by an act, power is conferred upon justices to issue a distress warrant "if they shall think fit," they must not refuse to issue it merely because they think the act of parliament does an injustice in giving such power in the particular case. *Reg.* v. *Boteler*, 4 B. & S. 959; 33 L. J., M. C. 101; 12 W. R. 466.

Where magistrates have convicted of penalties on matters within their jurisdiction, and the convictions are regular in form, and there is no legal reason shewn why the parties convicted have not paid the penalties, the court will grant a rule to the magistrates to issue warrants to levy the amounts, and have no discretion to refuse to do so on the ground of some supposed hardship in the number of the convictions or the amount of the costs. *Hartley, In re*, 31 L. J., M. C. 232.

—— **Validity of Order.**]—The court will inquire into the validity of an order of justices before compelling them (by rule) to issue a distress warrant to enforce such order, and will refuse a rule for that purpose where the order appears to be invalid. *Reg.* v. *Collins* or *Durham JJ.*, 21 L. J., M. C. 73; 16 Jur. 422.

—— **Highway Rate—Claim of Exemption.**]—On application to justices for a distress warrant to levy a highway rate upon an occupier of premises, he claimed to be exempt, by reason of having never contributed to the repair of the highways or been rated, but having always repaired so much of a highway as was within his premises, and half a bridge at the extremity of the highway. He shewed no origin of the exemption, but insisted that he was protected by 5 & 6 Will. 4, c. 50, s. 33. The justices refused a warrant. On application for an order on the justices to issue the warrant, the court held the question too doubtful to justify them in acting under the above statute, and left the applicants to move for a mandamus, or to try the question by having another rate made, and against which the party might appeal (the objection that he ought to have appealed having been waived by consent). *Reg.* v. *Browne*, 13 Q. B. 654.

—— **New Street.**]—By 18 & 19 Vict. c. 120, the vestry of a parish may pave any new street, and the owners of the houses forming the street shall, on demand, pay to the vestry the amount of the estimated expenses, such amount to be recovered before two justices on summons, who are to hear and determine the matter, and to make such order as to costs or otherwise as to them seems just. The owner of houses in a street having been summoned before a magistrate to shew cause why an order for the payment of his share of the estimated expense of paving the street should not be made upon him, the magistrate, after hearing the evidence, dismissed the complaint, on the ground that the street having been dedicated to the public as a highway before the act, was not a new street within the meaning of it. On a motion calling on the magistrate to shew cause why he should not hear and adjudicate:—Held (Erle, J., dissentiente), that he had done so, and that the court could not interfere. *Reg.* v. *Dayman*, 7 El. & Bl. 328; 26 L. J., M. C. 128; 3 Jur. (N.S.) 744; 5 W. R. 578.

Held, by Erle, J., that the decision by the magistrate was of a fact going to his jurisdiction, and that the court could therefore review his decision. *Ib.* See *Reg.* v. *Hutchins*, 50 L. J., M. C. 35; 6 Q. B. D. 300; 44 L. T. 464; 29 W. R. 724—C. A.

—— **Lighting Rates—Validity of Meetings.**]—In September, 1853, at a meeting of ratepayers for determining whether so much of the 3 & 4 Will. 4, c. 90, as relates to lighting should be adopted in a parish, the act was not adopted. In December following, at a meeting for determining whether it should be adopted in part of the parish, the act was adopted. S. paid a rate assessed upon him in 1855, but having refused to pay subsequent rates, a summons was taken out against him, at the hearing of which the justices decided that the persons at the two meetings were substantially the same body, and therefore, the second being contrary to s. 16, dismissed the summons. Upon application for a rule on the justices to issue their warrant, semble that the decision of the justices was wrong, but being on a question of fact:—Held, that the court could not disturb it. *Reg.* v. *Dunn*, 7 El. & Bl. 221; 26 L. J., M. C. 74; 3 Jur. (N.S.) 341.

—— **Poor-Rate—No Paupers in Particular District.**]—An extra-parochial place having become a parish, and by order of the Poor Law Board added to a union, a contribution order was made by the guardians of the union upon the overseer. Upon his refusal to pay, the guardians applied to justices for a summons under 2 & 3 Vict. c. 84, s. 1, which empowers them, if they shall think fit, to issue their warrant for levying the amount. At the hearing the only ground which the overseer urged against issuing the warrant was, that, as the parish had not at that time any paupers chargeable to it, it was unjust and unreasonable that the ratepayers should be

called upon to pay anything towards the expenses of the union. The justices refused to issue their warrant, adding that they did so in the exercise of their discretion. Upon application for a rule on the justices to issue their warrant, the court made it absolute, with costs. *Reg.* v. *Boteler*, 4 B. & S. 959; 33 L. J., M. C. 101; 10 Jur. (N.S.) 798; 12 W. R. 406.

Preliminary Objection.]—A party was summoned before justices upon an information, under 18 & 19 Vict. c. 108, s. 11, charging that he, "being one of the owners and managers" of a colliery, had worked the colliery without providing the boiler with a proper steam-gauge, as required by s. 4. In defence, he contended that, as there were other owners, they ought to be charged with him; but he did not deny that he was resident owner, and took an active part in the management. The justices, upon this objection alone, dismissed the complaint, considering the information to be bad on the face of it, because it shewed that there were other owners. A mandamus was granted, commanding them to hear and determine the information; for, first, the objection was invalid; and, secondly, the justices had not exercised jurisdiction, but had declined it, the objection being preliminary, though taken in defence, and not at the outset. *Reg.* v. *Brown*, 7 El. & Bl. 757; 26 L. J., M. C. 183; 3 Jur. (N.S.) 745; 5 W. R. 625. And see *Reg.* v. *Middlesex JJ.*, infra, col. 680.

Adjournment for Special Case.]—A magistrate, upon a complaint regularly heard before him, gave his opinion against the complainant, but at the request of the complainant he refused to adjudicate, for the purpose of enabling the complainant to take the opinion of the Court of Queen's Bench. The defendant objected, and wished the magistrate to adjudicate and dismiss the complaint:—Held, that there was no such refusal to adjudicate as to entitle the complainant to a rule. *Reg.* v. *Paynter*, 7 El. & Bl. 328; 26 L. J., M. C. 102; 3 Jur. (N.S.) 511; 5 W. R. 267.

Interested Justice.]—W. having applied to the licensing justices for a licence for a new hotel, and the three justices who were sitting having refused it, afterwards applied to the court for a mandamus to have the case heard again, on the ground that B., one of the justices, was interested as owner in one of the licensed houses near the proposed hotel. The affidavit shewed that B.'s wife had succeeded to the licensed house, and was tenant for life, but it was a small house without hotel accommodation, and not likely to be injured by the new licence being granted:—Held, (a) that a mandamus could not be granted, because the decision not having been set aside or quashed on certiorari, the case could not be heard again; (b) if a certiorari were applied for, the affidavits ought to state that the party applying and his solicitor did not know at the time that one of the justices was interested. *Reg.* v. *Kent JJ.*, 44 J. P. 298.

Where justices stopped the further hearing of a case on the ground that one of them was interested, and granted a case for a superior court as to whether such justice was interested or not:—Held, that they had not power to grant such a case, but that they might be compelled to determine the matter before them. *Wakefield Local Board* v. *Yorkshire, W. R., JJ.*, 6 B. & S. 794; 35 L. J., M. C. 69; 10 Cox, C. C. 162.

Practice on Affidavits.]—Although affidavits are admissible for the purpose of shewing that a magistrate has made an order without jurisdiction, yet as the test of jurisdiction with respect to the right of a magistrate to deal with any particular case is, whether he had power to commence the inquiry, and not whether he has in the course of it come to right conclusions, affidavits are not admissible merely to disprove the existence of any fact stated in the information, because the power of the magistrate to commence the inquiry depends not upon the question whether the statements contained in the information are true or false, but upon the question whether the facts as stated in the information do or do not amount in law to an offence over which he has jurisdiction. *Reg.* v. *Bolton*, 4 P. & D. 679; 1 Q. B. 66.

A rule calling upon justices to shew cause why they should not issue a distress warrant was founded upon an affidavit, shewing the refusal only, but not stating the proceedings which took place before them, or the reason why they refused. The party shewing cause against the rule made no affidavit:—Held, that the affidavit must be construed in favour of the party making it, and that the rule should be absolute. *Reg.* v. *Deverell*, 3 El. & Bl. 372; 23 L. J., M. C. 121.

Affidavits of Justices.]—Under 35 & 36 Vict. c. 26 (the Review of Justices Decisions Act, 1872), the affidavit must be sworn by the justice himself, and affidavits sworn by persons upon whose evidence the decision of the justice is founded are not admissible. *Reg.* v. *Sperling*, 21 W. R. 461.

Costs.]—On motion against a justice of the peace under the 11 & 12 Vict. c. 44, s. 5, the general rule is, that the court will order the unsuccessful party to pay costs, and will not on motion for costs enter into the merits of the original application. *Reg.* v. *Ingham*, 17 Q. B. 884; 21 L. J., M. C. 125; 16 Jur. 526.

Where no cause is shewn against the rule, the court will not make the rule absolute with costs, unless asked for by the rule. *Leamington Priors Commissioners* v. *Moultrie*, 7 D. & L. 311.

Attachment or Information.]—On an application for an attachment or criminal information against a justice of the peace for misconduct in the exercise or under the authority of his office, it must be shewn that six clear days' notice in writing has been given to him. *Reg.* v. *Rae*, Ir. R., 8 C. L. 524. *And see* CROWN OFFICER (CRIMINAL INFORMATION).

Mandamus to Sessions to hear Appeal.]—S. was convicted by a metropolitan police magistrate under 5 Geo. 4, c. 83, s. 4, which makes punishable as a rogue and vagabond "every person . . . . using any subtle craft, means or device, by palmistry or otherwise, to deceive and impose on any of his Majesty's subjects." The conviction described the offence as "unlawfully using certain subtle craft, means and device" (omitting the words "by palmistry or otherwise"). Upon appeal to the Middlesex Sessions, the proceedings commenced with an objection from S. that the omission of the words made the conviction bad. The justices, after hearing the point argued, retired, and on their return the assistant judge gave what purported to be the decision of the sessions, quashing the conviction

on the objection taken to it. Upon application for a mandamus to the sesssons to hear the appeal on the merits, it was proposed to shew by affidavits from the justices that the decision given by the assistant judge was contrary to the opinion of the majority of the justices forming the court, and that after such opinion had been communicated to him, he persisted in giving his decision as that of the sessions:—Held, that the order of sessions having been duly recorded, it was too late to inquire whether it did or did not represent the opinion of the majority of the justices, and that the decision upon the form of the conviction was not a decision upon a preliminary matter, but a hearing and adjudication upon the merits, which, upon a mandamus, could not be reviewed. *Reg.* v. *Middlesex JJ., Slade, In re*, 46 L. J., M. C. 225; 2 Q. B. D. 516; 36 L. T. 402; 25 W. R. 610.

The court, having quashed an order of sessions which quashed the rate, will not, thereupon, issue a mandamus to the sessions to enter continuances. The proper course for the appellant is to apply to the court for an order to the sessions to hear the appeal. *Reg.* v. *Cheltenham Commissioners*, 1 G. & D. 167; 1 Q. B. 467; 10 L. J., M. C. 99.

—— **Where Case Stated.**]—When the court of quarter sessions dismisses an appeal subject to a case, the court will not grant a mandamus to enter continuances and hear the appeal. *Rex* v. *Suffolk JJ.*, 1 N. & P. 306; 6 A. & E. 109; W. W. & D. 7; 6 L. J., M. C. 37.

The court will not grant a mandamus commanding the justices in sessions to try an appeal dismissed for want of notice of trial, where the court of quarter sessions has granted a case upon the question whether it had been rightly dismissed, which has been abandoned by the party applying for the mandamus. *Rex* v. *Yorkshire W. R. JJ.*, 3 N. & M. 757; 5 B. & Ad. 677.

—— **Time for.**]—On the 5th January, 1844, the sessions dismissed an appeal, giving the appellants the option of stating a case, or applying for a mandamus. No case was brought up, but an application for a mandamus was made on the 30th April following:—Held, that the application was not too late, and a mandamus was granted. *Reg.* v. *Cheshire JJ.*, 2 New Sess. Cas. 420; 1 B. C. Rep. 164; 15 L. J., M. C. 114; 10 Jur. 808.

See also CROWN OFFICE (MANDAMUS).

G. LIABILITY OF, TO ACTION.

1. LIABILITY, IN RESPECT OF WHAT.

Acts done in Execution of the Office.]—A justice of the peace is entitled to the protection of the 7th and 8th sections of the 11 & 12 Vict. c. 16, with respect to any act done by him under the bonâ fide belief in the existence of a state of facts which, if existing, would have justified the act as an act done by him in the execution of his office. The reasonableness of such belief, though an element in determining its bona fides, is not essential to his right to claim the benefit of these provisions. *Chamberlain* v. *King* (L. R. 6 C. P. 474) followed. *Rochfort* v. *Rynd*, 8 L. R., Ir. 204. Affirmed in C. A.

Upon an application under these sections to set aside proceedings in an action against a justice of the peace for an act alleged by him to have been done in execution of his office, the affidavit in support of the motion must shew, not only that he bonâ fide believed that he was authorised as such justice to act as he did, but must also allege facts shewing that such a belief might have been entertained. An allegation that the act complained of was done bonâ fide without malice, and in ignorance of any cause against the doing thereof, and was done in execution of his office as such justice, is insufficient. The affidavit should state the facts proved before the justice, and the belief formed by him on such facts. *Ib.*

A magistrate who commits a party in a case where he has no jurisdiction is liable to an action of trespass; but where, supposing the facts alleged to be true, the magistrate has jurisdiction, his liability to be sued, or his exemption from such liability, on the ground of jurisdiction, cannot be affected by the truth or falsehood of these facts, or by the sufficiency or insufficiency of the evidence adduced for the purpose of establishing them. *Carr* v. *Mountain*, 1 Man. & G. 257; 1 Scott (N.R.) 132; 9 L. J., M. C. 90.

A magistrate is not justified in removing a driver from one part of a cart to another to obtain the name of the owner. *Jones* v. *Owen*, 2 D. & R. 600; 1 L. J. (O.S.) K. B. 139.

An information brought before a magistrate, which charges an offence within his cognisance, is sufficient to give the magistrate jurisdiction, and to protect him from an action for false imprisonment, although the information discloses no legal evidence against the alleged offender, and even although it purports to be founded upon inadmissible hearsay evidence. *Carr* v. *Mountain*, supra.

Knowledge on the part of the committing magistrate that the prisoner would be subject to restriction unnecessarily severe, in the gaol to which the commitment is made, does not make the magistrate a trespasser, unless he expressly directs such treatment to be adopted in the particular case. *Ib.*

An action will not lie against a magistrate for anything done by him in the discharge of his duty, unless he is made acquainted with every fact necessary to enable him to determine when called upon to act. *Pike* v. *Carter*, 10 Moore, 376; 3 Bing. 78; 3 L. J. (O.S.) C. P. 169.

Thus an action of trespass does not lie against justices acting upon a complaint made to them on oath, by the terms of which they have jurisdiction; though the real facts of the case might not have supported such complaint, if such facts were not laid before them at the time by the party complained against having notice of such complaint, and being properly summoned to attend. *Lowther* v. *Radnor* (*Earl*), 8 East, 113. *See* 20 R. R. 542, n.

If a person is charged on oath before a magistrate with an offence amounting to felony, and he issues his warrant; and, on the party being brought before him, the charge is substantiated, and the offender is committed to prison, the magistrate committing is not liable in trespass for false imprisonment, although the charge turns out to be unfounded. *Mills* v. *Collett*, 3 M. & P. 242; 6 Bing. 85; 7 L. J. (O.S.) M. C. 97; 31 R. R. 355.

Justices who have issued a warrant of distress against a person occupying lands within the limits of their jurisdiction for non-performance of statute duty under 13 Geo. 3, c. 78, ss. 34–37,

cannot be proceeded against by action. *Fawcett* v. *Foulis*, 6 L. J. (o.s.) M. C. 44.

A justice cannot justify the committing of a party charged to the custody of a constable, in order that he may compromise with the complainant until the party has been actually convicted. *Bridget* v. *Coyney*, 6 L. J. (o.s.) M. C. 42.

—— **Protection under 11 & 12 Vict. c. 44, ss. 1, 2.**]—These sections must be read together, and therefore, where, in the course of a matter transacted before a justice, there has been an excess of jurisdiction, the 2nd section does not apply unless the action in which it is sought to be applied is brought for an act done in respect of that part of the matter, or some part of it, which was beyond the jurisdiction. *Barton* v. *Bricknell*, 13 Q. B. 393; 20 L. J., M. C. 1; 15 Jur. 668.

The statute 11 & 12 Vict. c. 44, s. 2, which provides that a conviction shall be quashed before an action can be brought against the committing magistrate, applies only to cases where there has been a conviction. When a person has been taken into custody and remanded on a charge which turns out to be false, the court will not grant a certiorari for the purpose of quashing the warrant under which he was remanded preliminary to his bringing an action against the justice who signed it. *Reg.* v. *Ely JJ.*, 4 W. R. 13.

—— **Negligence in building Police Station.**]—The building of a police station is an act done by justices in the execution of their office; and the justices, if sued for negligence in the building or maintaining thereof, and for damage arising therefrom, are entitled to the protection afforded by 11 & 12 Vict. c. 44. *Hardy* v. *North Riding JJ.*, 50 J. P. 663.

Protection of Provincial Magistrates in India.]—The 21 Geo. 3, c. 70, s. 24, protecting provincial magistrates in India from actions for any wrong or injury done by them in the exercise of their offices, gives them only the same measure of exemption as that which is given to magistrates in England under similar circumstances, that is, an exemption in cases where they have acted bonâ fide. Where they have exceeded their jurisdiction, the onus of shewing that they knew, or had the means of knowing, the want of jurisdiction, lies upon the party complaining. *Calder* v. *Halket*, 3 Mont. 28.

Express Malice.]—A justice of the peace may be acting maliciously and without reasonable and probable cause, and yet be acting in the execution of his duty as such justice; as, for instance, where maliciously and without reasonable and probable cause he excites a person to bring a complaint before him. *Kirby* v. *Simpson*, 10 Ex. 358; 2 C. L. R. 1286; 23 L. J., M. C. 165; 18 Jur. 983.

A count stated that the defendant, being a justice of the peace, unlawfully and maliciously, and without reasonable or probable cause, took an information of W. against the plaintiff, and wrongfully, wilfully, maliciously and without reasonable or probable cause, as the defendant well knew, convicted the plaintiff, and he was thereby compelled to pay a sum of money; and that upon appeal to the quarter sessions, the conviction was afterwards quashed. A verdict having been found for the plaintiff, the court refused to arrest the judgment. *Gelen* v. *Hall*, 2 H. & N. 379; 27 L. J., M. C. 78; 5 W. R. 757.

Quære, whether an action is maintainable against a justice of the peace for wilfully and maliciously, and without reasonable and probable cause, convicting a person in a penalty in a matter in which he has jurisdiction, and which penalty is paid, but the conviction has been subsequently quashed. *Ib.*

Where a justice of the peace maliciously grants a warrant against a person without any information upon a supposed charge of felony, the remedy against the justice is trespass, and not case. *Morgan* v. *Hughes*, 2 Term Rep. 225.

Reasonable and probable Cause.] — Where means of knowledge, as distinguished from knowledge actual or imputed, is relied upon to sustain an action against a justice of the peace, acting judicially, for an act done without jurisdiction, the action will lie only when he has acted maliciously and without reasonable and probable cause. *Johnston* v. *Meldon*, 30 L. R., Ir. 15.

Absence of Malice—Excess of Jurisdiction.]—In an action against justices for acting in excess of jurisdiction, a declaration without any allegation that they acted maliciously and without reasonable and probable cause is good. *Pease* v. *Chaytor*, 1 B. & S. 658; 31 L. J., M. C. 1; 8 Jur. (N.S.) 482; 5 L. T. 280; 10 W. R. 16.

Discretion—Refusing to Admit to Bail.]—The duty of a magistrate in respect of admitting to bail is judicial; and, therefore, an action cannot be maintained against him for refusing to admit to bail a person charged with a misdemeanour, and entitled to be admitted to bail, without proof of malice. *Linford* v. *Fitzroy*, 13 Q. B. 240; 3 New Sess. Cas. 438; 18 L. J., M. C. 108; 13 Jur. 303.

Remarking on Conduct of Constable.]—It is the duty of a magistrate to express his opinion of the conduct of police constables, in order that the police commissioners may have proper information on which to proceed in making inquiries to enable them to regulate the force under their direction. *Kendillon* v. *Maltby*, Car. & M. 402; 2 M. & Rob. 438.

—— **Of Witnesses.**]—An action will not lie against a magistrate for words spoken in pronouncing judgment, of a witness in the case. *Ib.*

Refusal to License.]—An action does not lie against justices of the peace for refusing a licence to keep an inn or an alehouse. *Basset* v. *Godschall*, 3 Wils. 121.

Wrongful Appointment of Overseers.]—Seven borough magistrates, including the mayor, assembled to appoint overseers. The mayor drew from his pocket two blank forms, with three seals ready attached; filled them up with the names of two persons of his own political party, handed them to the two magistrates sitting next to himself, and, on their being signed, immediately despatched them by a constable to be served. As soon as the constable had left the room, the four other magistrates, who had not observed the mayor's proceedings, requested him to nominate two other overseers; and, upon his refusing to put the question, appointed them without his concurrence. The mayor afterwards caused a distress to be levied

on the plaintiff for refusing to pay a rate made by the overseers appointed by the mayor. The plaintiff sued the mayor in trespass; the jury was directed that they might find for the plaintiff, if they thought the mayor's appointment of overseers to be fraudulent. The jury having found it not fraudulent:—Held, that the action was not maintainable; the appointment of the overseers being a judicial act, performed without fraud, at a meeting competent, in point of jurisdiction, to perform it, and the act being verified by a sufficient number of signatures to satisfy the statute regulating the mode of appointment. *Penny* v. *Slade*, 7 Scott, 285; 5 Bing. (N.C.) 319; 1 Arn. 539; 8 L. J., C. P. 221.

Jurisdiction.]—If a party makes a complaint of another to a magistrate in a matter over which he has a general jurisdiction, who thereupon issues his warrant, by force of which an arrest is made, neither the party complaining, nor the magistrate, is liable in trespass; and the only remedy for the party aggrieved is in an action for a malicious prosecution. But if the matter was one in which the magistrate had no jurisdiction at all, then the latter is a trespasser. *West* v. *Smallwood*, 3 M. & W. 418; 6 D. P. C. 580; 7 L. J., Ex. 144; 2 Jur. 328.

An action will not lie against a magistrate for anything done under a conviction, unless there is an entire want of jurisdiction. *Fawcett* v. *Foulis*, 7 B. & C. 394; 1 M. & Ry. 102; 6 L. J. (O.S.) M. C. 44.

A justice who acted without jurisdiction in convicting for an offence was not protected by 43 Geo. 3, c. 141, s. 1, against an action of trespass, although the conviction might have been quashed. *Jones* v. *Gurdon*, 2 G. & D. 133; 2 Q. B. 600; 11 L. J., M. C. 45; 6 Jur. 482.

Trespass is maintainable against a justice, if, in the particular act of issuing the warrant, the magistrate acted without, or in excess of, jurisdiction, although he had a general jurisdiction over the subject-matter of inquiry. *Lawrenson* v. *Hill*, 10 Ir. C. L. R. 177.

In such a case, the magistrate is not protected, although he bonâ fide believed that he was acting within his jurisdiction. *Ib.*

Three magistrates, acting under 5 & 6 Will. 4, c. 76, s. 60, committed the crier of a borough to the county gaol until he should deliver up the bell, which was stated in the conviction and commitment to be the property of the council of the borough. This conviction was afterwards quashed on appeal:—Held, that the magistrates had jurisdiction to convict; and, there being nothing on the face of the conviction to make it void, that trespass would not lie against the magistrates. *Baylis* v. *Strickland*, 1 Scott (N.R.) 540; 1 Man. & G. 591; 10 L. J., M. C. 61; 4 Jur. 823. And see *Cave* v. *Mountain*, and cases, ante, col. 681.

Conviction—What is Sufficient Appearance—Summons after Conviction.]—B. had been convicted by a magistrate of an offence under the Copyright of Designs Act (6 & 7 Vict. c. 65), and ordered to pay a penalty. Upon nonpayment he was summoned to shew cause why he should not be committed in default of payment, and be further dealt with according to law. He did not attend to the summons personally, but his counsel and attorney appeared for him. The magistrate refused to proceed in his absence, and issued a warrant for his apprehension to answer to the complaint, and to be further dealt with according to law, under which he was afterwards apprehended and imprisoned. The conviction was afterwards quashed. In an action for false imprisonment against the magistrate:—Held, first, that he was not protected by 11 & 12 Vict. c. 44, s. 2, inasmuch as it did not apply to default in appearance to a summons after conviction. *Bessell* v. *Wilson*, 1 El. & Bl. 489; 22 L. J., M. C. 94; 17 Jur. 664; 1 W. R. 126.

Held, secondly, that even if the summons had been within the section, the appearance to it by counsel and attorney was sufficient. *Ib.*

Where Ten Days' Notice not given.]—Where penalties are to be recovered by information before justices, under a statute which directs that they shall summon the person against whom the information is exhibited, to appear and plead to, and to attend the hearing of the information, at a time and place named in the summons, such summons to be served "ten days at the least" before the time appointed:—Held, that there must be ten clear days between the service and the day of hearing; and that, where the conviction shewed on its face that the party was convicted ex parte on default of appearance to a summons appointing too early a day, such conviction was no defence to an action of trespass for enforcing it. *Mitchell* v. *Foster*, 12 A. & E. 472; 4 P. & D. 150; 9 D. P. C. 527; 9 L. J., M. C. 95.

Where Appeal pending.]—An order of affiliation having been made on the plaintiff, he gave notice of appeal, and entered into the required recognizance for payment of costs. The quarter sessions confirmed the order, subject to a case. Afterwards, upon nonpayment of the sum ordered to be paid, a justice of the peace issued his warrant to take the plaintiff before two justices. In an action of trespass against the justice:—Held, by Lord Campbell, C.J., and Erle, J., that neither the giving of notice of appeal and entering into the recognizance, nor the confirmation of the order, subject to a case, suspended the jurisdiction of the justice to issue his warrant, under 7 & 8 Vict. c. 101, s. 3; and by Coleridge, J., that the granting the warrant being for the purpose of a judicial inquiry, whether or not the plaintiff ought to pay the money, was within the justice's jurisdiction, notwithstanding the pendency of the appeal, and therefore the action was barred, there being no allegation that the act was done maliciously, and without reasonable and probable cause. *Kendall* v. *Wilkinson*, 4 El. & Bl. 680; 3 C. L. R. 668; 24 L. J., M. C. 89; 1 Jur. (N.S.) 538; 3 W. R. 234.

Warrant of Commitment Irregular.]—Justices convicted the plaintiff in a penalty of 2*l.* and costs, or two months' imprisonment; against this decision, which was given orally, he gave notice of appeal, and immediately left the court. A conviction and warrant of commitment were afterwards drawn up, in which blanks were left for the amount of costs to be inserted, and so signed by the justices. The blanks were afterwards filled up by the justices' clerk, and the plaintiff was arrested on the warrant, when he, for the first time, became aware of the amount of costs:—Held, that the signing in blank by the justices was a mere irregularity, and not an excess of jurisdiction; and that the plaintiff,

having brought an action for false imprisonment against the justices, was rightly nonsuited under 11 & 12 Vict. c. 44, s. 1. *Bott* v. *Ackroyd*, 28 L. J., M. C. 207; 5 Jur. (N.S.) 1053; 7 W. R. 420.

In an action against a magistrate for false imprisonment, the plaintiff proved a commitment for a certain alleged offence. The defendant proved a conviction of the plaintiff for an offence differing from that recited in the commitment:—Held, that this conviction was no justification of the imprisonment. *Rogers* v. *Jones*, 5 D. & R. 268; 3 B. & C. 409; R. & M. 129; 3 L. J. (O.S.) K. B. 40.

—— **For Indefinite Time.**]—A justice's warrant, committing a party in default of his finding sureties to keep the peace, is bad if the commitment is for no definite time, but until he shall find such sureties or be discharged by due course of law. And an action lies against the justices for committing on such warrant; and bona fides is no defence. *Prickett* v. *Gratrex*, 8 Q. B. 1021; 2 New Sess. Cas. 429; 15 L. J., M. C. 145; 10 Jur. 566.

Where Two Convictions.]—Where a person had been convicted under the 7 & 8 Geo. 4, c. 29, s. 34, and committed to prison by justices of the peace, and they had drawn up two convictions, one of which had been returned to the sessions, but the other not:—Held, that in an action of trespass and false imprisonment brought against them by such person, they might rely on both the convictions. *Fuller* v. *Brown*, 3 New Sess. Cas. 603.

Order for Possession Reversed.]—Two magistrates having, at a landlord's request, given possession of a dwelling-house as deserted and unoccupied, pursuant to 11 Geo. 2, c. 19, s. 16, the judges of assize of the county, on appeal, made an order for the restitution of the farm to the tenant, with costs. The latter brought an action of trespass for the eviction, against the magistrates, the constables, and the landlord:—Held, that the proceeding before the magistrates was an answer to the action on behalf of all. *Ashcroft* v. *Bourne*, 3 B. & Ad. 684; 1 L. J., K. B. 209.

Invalid Orders.]—A justice is liable in trespass if he commits a person for disobedience to an order which turns out to be invalid. *Wilkins* v. *Hemsworth*, 3 N. & P. 55; 7 A. & E. 807; 7 L. J., M. C. 28; 2 Jur. 94, 301.

Goods Seized upon Irregular Warrants.]—If goods are seized upon a warrant founded on a conviction improperly framed, the magistrates issuing the warrant are liable in trespass. *Newman* v. *Hardwicke* (*Earl*), 8 A. & E. 124; 3 N. & P. 368; 7 L. J., M. C. 101.

A local act prohibited the exposing for sale of goods on the footway of a street, under a penalty of 10*s.*; and justices had a summary jurisdiction to enforce the payment of the penalty. By a subsequent act, the section in the first act creating the offence was repealed and re-enacted, with this difference, that the penalty was made 20*s.* instead of 10*s.* There was no clause in the last act as to the mode in which the penalty should be enforced:—Held, that, as the first act was repealed by the second, the justices, having granted a distress warrant for the purpose of enforcing payment of a penalty imposed by this latter act, were liable to an action of trespass. *Ward* v. *Stevenson*, 1 New Sess. Cas. 162.

Cost of Removal of Pauper.]—A lunatic having a settlement in J., but having the status of irremovability from M., was, in 1851, sent to an asylum from M., which was not comprised in any union; and an order for the expenses was made on J. The 16 & 17 Vict. c. 97, having afterwards passed, J. refused to pay any expenses incurred subsequently to 29th September, 1853. Two justices issued a distress warrant to levy the arrears under which the goods of one of the overseers of J. were seized:—Held, that the justices had no jurisdiction to issue the warrant; the order on J. being by implication annulled by 16 & 17 Vict. c. 97, and there being no obligation on J. to take any steps to get rid of it. *Knowles* v. *Trafford*, 7 El. & Bl. 144; 26 L. J., M. C. 188; 3 Jur. (N.S.) 1018; 5 W. R. 741—Ex. Ch.

Payment of Church-rates—Validity of Objections.]—Justices are not liable to an action if they honestly, though erroneously, decide that an objection to the validity of a church-rate made at the hearing of a complaint for non-payment of arrears, is not made bonâ fide, and proceed to adjudicate and issue their warrant to enforce payment. *Pease* v. *Chaytor*, 3 B. & S. 620; 32 L. J., M. C. 121; 9 Jur. (N.S.) 664; 8 L. T. 613; 11 W. R. 563.

—— **Within what Time.**]—An order for payment of a church-rate was made by two justices more than six months after there had been a demand and a refusal, and was therefore bad. An action was brought against the justices, but in the declaration there was no allegation that the justices had acted maliciously in issuing the order:—Held, that, without such an allegation, the declaration was bad, as the justices were not liable for issuing an order which they bonâ fide believed they had power to do. *Sommerville* v. *Mirehouse*, 1 B. & S. 652; 3 L. T. 294; 9 W. R. 53.

Poor-rate — Amount — Form of Warrant.]—A warrant by two justices of a county, after reciting the making of a rate, the assessment of the plaintiff in 17*l.* thereto, and his refusal to pay the same, and that two justices had issued their warrant to levy 17*l.* 19*s.* 6*d.*, and the further sum of 6*s.* for costs incurred in the premises, making in the whole 18*l.* 5*s.* 6*d.*, by distress, commanded the constable to apprehend and take the plaintiff to the house of correction, there to remain "until payment of the said sum":—Held, bad in toto, and trespass lay against the justices and the constable for the arrest and imprisonment under it. *Clark* v. *Woods*, 2 Ex. 395; 3 New Sess. Cas. 253; 17 L. J., M. C. 189.

A party having been arrested under the foregoing warrant, and having paid under protest the money specified in it, is entitled to recover back the whole of the money so paid, although the sum of 17*l.* 19*s.* 6*d.* was really due from him in respect of the rate. *Ib.*

—— **Places Liable.**]—The poor-law commissioners, by an order directed nine parishes, townships and places to be formed into a union, to be called the Pately Bridge Union, for the administration of the law for the relief of the poor. In the margin of the order were enumerated eleven townships; first Beverley; second, Dacre; and the commissioners ordered that a board should be constituted, fourteen to

be the number of guardians, three for Beverley and two for Dacre, treating them as separate townships. They then directed them to contribute to a common fund for providing a workhouse, and afterwards fixed the proportions payable by each township or place. The chairman and guardians of the union made an order on the plaintiff and three others, as overseers of the parish of Dacre-cum-Beverley (treating the two as one township), for payment of 500*l.*, by way of contribution towards the relief of the poor. This order having been disobeyed, the magistrates issued their summons to the plaintiff and the other overseers, as overseers of Dacre-cum-Beverley, and afterwards issued a warrant of distress, under which his goods were taken. In trespass against them for a seizure of these goods under the warrant:—Held, that 2 & 3 Vict. c. 84, s. 1, gave to the magistrates a power similar to that exercised by them in enforcing a legal poor-rate, but that, in the absence of a legal obligation to pay the contribution by the party whose goods had been seized, the magistrates had acted without jurisdiction, and were liable in an action of trespass, and that 11 & 12 Vict. c. 44, s. 1, which in certain cases makes a magistrate liable in an action on the case only, did not therefore apply. *Newbould* v. *Coltman*, 6 Ex. 189; 20 L. J., M. C. 149.

Liability for Repair of Bridge.]—By a local act, the owners and occupiers of lands in the district were empowered to rate the owners and occupiers of abbey lands, for the purpose of raising funds for the repair of bridges. It enacted, that if any owner or occupier of any land in respect of which a rate had been imposed by virtue of the act should refuse to pay the same, a justice, on proof of demand, might summon, and on due proof issue a distress warrant. By subsequent sections, an appeal was given to any person claiming exemption, on the ground that the lands rated were not abbey lands; and the decision of the quarter sessions on such appeal was final. The plaintiff having been rated in respect of lands which the jury found not to be abbey lands, and having refused to pay upon summons, a magistrate issued a distress warrant, under which his goods were seized:—Held, that he was not protected by 11 & 12 Vict. c. 44, s. 1, or by a similar clause in the local act. *Pedley* v. *Davis*, 10 C. B. (N.S.) 492; 30 L. J., C. P. 374; 8 Jur. (N.S.) 263; 5 L. T. 253. See *Allen* v. *Waldegrave*, infra, col. 690.

Criminal Proceedings.]—A magistrate cannot be proceeded against criminally until the action against him is discontinued. *Rex* v. *Fielding*, 2 Kenyon, 386; 2 Burr. 720.

2. Action Against.

Parties—Individual Liability on Contracts.]—A single magistrate is not liable to pay for the expenses incurred in preparing plans for a county gaol, advertised for by the sessions of which he was one. *Tuck* v. *Ruggles*, 5 Esp. 237.

By an act of parliament for rebuilding a bridge, justices of the peace were empowered to contract for its erection, and the contractor was to give sufficient security for the due performance of his contract to the clerk of the peace; and the justices were empowered to appoint superintending justices at a general quarter sessions. The expenses of rebuilding the bridge were to be charged on the county rates, and all actions or proceedings at law, to be prosecuted or defended in pursuance of the act, were to be brought in the name of the clerk of the peace, who should be deemed the plaintiff or defendant, and be reimbursed all such costs and expenses as he should have paid, out of the money arising by virtue of the act. The superintending justices at the general sessions covenanted by deed with the plaintiff, who undertook to rebuild the bridge, that the justices or the treasurer of the county should pay him a certain sum by instalments, until the bridge was completed. In an action brought against such justices by the plaintiff for nonpayment of two of the instalments:—Held, that they were not individually liable; and that his remedy was by action against the clerk of the peace. *Allen* v. *Waldegrave*, 2 Moore. 621; 8 Taunt. 566; 20 R. R. 560.

By 8 & 9 Vict. c. 126, s. 17, a select number of the justices for a county or a borough, called the committee of visitors, were empowered to contract for plans for the erection of a lunatic asylum for the county, and by s. 16 they were enabled to sue and be sued in the name of their clerk:—Held, that an action was maintainable against the committee of visitors in the name of their clerk, in respect of a contract so entered into by them, although the plaintiff might have no means of enforcing judgment when obtained. *Kendall* v. *King*, 17 C. B. 483; 25 L. J., C. P. 132; 4 W. R. 389.

—— **In Replevin.**]—An action of replevin may be maintained against magistrates alone, who issue improperly a warrant of distress against the goods of a party. *Jones* v. *Johnson*, 5 Ex. 862; 20 L. J., M. C. 11.

Change of Venue.]—In an action against justices for falsely imprisoning the plaintiff on a charge of feloniously beginning to demolish a house contrary to the 7 & 8 Geo. 4, c. 30, s. 41, the court granted a rule to change the venue, on a suggestion that a fair trial could not be had in the county. *Thomas* v. *Saunders*, 5 B. & Ad. 462.

Brought in County Court.]—Where a magistrate who has been sued in a county court for an act done in the execution of his office has given notice of his objection to be sued in such court, he is not entitled to remove the plaint by certiorari into a superior court. *Weston* v. *Sneyd*, 1 H. & N. 703; 26 L. J., Ex. 161; 5 W. R. 317.

Payment into Court.]—In an action against a magistrate, after issue joined, he may move to withdraw the general issue, pay money into court, and plead de novo. *Devaynes* v. *Boys*, 2 Marsh. 356; 7 Taunt. 33. S. P., *Nestor* v. *Newcome*, 4 D. & R. 776; 3 B. & C. 159; 2 L. J. (O.S.) K. B. 211.

Justices are not bound to state in the plea the character in which they make the payment. *Aston* v. *Perkes*, 3 D. & L. 655; 15 M. & W. 385; 15 L. J., Ex. 241.

Where a notice of action given to a justice of the peace for an act done by him in the execution of his office, does not clearly and explicitly contain the cause of action, a tender of amends will not cure the defect. *Martins* v. *Upcher*, 1 D. (N.S.) 555; 6 Jur. 582.

Evidence — Justifying Warrant.] — After a summons issued, information was given before

the magistrate, that the party against whom the summons had been granted was going out of the magistrate's jurisdiction, who thereupon issued his warrant, and the person was taken into custody, and afterwards brought his action against the magistrate for false imprisonment. At the trial the summons was put in, and the warrant, but not the information:—Held, that the evidence was not sufficient, and that the magistrate must put in the information to justify his warrant for apprehension, for that without the proper information the magistrate is guilty of an act of false imprisonment in issuing his warrant. *Stevens* v. *Clark*, Car. & M. 509; 2 M. & Rob. 435.

Damages.]—Before 11 & 12 Vict. c. 44, s. 13, when a party was committed for non-payment of a penalty, in a case where the magistrate had no jurisdiction, and after a part of the imprisonment, he was discharged on the penalty being paid, the jury might, in an action for false imprisonment against the magistrate, include the amount of the penalty in the damages, if satisfied that the plaintiff paid it, or that it was paid in such a way that he was liable to repay the amount to the person who actually advanced the money. *Mason* v. *Barker*, 1 Car. & K. 100.

If a magistrate commits a person to prison in a case in which he has no jurisdiction, he is liable for all the circumstances that usually attend the execution of a warrant of commitment, such as the party being handcuffed, having his hair cut short at the prison, and his being put in a bath there; but not for any violence or excess of the officers. *Ib.*

Limit of Time.]—Where to a certiorari to bring up an order of justices they returned that there was no order in writing, and the six months within which an action must be brought would elapse before cause could be shewn against the present application, the court made absolute the rule to quash the return and granted a rule nisi to draw up an order and return it with the warrant issued upon it. *Reg.* v. *Trafford*, 4 W. R. 55. *And see* LIMITATION (STATUTES OF).

Costs.]—The 43 Geo. 3, c. 141, s. 2, which deprived a plaintiff of his costs of suit against a magistrate, if the latter proved at the trial that the plaintiff was guilty of the offence imputed, only applied to cases where the conviction had been quashed. *Rogers* v. *Jones*, 5 D. & R. 268; 3 B. & C. 409; R. & M. 129; 3 L. J. (O.S.) K. B. 40; 27 R. R. 389. S. P., *Gray* v. *Cookson*, 16 East, 13.

Notice of Action and Form of.]—*See* PRACTICE (NOTICE OF ACTION).

H. CLERKS TO JUSTICES.

Appointment.]—A clerk to justices of a borough, appointed under 5 & 6 Will. 4, c. 76, s. 102, holds only during the pleasure of the justices, and therefore a quo warranto will not lie for his office. *Reg.* v. *Fox*, 8 El. & Bl. 939; 27 L. J., Q. B. 151; 4 Jur. (N.S.) 410; 6 W. R. 282.

A clerk to justices in petty sessions, appointed by order of such sessions, has no legal hold upon his office, nor will the court interfere if he is dismissed summarily and without any cause being assigned. *Sandys, Ex parte*, 1 N. & M. 591; 4 B. & Ad. 863.

Re-appointment.]—If a clerk to justices of a borough, who was such at the time of the passing of the Municipal Corporations Amendment Act (24 & 25 Vict. c. 75), and has not ceased to hold the office, is appointed clerk of the peace of the county in which such borough is situate, the justices of the borough may re-appoint him as their clerk, and will be protected by the proviso to s. 5 from liability to any penalty for so doing. *Brown* v. *Evans*, 35 L. T. 877; 24 W. R. 937—C. A.

Clerks to Borough Justices.]—*See* CORPORATIONS (OFFICERS).

Liability for Salary.]—*See* LOCAL GOVERNMENT.

Fees—Penalty for Excessive.]—In an action under 26 Geo. 2, c. 14, s. 2, to recover a penalty against a clerk to justices of the peace for extorting excessive fees, the venue is local by 31 Eliz. c. 5, s. 2; for 26 Geo. 2, c. 14, s. 2, gives a right of action for the penalty to any person, and not to the party aggrieved alone. *Lewis* v. *Davis*, 44 L. J., Ex. 86; L. R. 10 Ex. 86; 23 W. R. 635—Ex. Ch.

—— **Table of.**]—Semble, that the power given by 26 Geo. 2, c. 14, to justices of the peace from time to time to make a table of fees may be exercised, although no table was made in 1753 as required by the statute. *Ib. See now* 40 & 41 Vict. c. 43.

If a clerk to justices demands and receives a fee for the taking of recognizances, as for a principal and two sureties, there being in fact only one surety, he is not guilty of an offence or liable to a forfeiture, under 26 Geo. 2, c. 14, s. 2, if he actually believed that there were two sureties. *Bowman* v. *Blyth*, 7 El. & Bl. 26; 26 L. J., M. C. 57; 3 Jur. (N.S.) 359, 886; 5 W. R. 86.

A table of fees to be taken by the clerks of justices was made at the June quarter sessions, and submitted for approval to the next October quarter sessions, when the further consideration thereof was adjourned to the next Epiphany sessions; and at these last-mentioned sessions the table (with some alterations) was approved of, and the same was afterwards ratified and confirmed by the judges at the next following assizes:—Held, that the table was not duly approved, ratified, and confirmed, under the 26 Geo. 2, c. 14, s. 1, as the approval ought to have been at the October sessions, and such sessions had no power to adjourn the consideration thereof. *Ib.*

—— **Agreement as to—Indictable Offence.**]—A clerk to the justices of a borough, which had no separate quarter sessions, was in partnership with A., who was clerk of the peace for the county. By arrangement between him and A. the former was entitled to receive, and did receive, one-half of the fees taken by A.:—Held, that such clerk was liable to an indictment, under the 5 & 6 Will. 4, c. 76, s. 102, as being interested in the prosecution of offenders within the proviso in that section. *Fox* v. *Reg.* (*in error*), 1 El. & El. 729; 29 L. J., M. C. 54; 5 Jur. (N.S.) 1248; 1 L. T. 216; 8 W. R. 93—Ex. Ch.

—— **Who Liable for.**]—A railway station-master gave a person into the custody of a police

constable on the charge of picking pockets at the railway station, and he afterwards appeared and gave evidence before two justices, who convicted the prisoner under the Vagrant Act (5 Geo. 4, c. 83), of frequenting a place of public resort with intent to commit a felony:—Held, that the station-master was not liable for the fees payable to the clerk of the justices in respect of such conviction. *Reddish* v. *Hitchinor*, 48 L. J., M. C. 31; 40 L. T. 65.

—— **Payment by Superintendent of Police.**]—An order under 5 & 6 Vict. c. 109, s. 17, and 12 & 13 Vict. c. 20, s. 2, on overseers, requiring them to pay a sum of money to the superintendent of police, for fees due to him, is not supported by evidence that the fees were those really due to the clerk of the justices in vagrant cases, and had been paid in the first instance to him by the superintendent, who sought the order as a means of reimbursing himself. *Neithrop Overseers* v. *Whitecoat*, 9 L. T. 383.

—— **Deducting from Payment to Receiver—Police Summonses.**]—By 10 Geo. 4, c. 44, s. 37, all sums adjudged by justices of the peace to be paid for any offence against the act, are to be paid to the receiver of the metropolitan police district, who is to apply all moneys applicable to the payment of salaries of the police force, and all other charges and expenses in carrying the act into execution. By 2 & 3 Vict. cc. 47 and 71, and 3 & 4 Vict. c. 84, penalties inflicted by the magistrates within the metropolitan police district are to be paid over to the receiver, who is directed to pay salaries, expenses, and charges attending the metropolitan police courts, and in carrying the acts into execution, and to apply the sums which he receives to the purposes of the act. And the clerks of the magistrates within the district are to keep account of such fines and penalties to be rendered to the receiver quarterly, and the magistrates are to cause the amount to be paid to him. The clerks of the justices of a part of Surrey within the metropolitan police district for which no police court had been established, claimed to deduct from the amount payable to the receiver the amount of their fees for summonses granted on the application of officers of the police force:—Held, that the clerks were entitled to such fees; but that they were not entitled to deduct them from the amount payable to the receiver, or in any way to recover them from him, the payment of such fees not falling under the description of carrying the acts into execution. *Wray* v. *Chapman*, 14 Q. B. 742; 19 L. J., M. C. 155; 14 Jur. 687.

Books relating to Office—Delivery.]—When certain books relating to the office of justices' clerk were in the possession of the clerk at the time of his death, and the executor refused to deliver them up to the justices upon the ground that they contained private entries, that there was a lien upon them for fees, and that they had been purchased with the clerk's money, a mandamus to compel the delivery was granted. *Reg.* v. *Rastrick*, 6 W. R. 654.

Acting as Solicitor.]—The clerk to the justices should not act as solicitor for one of the parties on a prosecution before his own bench of justices, but such an interest in the clerk does not affect the jurisdiction of the bench. *Reg.* v. *Brakenridge*, 48 J. P. 293.

I. CLERK OF THE PEACE.

1. Appointment.

By Parol.]—The appointment may be by parol. and without deed. *Saunders* v. *Owen*, 2 Salk. 467.

By Whom.]—The appointment to the office of clerk of the peace is in the custos rotulorum of each county. *Harding* v. *Pollock*, 6 Bing. 25; 1 Dow & Cl. 453; 3 Bligh (N.S.) 161.

In 1819, the plaintiff, who was then under age, was appointed clerk of the peace for the county of Kerry, by the custos rotulorum of the county, and acted by himself as well as by deputies, till 1824. In that year, the defendant, as appointee of the crown, obtained possession of the office under a mandamus, and continued to hold the possession and receive all the fees and emoluments till 1829, when the plaintiff was restored to the office. The plaintiff then brought an action against defendant for the fees received by him whilst clerk de facto:—Held, that the action was maintainable, as the mandamus did not decide the title, but merely enabled the defendant to try the right, and the right being settled upon principles of law to be in the custos and not in the crown; secondly, that the letters patent of the custos, under the 55 Geo. 3, c. 78, need not be stamped; thirdly, that the fact of the plaintiff having for a considerable time acted as clerk of the peace, was sufficient evidence of his admission to the office. *Crosbie* v. *Hurley*, 1 Alcock & Napier, 431.

Clerk of Peace for Westminster.]—A person appointed since the 7 & 8 Vict. c. 71, to the office of clerk of the peace for Westminster is not entitled to the emoluments of the office of clerk of the peace within the city and liberty of Westminster. *Nicholson* v. *Ellis*, El. Bl. & El. 267; 28 L. J., Q. B. 238; 5 Jur. (N.S.) 385—Ex. Ch.

Penalty for appointing Clerk of Peace to be Clerk of Borough.]—In June, 1845, P., who was a partner in the firm of P. & F., solicitors, in the borough of Newport, Monmouthshire, was appointed clerk to the borough justices. In March, 1848, P., being still a member of the firm, was appointed, and acted as clerk of the peace of the county of Monmouth, and he filled the appointment until his death in June, 1874. P., soon after his appointment, appointed F., his partner, deputy clerk of the peace, and from 1870 until P.'s death F. discharged all the duties of the office. Upon the passing of the Municipal Corporations Act Amendment Act, 1861, the borough justices appointed F. their clerk, and he continued to act as such. On P.'s death F. was, on the 24th June, 1874, appointed clerk of the peace of the county of Monmouth, and has continued to act in that capacity. On the 9th November, 1874, the justices of the borough held a meeting, and passed the following resolution: "If, and so far as it may be necessary in accordance with the provisions of s. 5 of the 24 & 25 Vict. c. 75, Mr. F. be re-appointed clerk to the said justices of the said borough." F. afterwards continued to fill the offices of clerk of the peace of the county, and clerk to the borough justices. A borough justice took part in the meeting of the 9th November, 1874, and voted for the resolution. The plaintiff brought a qui tam action against him to recover the 100*l.* penalty under

s. 5 of 24 & 25 Vict. c. 75, for appointing and continuing F. clerk to the borough justices, he being at the same time clerk of the peace of the county:—Held, that, on the true construction of the proviso attached to s. 5 of 24 & 25 Vict. c. 75, he was not liable. *Brown* v. *Evans*, 35 L. T. 877; 24 W. R. 937—C. A.

Deputy—Penalty for Practising at Sessions.]—In an action on the 22 Geo. 2, c. 26, s. 14, against an attorney for practising at sessions where he executed the office of deputy clerk of the peace, evidence that he was appointed deputy town clerk, and that his principal, and the preceding town clerks for a considerable period of time discharged the duties of town clerk and clerk of the peace also, without any separate appointment, is sufficient proof that he executed the office of deputy clerk of the peace. *Faulkner* v. *Chevell*, 2 P. & D. 262; 10 A. & E. 76; 8 L. J., Q. B. 186; 3 Jur. 1148.

Effect of—Justice of the Peace.]—A person holding the commission of the peace was appointed clerk of the peace and acted in both capacities for the same county:—Held, that the appointment to the clerkship of the peace did not vacate the commission of the peace. *Forbes* v. *Lloyd*, Ir. R. 10 C. L. 552.

2. Duties and Emoluments.

Levying Fines.]—It is the duty of the clerk of the peace to put the law in motion to levy all recognizances forfeited at quarter sessions. *Reg.* v. *Yorkshire, W. R., JJ.*, 2 N. & P. 457; 7 A. & E. 583; 7 L. J., M. C. 9.

The duty of the sheriff with respect to the roll of fines sent to him by the clerk of the peace, pursuant to 3 Geo. 4, c. 46, is not purely ministerial, and the sheriff is not justified in levying a fine stated in the roll to be unpaid, when the amount has been paid to the sheriff himself before receiving the roll. *Wildes* v. *Morris*, 22 L. J., M. C. 4; 16 Jur. 1115; 1 W. R. 65.

A deputy clerk of the peace is authorised to receive the amount of fines imposed at the quarter sessions, and if he receives the money, and omits to notify the receipt in the roll, and damage accrues in consequence to the party fined, the latter may maintain an action against the deputy clerk of the peace for negligence. *Ib.*

Deputy—Certificates of Conviction and Sentence.]—Under 5 Geo. 4, c. 84, s. 24, the certificate of conviction and sentence of transportation may be made out and given by the deputy clerk of the peace, he being proved to have been appointed and to act as such, and it being also proved that the clerk of the peace did not usually act. *Reg.* v. *Parsons*, 35 L. J., M. C. 167; L. R. 1 C. C. R. 24; 12 Jur. (N.S.) 436; 14 L. T. 450; 14 W. R. 662; 10 Cox, C. C. 243.

Fees.]—The 8 & 9 Vict. c. 114, abolishing certain fees, does not apply to defendants convicted, or to fees payable upon traverses. *Reg.* v. *Coles*, 8 Q. B. 75; 15 L. J., M. C. 10.

Assignment of Profits.]—An assignment to trustees of all the emoluments and profits which, during the life of A. and his continuing to hold the office of clerk of the peace, should arise or become due to him as clerk of the peace, or in respect of his office, after deducting the salary or allowance of his deputy for the time being, to pay the interest arising on certain debts due from A., and from time to time to render the surplus, after satisfying the trusts to A., is invalid. *Palmer* v. *Bate*, 2 Br. & B. 673; 23 R. R. 535.

Agreement to procure Prosecutions for Another.]—An attorney, town clerk, and clerk of the peace for a borough, upon the dissolution of a partnership which had existed between him and two other persons, entered into an agreement to pay to one of them a certain sum of money, and use his endeavours to procure for him one fourth of the prosecutions arising in the town clerk's office. In an action by him on this agreement it appeared that the magistrates of the borough committed some offenders to be tried at the borough sessions, others at the county sessions, and others at the county assizes:—Held, that the defendant as clerk of the peace of the borough could not legally enter into such an agreement. *Hughes* v. *Statham*, 6 D. & R. 219; 4 B. & C. 187; 3 L. J. (O.S.) K. B. 179.

Compensation for.]—The court of quarter sessions had no jurisdiction under 55 Geo. 3, c. 51, s. 16, to make a prospective order for a compensation thereafter to be made to the clerk of the peace. *Rex* v. *Williams*, 3 B. & Ald. 215; 22 R. R. 352.

3. Removal.

For Misdemeanour in Office.]—By 1 Will. & M. c. 21, s. 6, if a clerk of the peace misdemean himself in the execution of his office, and a complaint and charge in writing be exhibited against him to the quarter sessions, they may upon examination and due proof thereof, openly in their quarter sessions discharge him from his office, quo warranto. Plea: That a complaint and charges in writing of having misdemeaned himself in the execution of his office were duly exhibited against the relator to the quarter sessions; that upon examination and due proof of the complaint and charges, an order was duly made by the quarter sessions and entered of record. The plea set out the order, which stated the complaint and charges, viz. that the quarter sessions had ordered a sum of money to be paid to the county solicitor for costs incurred by them in a litigation with the relator and that he had unlawfully and contumaciously refused to record it; and that upon examination of the complaint and charges the quarter sessions adjudged them proved, and that the relator had been guilty of the misdemeanours in the execution of his office, and they therefore openly in court discharged him from his office, and that the defendant was appointed to it:—Held, first, that the complaint and charges against the relator amounted to a charge of misdemeanour in the execution of his office within the statute. *Reg.* v. *Russell*, 10 B. & S. 91; 19 L. T. 686; 17 W. R. 402.

Held, secondly, that as the quarter sessions had jurisdiction to inquire into and decide upon the complaint and charges, and the essentials of justice were observed, and there was a record of the sessions that the relator had been discharged from the office and the defendant appointed to it, the court could not review their decision. *Ib.*

A contumacious refusal by a clerk of the peace to record an order of the court of quarter sessions, is a misdemeanour in the execution of the office of such clerk, within the meaning of

1 Will. & M. c. 21, s. 6, and for which, therefore, the justices may dismiss him from such office. *Wildes* v. *Russell*, 35 L. J., M. C. 241; L. R. 1 C. P. 722; 16 L. T. 478; 12 Jur. (N.S.) 645; 14 W. R. 796.

In Boroughs.]—The power of removal of the clerk of the peace of a borough for misbehaviour is vested in the recorder by 5 & 6 Will. 4, c. 76, ss. 103, 105, and not in the town council. *Reg.* v. *Haward*, 2 B. & S. 585; 31 L. J., M. C. 177; 9 Jur. (N.S.) 45; 6 L. T. 285; 10 W. R. 558.

T. H. W.

LACHES.

See WAIVER.

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LANDLORD AND TENANT.

[BY J. RITCHIE.]

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A. BY WHOM LEASES OR AGREEMENTS FOR LEASES MAY BE GRANTED.

By Agent.]—An agreement for a lease made with an agent who acts under a power of attorney, and a lease executed by such agent in pursuance of the agreement, effectually binds the principal. *Hamilton* v. *Clanricarde* (*Earl*), 1 Bro. P. C. 341.

If a man describes himself, in the beginning of an agreement to grant a lease, as making it on behalf of another, but in a subsequent part of it says that he will execute the lease, he is personally liable. *Norton* v. *Herron*, 1 Car. & P. 648; R. & M. 229; 28 R. R. 797.

By Steward.] — A steward has no general authority to enter into contracts for granting leases of farms for a term of years. *Collen* v. *Gardner*, 21 Beav. 540.

But a power to a land agent to "manage and superintend estates," authorises him, on behalf of his principal, to enter into an agreement for the usual and customary leases, according to the nature and locality of the property. *Peers* v. *Sneyd*, 17 Beav. 151.

By Farm Bailiff.]—A farm bailiff or an agent accustomed to let farms upon the ordinary terms, and receive the rents, has no authority in law to let upon unusual terms unknown to the owner, and the question was left to the jury as one of fact, whether he had express authority, or had been held out by the owner as having it. *Turner* v. *Hutchinson*, 2 F. & F. 185.

By Tenant from Year to Year.]—A tenant from year to year may make a lease for twenty-one years. *Mackay* v. *Mackreth*, 4 Dougl. 213; 2 Chit. 461.

By Tenant for Life.]—A tenant for life, with remainder to A. B. and C., in common in fee, granted a lease of the estates to D. for twenty-one years, which lease was confirmed by A. and C.:—Held, that the lease was good as against A. and C., and that B. could not impeach it in a suit for partition, in which he was a co-plaintiff with A. *Story* v. *Johnson*, 2 Y. & C. 586.

A tenant for life having power to grant leases in possession may bind himself by covenant to grant a lease in reversion expectant on the

determination of a subsisting term; but a trustee having a similar power cannot, for he is bound to exercise the power for the benefit of the estate. *Moore* v. *Clench*, 45 L. J., Ch. 80; 1 Ch. D. 447; 34 L. T. 13; 24 W. R. 169.

A testator devised real estates in strict settlement, and empowered tenants for life (who were unimpeachable for waste) to grant mining leases for such terms, and under and subject to such rents or reservations or agreements, as to them should "seem reasonable and proper." A tenant for life, in 1843, demised mines for a term of ninety-nine years at a peppercorn rent, by way of mortgage, to secure 6,000*l.* and interest:—Held, that this was a valid lease under the power, and binding on the inheritance. *Mostyn* v. *Lancaster*, 52 L. J., Ch. 848; 23 Ch. D. 583; 48 L. T. 715; 31 W. R. 686—C. A.

A tenant for life without leasing power demised a plot of building land for the term of sixty years, from the 29th of September, 1834, at the annual rent of sixpence; the lease contained a covenant by the tenant for life for quiet enjoyment. The lessee accordingly erected a house on the plot of land. After the death of the tenant for life the fee-simple ultimately vested in H., who accepted the rent from a son of the original lessee, who was then in possession of the house. H. afterwards conveyed the house and land to the plaintiff by indenture: the grant was made expressly subject to the supposed term of sixty years. No notice to quit had been given, and the annual value of the house and land was about 6*l.* The plaintiff having sued to recover possession of the house and land:—Held, that as the representatives of the original lessee, under the indenture of the 29th September, 1834, could not have sued H. for breach of the covenant for quiet enjoyment, the void lease afforded no defence against the plaintiff claiming under the grant of the fee-simple subject to it; that a tenancy from year to year had not been created by the payment of rent at the rate of sixpence a year; and that the plaintiff was entitled to immediate possession of the house and land. *Smith* v. *Widlake*, 47 L. J., C. P. 282; 3 C. P. D. 10; 26 W. R. 52—C. A.

By Tenant in Tail.]—A., tenant in tail, made a lease for years to B., not conformable to 32 Hen. 8, c. 28. A. died, and C., the next in tail in remainder, applied to B. to attorn, and demanded rent from him. B. did not attorn; and, after some negotiation, refused to pay any rent, on the ground that D. was entitled to the estate:—Held, that B. did not become tenant to C., and that C. could maintain ejectment against B. without serving him with notice to quit; and that the setting up the title of D. amounted to a disclaimer of the title of C. *Doe* d. *Phillips* v. *Rollings*, 4 C. B. 188; 17 L. J., C. P. 268.

If a tenant in tail makes an agreement, not under seal, to let land for fourteen years, and then dies, the issue in tail cannot be compelled specifically to perform the agreement by granting a lease under 32 Hen. 8, c. 28. *Osborn* v. *Marlborough (Duke)*, 12 Jur. (N.S.) 559; 14 L. T. 789; 14 W. R. 886.

If tenant in tail reserves an entire rent upon a farm, in which some leasehold lands are mixed with the entailed lands, the lease is not good against the reversioner. *Rees* v. *Philip*, Wightw. 69.

A tenant in tail in remainder during the lifetime of the tenant for life, demised for several terms of ninety-nine years, at different dates, to commence immediately. In ejectment by one of the posterior lessees:—Held, that by virtue of 4 Anne, c. 16, s. 9, the leases, without entry of the lessees, operated not by way of interesse termini, but as grants of estates or interests out of a remainder to which the tenants of the preceding estates had attorned. *Doe* d. *Agar* v. *Brown*, 2 El. & Bl. 331; 22 L. J., Q. B. 432; 17 Jur. 1161.

By Remaindermen.]—When a demise is determined by the expiration of the landlord's estate, and the tenant continues to hold under the remainderman, paying the same rent, the question, whether a term contained in the former tenancy is adopted into a new contract of demise is a question of fact. If such a tenant continues to hold under the remainderman, and nothing passes between them except the payment and receipt of rent, the new landlord is not bound by a stipulation contained in the former tenancy, which is not known to him in fact, nor is according to the custom of the country. *Oakley* v. *Monck*, 4 H. & C. 251; 35 L. J., Ex. 87; L. R. 1 Ex. 159; 12 Jur. (N.S.) 253; 14 L. T. 20; 14 W. R. 406—Ex. Ch.

A tenant for life granted a lease containing a covenant that he would, at the expiration of the term, pay and allow the lessee, a nurseryman, for all fruit trees and shrubs then on the premises which had been planted by him. At the expiration of the lease the lessee continued in possession, and paid rent, and upon the death of the tenant for life he paid the same rent to the remainderman, who was not aware of the covenant in the lease:—Held, that there was no evidence that the tenancy continued upon the terms of the lease, so as to bind the remainderman by the covenant. *Ib.*

Donee of Leasing Power under Will—Construction of Will.]—A testator who had lands in a mining county, devised them to his daughter, who was his only child, for life, without impeachment of waste, otherwise than thereinafter provided, remainder to her sons in tail, remainder to her daughters in tail male, remainder in tail male to one of three relations to be named by her, remainder to P. in tail male, remainder to the heirs of the testator. The testator thereby empowered his daughter and all possessed of his real estates under the will, to grant leases of them for twenty-one years, but with a clause therein reserving a right to his daughter and her successors, when in possession, to search for and carry away minerals "or for the purpose of cutting down or grubbing up any wood or underwood." There was then a direction in the will that neither the testator's daughter nor her successors should under a penalty of 100*l.* grub up or cut down any wood or underwood except for necessary reparations of houses belonging to the estates, until twenty years after testator's death. This direction was immediately followed by a clause authorising the testator's daughter "to work or contract for, lease or let out to be worked or wrought, all the coal," &c., or any other mines or minerals whatsoever then discovered, or thereafter to be discovered; "and that all the issues, net proceeds, and profits arising therefrom" should be paid over by his said daughter to trustees, for the payment of the testator's debts, and afterwards for the purchase of estates to be settled to the trusts and limitations of the will:—Held, by Erle, C.J., and

Willes, J., first, that the will gave the testator's daughter a power to lease the coal mines under the devised lands without limit as to duration, and without condition, to be exercised by the said daughter, at her discretion, according to her fiduciary duty; secondly, that a lease of such mines by the daughter for sixty years was therefore a valid exercise of such power, and vested the term in the lessee, so as to be an answer to an action of ejectment by the remainderman against a person claiming under that lease, notwithstanding such lease might contain licences to the lessee as to the use of the mines which were ultra vires. Held, by Byles, J., and Montague Smith, J., that such lease was void, as the testator's daughter had no power under the will to lease the mines for a term extending beyond her own life, the meaning of the will being that she might get the minerals in her own time, or the value of them, in any way she pleased; disposing of the proceeds, however, as prescribed by the testator. *Jegon* v. *Vivian*, 35 L. J., C. P. 73; L. R. 1 C. P. 9; 12 Jur. (N.S.) 184; 14 W. R. 227.

Under 13 Eliz. c. 10.]—By 13 Eliz. c. 10, s. 3, all leases made by spiritual persons other than for the term of twenty-one years, or three lives, whereupon the accustomed yearly rent or more shall be reserved are void:—Held, that in order to render a lease valid under this statute it must be made of land which had been previously let, or on which some rent had been reserved. *Doe* d. *Tennyson* v. *Yarborough* (*Lord*), 7 Moore, 258; 1 Bing. 24; 25 R. R. 575.

By Warden of Hospital.]—A new lease made by the warden and poor of a hospital, under their corporation seal, before the expiration of a former lease, to a lessee, who had then only a part interest in the first lease, but to whom the entire interest was assigned within three years afterwards, is binding on the succeeding warden and poor of such hospital. *Grumbrell* v. *Roper*, 3 B. & Ald. 711; 22 R. R. 533.

By Churchwarden.] — Churchwardens only cannot execute leases as a body corporate of parish lands under 59 Geo. 3, c. 12, s. 17. *Phillips* v. *Pearce*, 8 D. & R. 43; 5 B. & C. 433; 29 R. R. 284.

Leases by the churchwardens of A., in which the demised tenement is described as parcel of the lands of the parish church of A., and payment of the rent to them, are primâ facie evidence that the tenement is parish property. *Doe* d. *Higgs* or *Hobbs* v. *Cockell*, 6 N. & M. 179; 4 A. & E. 478.

By Dean and Chapter.]—Leases granted by deans and chapters for long terms of years, not in conformity with the disabling and restraining statutes, are not void, but voidable only. *Pennington* v. *Cardale*, 3 H. & N. 656; 27 L. J., Ex. 438; 6 W. R. 837.

By Corporation—Statute prohibiting Conveyance except pursuant to "Resolution."]—By 6 & 7 Will. 4, c. 100 (passed in August, 1836), no conveyance of lands in certain corporations, of which D. was one, was to be made unless pursuant to a covenant, contract, or agreement made, or a resolution of the corporation duly entered in the corporate books, before 16th February, 1836. This provision was continued by successive statutes, and incorporated into 3 & 4 Vict. c. 108 and c. 109. The corporation of D. had from time to time passed resolutions as to the granting of leases of the corporate property, and on 20th April, 1801, passed a resolution (duly entered in the corporate books), directing that, "the auditors and viewers should on reporting on petitions for the renewal of leases, take into consideration the value of the premises, and value the same at full value between man and man, and that the petitioner so applying shall be then entitled to a renewal" on the terms therein mentioned, "and that all reports shall hereafter be received at one assembly, and taken into consideration not sooner than the then following quarter assembly." A lease had been granted in 1785 for sixty-one years; in 1841 a petition was presented for its renewal; the petition was referred to the auditors and viewers, whose report was presented on 7th January, 1842, and on the same day, a resolution ordering the renewal was passed:—Held, that this was not a resolution which brought the case within the exceptions in the statute; for it merely bound the corporation to receive the report, and afterwards to consider the propriety of acting upon it. The resolution need not be a contract. Per Lord St. Leonards: This resolution was insufficient, although it might not be necessary that the resolution should be such as would form a binding contract, enforceable in a court of equity; and, further, the resolution such as it was had not been complied with, for the lease was granted at the same meeting at which the report of the auditors and viewers was presented. *Drogheda* (*Mayor*) v. *Holmes*, 5 H. L. Cas. 460.

Joinder of Owner of Equitable Interest.]—A. agreed to demise premises to B. There was an outstanding equitable interest vested in C.:—Held, that B. was bound to accept a demise from A., in which C. joined, and was not justified in insisting on A. obtaining a release from C. in order to enable him alone to make a valid demise. *Reeves* v. *Gill*, 1 Beav. 375.

By Mortgagor.]—*See* MORTGAGE.

B. COMMENCEMENT AND DURATION OF TERM.

Commencement—Generally.]—A lease from a certain day commences on the next day. *Anon.*, Lofft, 275.

The words "from the day of the date" mean either inclusive or exclusive, according to the context and subject-matter; and the court will construe them so as to effectuate the intention of the parties. *Pugh* v. *Leeds* (*Duke*), Cowp. 714.

A lease of lands by deed, to hold from the feast of St. Michael, must be taken to mean from New Michaelmas, and cannot be shewn by extrinsic evidence to refer to a holding from Old Michaelmas. *Doe* d. *Spicer* v. *Lea*, 11 East, 312.

Where a lease was dated 25th March, 1783, habendum "from the 13th March now last past," and the deed was not executed until some time after the date:—Held, that the term commenced on the 25th March, 1783, and not on the 25th March, 1782. *Steele* v. *Mart*, 6 D. & R. 392; 4 B. & C. 272; 28 R. R. 256.

By an agreement dated the 31st August, 1838, W. agreed to let, and R. to take, a house, at a yearly rent, payable quarterly, "to commence

from the 29th September next, and the first quarter's rent to become due and payable on the 25th December next." Though not so stated in the agreement, the house was, at the time of making the agreement, in the occupation of C., as tenant to W., who quitted on the 26th of September :—Held, that, under this agreement, the tenancy commenced on the 29th September. *White* v. *Nicholson*, 4 Scott (N.R.) 707 ; 4 Man. & G. 95 ; 11 L. J., C. P. 264.

By indenture of lease, of the 28th April, 1834, the lessor of the plaintiff demised to E. a messuage, to hold from the 1st May then next, for forty years, at the rent of 25*l.* a year. E. covenanted not to underlease without the consent in writing of the lessor ; and there was a proviso for the forfeiture in case he should be adjudged bankrupt. With the lessor's consent in writing, E. underleased three rooms in the messuage to the defendant for twenty-one years, by a lease dated the 25th March, 1839. In January, 1840, E. was adjudged a bankrupt, and the lessor of the plaintiff brought ejectment for the whole of the messuage, except the rooms leased to the defendant, and entered under a writ of possession on the 12th May, 1841. The defendant continued to occupy the three rooms ; and in February, 1843, an execution having issued against him, the lessor of the plaintiff served the sheriff with notice that there was a sum of 25*l.*, being one year's rent, due in November, 1842, in respect of the premises occupied by the defendant as his tenant, and requiring the sheriff to pay the same to him. The sheriff accordingly paid over to the lessor of the plaintiff 25*l.* out of the levy. On the 24th April the defendant was served with a six months' notice to quit :—Held, that the tenancy must be considered as commencing on the 12th May, 1844, and that a demise on the 4th May was before title had accrued to the lessor of the plaintiff, and, therefore, the ejectment was not maintainable. *Doe* d. *Lloyd* v. *Ingleby*, 14 M. & W. 91 ; 14 L. J., Ex. 246.

—— **"Immediate Possession if Required."**]—Semble, in a contract for a lease, the words "immediate possession if required" do not fix the commencement of the term. *Rock Portland Cement Co.* v. *Wilson*, 52 L. J. Ch. 214 ; 48 L. T. 386 ; 31 W. R. 193.

—— **Of New Lease.**]—Agreement in writing between landlord and tenant, signed by the landlord, for a new lease, to be granted at any time after the completion of repairs to be made by the tenant with all convenient speed, but blanks were left for the day of the commencement. The repairs being completed, the landlord tendered a lease, to commence from that time, and, on refusal, filed a bill ; the answer admitted that the agreement was accepted, and insisted that the new lease was not to commence till the expiration of the old ; and so it was decreed, parol evidence being refused. *Pym* v. *Blackburn*, 3 Ves. 34.

—— **Where no Time Specified.**]—A memorandum of agreement for a lease did not specify the date when the lease was to commence :—Held, that the lease was to commence on the date of the agreement itself, and specific performance of the agreement was ordered accordingly, with damages. *Jaques* v. *Millar*, 47 L. J., Ch. 544 ; 6 Ch. D. 153 ; 37 L. T. 151 ; 25 W. R. 846.

Action for specific performance of an agreement to take a lease of a house. In order to take the case out of the Statute of Frauds the plaintiff relied on a letter, written by the defendant, in which "the term" was stated to be for "twelve years," but the day of the commencement of the term was not mentioned ; and in the same letter, referring to certain covenants, the defendant "suggested that they be similar to those contained in A.'s lease" :—Held, that there never was any concluded agreement between the parties. *Cartwright* v. *Millar*, 36 L. T. 398.

Specific performance will not be enforced of an agreement to grant a lease where no time for the commencement of the lease is fixed by the agreement, and the mere fact that the agreement itself is dated does not fix the time for such commencement. *Jaques* v. *Millar* (6 Ch. D. 153) disapproved of ; *Blore* v. *Sutton* (3 Mer. 237) explained. *Marshall* v. *Berridge*, 51 L. J., Ch. 329 ; 19 Ch. D. 233 ; 45 L. T. 599 ; 30 W. R. 93 ; 46 J. P. 279—C. A.

The plaintiff offered to take a lease of furnaces from the defendant conditionally upon his being able to make arrangements with other persons as to ore. A loosely-drawn memorandum was shortly afterwards signed by the parties, substituting certain other rents for the rents mentioned in the letter, which in other respects was to form the basis of the agreement. The defendant, understanding that the lease was to begin immediately, offered possession to the plaintiff at once, but the plaintiff refused to take it as he had not yet made arrangements for ores, and continued to treat the agreement as conditional on his making those arrangements. Ultimately the parties differed as to the covenants to be inserted in the lease, and the plaintiff commenced his action for specific performance : —Held, that although where an agreement is clear the court must act upon its own view of the construction without regard to the view entertained by the parties, yet where a party has throughout insisted on one construction of an obscure agreement, he cannot get specific performance on the footing of the opposite construction. *Ib.*

An executory agreement in writing to grant a lease for a term of years, which does not state the date from which the term is to commence, is not sufficiently definite to satisfy the Statute of Frauds, and cannot be enforced, and the mere fact of the agreement being dated does not shew from what date the lease is to run. *Wyse* v. *Russell*, 11 L. R., Ir. 173.

Where in an agreement for a lease, no time for commencement and no term were specified, a demurrer, for insufficiency of the agreement within the Statute of Frauds, to a bill for specific performance was allowed with costs. *Dolling* v. *Evans*, 15 W. R. 394.

Where an undated written contract for a lease omits to state the period of commencement, and contains nothing from which it may be inferred, a specific performance of it cannot be enforced as a written contract. *Gilbert* v. *Hall*, 1 L. J., Ch. 15.

In the absence of any evidence to the contrary, the tenancy under a written agreement for the hire of premises at a yearly rental, from year to year, must be taken to begin from the day on which that agreement professes to have been executed ; and that question is for the judge, and not for the jury. *Bishop* v. *Wraith*, 2 C. L. R. 287.

The defendant was owner of a piece of land, which he held subject to restrictions as to the buildings which should be erected on it. He received 5*l.* from the plaintiff, for which he signed a receipt, which contained an agreement for a lease of the land for ninety-nine years, at a rent of 20*l.*, payable quarterly. It also stated that ground-rent was to be payable from a certain date, but did not fix any time for the commencement of the term:—Held, that the plaintiff was entitled to a lease for ninety-nine years from the date at which the ground-rent was to commence, and that the use of the words "ground-rent" did not import a stipulation that the ground was to be built on, and therefore did not imply that a building lease was to be agreed on and executed by the parties. *Wesley* v. *Walker*, 38 L. T. 284; 26 W. R. 268.

And see cases sub tit. CONTRACT, ante, vol. iv., cols. 37 et seq.

Duration—From Year to Year.]—The defendants entered into an agreement "that they should become tenants of the premises, at 37*5l.* a quarter, the tenancy to commence on the 14th June, they paying a quarter's rent on that day; and that they should give security to pay one quarter's rent in advance as long as they should continue tenants":—Held, that, under this agreement, the defendants did not become tenants from year to year, but from quarter to quarter only, and therefore that proof of such an agreement did not support an allegation that the defendants held "as tenants for a term of years, from year to year, for so long," &c., or "for the residue of a certain tenancy for a term of years," &c. *Wilkinson* v. *Hall*, 4 Scott, 301; 3 Bing. (N.C.) 508; 3 Hodges, 56; 6 L. J., C. P. 82.

A general parol demise, at an annual rent, where the bulk of the farm is inclosed, and a small part in the open common fields, is only a lease from year to year, and not for so long as the usual round of husbandry extends. *Roe* d. *Bree* v. *Lees*, 2 W. Bl. 1171.

A demise for one year, and so on from year to year, until the tenancy should be determined, as after-mentioned, with a proviso that either party might determine the tenancy by giving a three months' notice in writing, is a demise for two years certain. *Doe* d. *Chadburn* v. *Green*, 9 A. & E. 658; 8 L. J., Q. B. 100; 1 P. & D. 454.

A tenancy from year to year, so long as both parties please, is determinable at the end of the first as well as of any subsequent year unless in creating such tenancy the parties use words as shewing that they contemplate a tenancy for two years at least. *Doe* d. *Clarke* v. *Smarridge*, 7 Q. B. 957; 14 L. J., Q. B. 327; 9 Jur. 781.

A., being seised in fee of a moiety of lands, and B. being seised for life of the other moiety, they in 1805, by deed, reciting that they were entitled thereto as tenants in common, and that they had agreed to grant a perpetual lease to C., his heirs, &c., granted and demised the same to C., his heirs, executors and assigns, for ever, to hold from a day past unto and to the use of C., his heirs, executors, administrators and assigns, for ever; yielding and paying therefor yearly to A. and B., their heirs, &c., the clear yearly rent of 120*l.* half-yearly. The deed contained all the covenants usually found in an ordinary lease:—Held, that, in the absence of proof that at the date of the deed the premises were in the occupation of tenants, so that a reversion only could pass, and the expressed intention of the parties precluding the court from presuming that there had been livery of seisin, the deed could not operate as a conveyance of the fee, subject to a rent-charge, but created only a tenancy from year to year. *Doe* d. *Roberton* v. *Gardiner*, 12 C. B. 319; 21 L. J., C. P. 222.

A tenancy from year to year is considered as recommencing every year. *Tompkins* v. *Lawrence*, 8 Car. & P. 729.

A tenancy from year to year is not to be considered as a continuous tenancy, but as recommencing every year. *Gandy* v. *Jubber*, 5 B. & S. 78; 33 L. J., Q. B. 151; 10 Jur. (N.S.) 652; 9 L. T. 800; 12 W. R. 526. *See* 9 B. & S. 15; 13 W. R. 1022—Ex. Ch.

—— **From Year to Year—Effect of Death.**]—A lease to A., his executors, &c., for a year, and so on from year to year, for so long a time as it shall please the lessor and A., his executors, &c., does not expire on the death of A., but vests in his executors. *Mackay* v. *Mackreth*, 4 Dougl. 213; 2 Chit. 461.

Under a parol demise from year to year by a tenant for life, with power to lease by deed, &c., the interest of the lessee determines with the life of the lessor, and the rent is apportionable. *Smyth, Ex parte*, 1 Swanst. 337. S. P., *Clarkson* v. *Scarborough* (*Lord*), id. 354.

Under a parol demise from year to year, by a tenant for life, with power to lease by deed, &c., and under written agreements for leases not exceeding three years, signed by the lessees but not by the tenant for life, though witnessed by his agent, the interest of the lessee determines with the life of the lessor, and the rents are apportionable. *Symons* v. *Symons and Powell*, 6 Madd. 207.

—— **Year to Year—For a Term if Licence granted.**]—Demise by copyholder for one year, and at the end of that term from year to year, for the term of thirteen more, in all fourteen, if the lord will give licence, and so as there shall be no forfeiture, with usual covenants. The licence is a condition precedent, and not being granted, there is no lease at law further than from year to year; and there is no equity upon the evidence that the lord purchased his tenant's interest with notice of demise, and an express exception of all subsisting leases or agreements of leases. *Lufkin* v. *Nunn*, 11 Ves. 170.

—— **For Year or Quarter.**]—Where the defendant agreed by letter to occupy certain furnished apartments of the plaintiff from the 4th March to the 4th September for fifty guineas, and afterwards to take them from 4th September to 4th December on the same terms, viz., twenty-five guineas for the three months, or to take them unfurnished at the rate of eighty guineas per annum:—Held, that in the event of defendant not occupying the apartments furnished, there was a taking of the unfurnished apartments for the quarter, and not for the year. *Atherstone* v. *Bostock*, 2 Man. & G. 511; 10 L. J., C. P. 113.

—— **For such Term as Tenant Desires.**]—A. agreed, in writing, to let to B. premises at a rent of 36*l.*, payable quarterly; and not to raise the rent or give B. notice to quit so long as he continued to pay the rent when due. A., who had only a leasehold interest to expire in 1881, had also agreed verbally with B. to let him remain in the premises for such term of years, not exceeding A.'s term therein, as B. might

desire to continue tenant. A railway company contracted to purchase the interest of B. in the premises, which he described as "held for any term at tenant's option, but not beyond the term and interest of A., which term will expire in 1881." The company disputed B.'s title to the interest described, and paid the purchase-money into court:—Held, that the relation of landlord and tenant made B. a purchaser for valuable consideration to the extent of his lease; that the Statute of Frauds was no bar in equity to B.'s claim; that B. was not a mere tenant from year to year, but had a right to retain possession as long as his landlord's interest existed, and to enforce that right in equity; and that he was entitled to the purchase-money. *King, In re, East London Ry., Ex parte*, L. R. 16 Eq. 521; 29 L. T. 288; 21 W. R. 881.

—— **"So long as Rent is paid, and I (the Landlord) am in Possession."**]—By a written contract of tenancy, not under seal, the landlord agreed that the tenant should not be disturbed in his holding "so long as the rent for which he has stipulated is paid, and so long as I (the landlord) am in possession of the premises myself." The agreement did not otherwise specify the nature or duration of the tenancy. In an action by the executors and devisees of the landlord to recover possession, after the deaths of both landlord and tenant:—Held, that the agreement created a tenancy for the lessee's life, if the landlord's estate continued so long. *Wood* v. *Davis*, 6 L. R., Ir. 50.

—— **While Lessor continues Vicar.**]—A lease of tithes, or other matter which lies in grant, for all the time the lessor should continue vicar is good and conveys a freehold. *Brewer* v. *Hill*, 2 Anstr. 414; 3 R. R. 596.

—— **For Years, "If Lessee lives so long"—Remainder.**]—A lease for years, if the lessee so long lives, with a remainder to another for the residue of the term, must be construed to give the remainderman a power to enjoy during all the residue of the years to come. *Wright* d. *Arm* v. *Cartwright*, 1 Burr. 282; 1 Ld. Ken. 529.

—— **Covenant "not to molest, disturb, or raise the Rent of" Tenant.**]—G. S., a lessee of a house for a term of eighty years, which had fifty-nine years to run, agreed to let the same to R. K. at a fixed rent. The duration of the underlease was not specified; but the agreement went on to say that G. S. agreed to let R. K. have a lease at the same rent "at any period he may feel disposed"; and further agreed "not to molest, disturb, or raise the rent of" R. K. "after his having laid out money in improving the said premises." R. K. did not at the time of the agreement know the nature of the interest of G. S. in the property. R. K. having gone into and remained in possession, and having laid out money in improving the premises, and the lease having over twenty years to run—held, by Bacon, V.-C., that R. K. was entitled to an underlease for the whole of the residue of the term, less one day. Held, on appeal, by Jessel, M.R., and Bramwell, L.J., dubitante Baggallay, L.J., that he was entitled only to an underlease for the residue of the term, less one day, if he should so long live. *Kusel* v. *Watson*, 48 L. J., Ch. 413; 11 Ch. D. 129; 27 W. R. 714—C. A.

—— **Life of Lessee.**]—Where a lessor covenanted that upon or at any time before the expiration of the term granted by the lease, he would at the request of the lessee, his executors, administrators, or assigns, grant a new lease "for and during the life of the lessee or his nominee, or for and during such a period or number of years as the lessee, his executors, administrators, or assigns should think fit":—Held, on it appearing that it was the intention of the lessor to renew the lease only for the life of the lessee, and that at the time of the execution of the lease he was kept in ignorance of the full effect of the covenant, that the lessee could only enforce a renewal for life. *Price* v. *Power*, 19 L. T. 442.

—— **Use of Portion of Premises after Termination of Tenancy.**]—Upon a demise "until Michaelmas next, and no longer," with the privilege of using part of the premises for specific purposes till Lady-day following, ejectment may be brought for those parts to which the privilege does not extend, in the interval between Michaelmas and Lady-day. *Doe* d. *Waters* v. *Haughton*, 1 M. & Rob. 208.

—— **Error in Lease.**]—By an indenture of lease dated in 1784 and executed by the lessor, he demised certain premises to hold to the lessee and his assigns for the term of ninety-*four* and a quarter years, yielding and paying therefor during the said term of ninety-*one* and a quarter years hereby demised a yearly rent. The number of years was not mentioned in any other clause of the lease. But the counterpart, executed by the lessee, which was otherwise identical with the lease, had ninety-one in the habendum as well as in the reddendum. In an action by the assignee of the reversion to recover possession against the assignee of the lessee after the lapse of the ninety-one and a quarter years:—Held, that, there being a manifest clerical error in the lease, the counterpart might be looked at to ascertain where the mistake lay, and that, on the true construction of the lease and counterpart taken together, "the ninety-four" in the lease must be rejected, and the lease read as a grant for ninety-one and a quarter years only. *Burchell* v. *Clark*, 46 L. J., C. P. 115; 2 C. P. D. 88; 35 L. T. 690; 25 W. R. 334—C. A.

Perpetual injunction granted against persons claiming a reversion upon the expiration of a lease, made for a term of years shorter than was contracted for by the parties to the lease. *Wilde* v. *Ashley*, 2 Jur. 679.

—— **Shewn in Habendum.**]—The habendum in a lease only marks the duration of the tenant's interest, and its operation as a grant is merely prospective. *Shaw* v. *Kay*, 1 Ex. 412; 17 L. J., Ex. 17.

—— **Of Lands for different Terms.**]—Demise of freehold and copyhold lands, at an entire rent, habendum so much as was freehold for twenty-one years, and so much as was copyhold for three years, warranted by the custom, and covenant for renewal of the lease of the copyhold every three years, toties quoties, during the twenty-one years, under the like covenants; and that in the meantime, and until such new leases should be executed, the lessee should hold the land, as well copyhold as freehold:—Held, that this was only a lease of the copyhold for three years, and that the lessor after the three years

might recover the premises in ejectment against the lessee, there not having been any fresh lease granted. *Fenny* d. *Eastham* v. *Child*, 2 M. & S. 255.

—— **Of Same Land for Longer Term to other Tenant.**]—Tenant in fee demises to A. for twenty-one years; during that time he demises, not by deed, to B. for ninety-nine years. The second lease, though not by deed, shall take effect at the expiration of the first, for as many years as remain of the ninety-nine. *Doe* d. *Thomas* v. *Jenkins*, 1 L. J., K. B. 190.

—— **Enlarging Term on Happening of Event inconsistent with original Agreement.**]—The plaintiffs, a railway company, let premises, through an agent, to the defendants on the terms, which were reduced to writing and signed by both parties, of a weekly tenancy, to be determined by a week's notice on either side. At the same time the agent wrote, signed and handed to the defendants the following memorandum:—"Messrs. Lewis & Co. You may have the premises as per agreement until the railway company require to pull them down." The defendants took possession of the premises, and the plaintiffs, who subsequently required them for their own occupation, but had no intention of pulling them down, gave the defendants a week's notice to quit, and after the notice had expired brought ejectment. The defendants pleaded that the plaintiffs did not require the premises in order to pull them down, and, by counter-claim, asked for a declaration that the representation by the agent was binding upon the plaintiffs, and for an injunction restraining them from acting upon the notice, or determining the tenancy, until they required the premises for the purpose of pulling them down:—Held, that the plaintiffs were entitled to maintain the action, and that the defendants were not entitled to any of the equitable relief claimed. *Cheshire Lines Committee* v. *Lewis*, 50 L. J., Q. B. 121; 44 L. T. 293; 45 J. P. 404—C. A.

—— **Where not Specified.**]—One possessed of a term for 2,000 years in land, grants the land to A. without mentioning any term:—Held, void for uncertainty. *Kirsley* v. *Duck*, 2 Vern. 684.

—— **When Tenancy Terminates.**]—Where a lease is to commence from the 25th March then next, for twenty-one years fully to be completed and ended, the term does not end until the last moment on the 25th March in the last year. *Ackland* v. *Lutley*, 1 P. & D. 636; 9 A. & E. 879; 8 L. J., Q. B. 164.

By indenture of 21st March, 1828, a lessor demised a messuage to the tenant, habendum from 25th March then instant, for the term of seven years then next ensuing, wanting seven days, yielding and paying yearly and every year during the term the yearly rent of 285*l.* by four equal quarterly payments, on 25th March, 24th June, 29th September, and 25th December in every year, commencing from 25th March then instant; and the lessee covenanted to pay the yearly rent of 285*l.* on the days and in the manner appointed:—Held, that 285*l.* was payable for each year; and that either the first payment was to be made on the 25th March, 1828, or a payment on 25th March, 1835, though after the expiration of the term. *Hopkins* v. *Helmore*, 3 N. & P. 453; 8 A. & E. 463; 1 W. W. & H. 386; 7 L. J., Q. B. 195; 2 Jur. 856.

Cognisance that the plaintiff was tenant to H., at a certain rent, and that the defendant distrained for the rent of a half-year ending the 29th of September, 1841. Plea, that, after rent became due, H., by indenture purporting to be made the 1st of February, 1841, but made after the 29th of September, 1841, released the rent. The defendant, in his replication, set out the indenture, dated the 1st of February, 1841, being a demise to the plaintiff of the premises, to hold from the 30th of July, 1840, for fourteen years; the first payment of rent to be made on the 25th of March then next:—Held, that the indenture had not the effect of releasing the tenant from payment of the rent due under a parol contract before its execution. *Cooper* v. *Robinson*, 10 M. & W. 694; 12 L. J., Ex. 48.

Premises were demised for three lives and for twenty-one years after the death of the last survivor. The lessor covenanted with the lessee that if he should lose a life and think proper to have a new life put in, then, within six months after the death of the first life, and so on, continuing the term and estate thereby demised, the lessor would put in a new life:—Held, that the lessee had power to introduce one new life only, and that one in the place of the first life dropping, but with a new term of twenty-one years, commencing with the death of the survivor of the two survivors and the new life. *Walmesley* v. *Pilkington*, 35 Beav. 362.

—— **Lease to a Specified Date and Rent payable thereafter.**]—An instrument by which A. agrees to let, and B. to take certain premises on the terms that A. shall pay certain specified rents, varying in amount, at the end of every three years, up to a specified date, and which provides that from and after that date "he shall pay the clear annual rent of 9*l.* till the end of the lease," but does not mention any time at which the lease is to determine, is good only for the time previous to the date at which the 9*l.* is to commence. *Gwynne* v. *Mainstone*, 3 Car. & P. 302.

—— **Grant of Easement by Tenant in consideration of Rent—Claim for Rent after Termination.**]—The plaintiff was occupier under a lease of a farm and mill. The mill was supplied with water which flowed along a natural watercourse through the farm. The works of the defendant's slate company were contiguous to the farm; and the defendants sought to utilise the flow of the watercourse for the slate works. Accordingly, in 1871, the plaintiff and defendants entered into an agreement by which the plaintiff gave permission to the defendants to use the watercourse, trough and landers on the farm, and from time to time cleanse, scour and keep the same free for the passage of the water and in repair, the defendants having full liberty of ingress or egress on to the said farm. The parties further agreed that the agreement might be terminated at the expiration of three months' notice, to be given on either side. The rent reserved for the use of the water was 1*l.* per week, which was afterwards increased to 3*l.* per week. In 1876 the plaintiff's interest in the farm expired by effluxion of time, but he retained his occupation of the mill. The farm was subsequently leased by the freeholder to one Darbishire. The position of the mill was lower down the stream or watercourse than the farm. The defendants continued to pay the rent down to April, 1885, when Darbishire

claimed to exclude them from that portion of the farm which was in his occupation. No notice was given by either party to the agreement to terminate the arrangement. The defendants then refused to pay any more rent to the plaintiff. The plaintiff brought his action to recover seven quarters' rent in arrear. The action was tried, and the point of law reserved:—Held, on further consideration, that under the circumstances, the defendants were entitled to judgment, because, though there had not been any regular notice to terminate the agreement between themselves and the plaintiff, yet its operation was limited in point of time to the occupation of the farm by the plaintiff, and that on the determination of its occupancy by him his right to the rent for the use of the water ceased. *Jones* v. *Dorothea Co.*, 58 L. T. 80.

—— **Agreement to Determine.**]—On the 4th of November, 1858, A. let premises to B. for a term of four years, from Michaelmas preceding, at a yearly rent, payable quarterly, the agreement containing the following condition: "The condition of this agreement being binding on B. is that A. shall make good and support the floor of the warehouse of the premises within twenty-eight days of the date of this agreement; if not done, this agreement to be void." Within the twenty-eight days A. entered with workmen, and afterwards departed, stating that he had made all secure. B. paid rent at Christmas and at Lady-day. Early in April, 1859, the warehouse floor having broken in, the attention of the commissioners of sewers was called to the state of the premises, and the result was that in May an order was made upon A. under 18 & 19 Vict. c. 122, directing him to secure and repair the same. At the end of April A. informed B. that he was about to pull down the premises, and offered to assist B. in removing his printing-presses and plant. After the date of the commissioners' order A. entered the premises, and pulled down the ground-floor storey (including the warehouse floor) and took no steps to replace or repair it. B. thereupon obtained other premises, and he and his under-tenants went out, and on the 23rd of June B. sent A. the key, with a letter, stating that he had been forced out of the premises by A.'s wilful and unnecessary destruction of the warehouse floor, &c. A. received the key, read the letter, and said nothing, and a few days afterwards entered and pulled down the whole house for the purpose of rebuilding it:—Held, that these facts shewed an agreement for a determination of the tenancy on the 23rd of June, and consequently that A. could not sue for the quarter's rent. *Furnivall* v. *Grove*, 8 C. B. (N.S.) 496; 30 L. J., C. P. 3.

Optional Number of Years.]—A lease for one year, and so for two or three years, as the parties shall agree, means for two years, and after every subsequent year begins is not determinable till that is ended. *Harris* v. *Evans*, 1 Wils. 262; Amb. 329.

But it is a lease for one yearly only, without such subsequent agreement. *Ib.*

A lease was granted to A. for fourteen years, with a proviso for terminating the lease at the end of the first seven years, if the landlord should so desire, on his giving notice of his desire in writing; B. joined in the covenant as surety. The landlord gave a notice, in terms a notice to quit, not expressing in terms his desire to terminate the tenancy under the proviso, but referring to the lease and its determinable quality:—Held, that this was a termination of the lease under the proviso, and discharged the surety. *Giddens* v. *Dodd*, 3 Drew. 485; 25 L. J., Ch. 451; 4 W. R. 377.

A lease for twenty-one years, determinable at the end of seven or fourteen, if the parties so think fit, is not determinable without the joint assent of lessor and lessee. *Powell* v. *Tranter*, 3 H. & C. 458; 34 L. J., Ex. 6; 11 L. T. 317; 13 W. R. 145.

A demise for seven years, with a proviso that, notwithstanding anything before contained, if notice should not be given to determine the lease at the end of the seven years, it should be considered a lease upon the same covenants, from year to year, until notice to determine it, continues after the seven years until put an end to by notice, and the covenants continue binding. *Brown* v. *Trumper*, 26 Beav. 11.

B., by an indenture dated and made 19th July, 1851, granted, demised and leased to A. premises, habendum to A. from 25th December, 1849, for and during and until the full end and term of fourteen years thence next ensuing, determinable as therein mentioned: proviso that it should be lawful for either B. or A. to determine the demise at the expiration of the first seven years thereof, by six months' notice, and thereupon that demise, and every covenant therein contained, should cease and determine accordingly:—Held, that the seven years were to be reckoned from 25th December, 1849, and that the lease might be determined on 25th December, 1856. *Bird* v. *Baker*, 1 El. & El. 12; 28 L. J., Q. B. 7; 4 Jur. (N.S.) 1148; 7 W. R. 8.

—— **Who has the Option.**]—A. agreed to let premises to B. for three years, and, at the expiration of that term, to grant him a lease for an extended term. A. died, and three years having expired, B. continued to hold on under his executors for four years without asking for a lease. He then required a lease:—Held, that B.'s option had not determined, and that he was entitled to the extension of the term. *Moss* v. *Barton*, 35 Beav. 197.

It is a settled rule of law that an agreement for a lease for seven or fourteen years means a lease for fourteen years determinable by the lessee, but not by the lessor, at the end of seven years. *Powell* v. *Smith*, 41 L. J., Ch. 734; L. R. 14 Eq. 85; 20 W. R. 602.

An agreement for a lease for seven, fourteen or ——— years entitles the lessee, in the absence of other stipulations, to a lease for fourteen years determinable at the end of seven years at his option only, though the lessor proves that he supposed such an agreement gave to him, as well as to the lessee, the option of determining it at that time. *Ib.*

A land agent having no power to grant leases without reserving to his principal the power of determining them at the expiration of every seven years entered into an agreement for a grant to an intending tenant of a lease for seven or fourteen years. The tenant was put into possession of the farm, and took the stock on it from the outgoing tenant at a valuation. The lessor, who did not know the rule of law above mentioned, refused to grant a lease without reserving to himself the right to determine it at the end of seven years, as well as giving such

right to the tenant:—Held, that the lessor was not entitled to have a power of determining the lease at the end of seven years; for his ignorance of the law was no excuse, and he could not repudiate his agent's act after letting the tenant take possession of the farm on the faith of it. *Ib.*

A lease for seven, fourteen, or twenty-one years, as the lessee shall think proper, is a good lease for seven years, whatever it may be for the fourteen or twenty-one years. *Ferguson* v. *Cornish*, 2 Burr. 1032; 3 Term Rep. 463, n.

Lease of lands by indenture for twenty-one years, with proviso that it should be determinable by the lessee or the lessor at the end of the first seven or fourteen years, and a memorandum indorsed six years after the execution of the lease, "of its being agreed between the parties, previously to the execution, that the lessor shall not dispossess, nor cause the lessee to be dispossessed, of the said estate, but to have it for the term of twenty-one years from this present time"; which memorandum was signed by the parties, and stamped with a lease stamp, but not sealed:—Held, that the lessor might, notwithstanding, determine the lease at the end of the first fourteen years; for the memorandum did not operate as a new lease and surrender of the first lease. *Goodright* d. *Nicholls* v. *Mark*, 4 M. & S. 30.

A lease in 1785, for three, six or nine years, determinable in 1788, 1791, 1794, is a lease for nine years, determinable at the end of three or six years, by either of the parties, on giving reasonable notice to quit. *Goodright* d. *Hall* v. *Richardson*, 3 Term Rep. 462.

If a lease is granted for seven, fourteen or twenty-one years, the lessee only has the option at which of the above periods the lease shall determine. *Dann* v. *Spurrier*, 3 Bos. & P. 399, 442; 7 R. R. 797; 7 Ves. 231; 6 R. R. 119. S. P., *Price* v. *Dyer*, 17 Ves. 363; 11 R. R. 102.

So, where the lease was for fourteen or seven years, on the ground that every doubtful grant must be construed in favour of the grantee. *Doe* d. *Webb* v. *Dixon*, 9 East, 16; 9 R. R. 501.

Where there was an agreement that a tenant should be at liberty to quit at Lady-day, in which case the landlord engaged to take the fixtures at a valuation, or to permit the tenant to let the house:—Held, that the construction of this agreement was, that the tenant had an option in the event of his quitting. *Colton* v. *Lingham*, 1 Stark. 39.

And a letting by the tenant to an under-tenant until Lady-day is not an exercise of his right of option. *Ib.*

An agreement that a house should be held for a term of thirty-one years, with liberty to have the same determined at the end of the third, sixth, ninth, twelfth, fifteenth, eighteenth, twenty-first, twenty-fourth, or twenty-seventh year, should it be so desired, in which case six months' notice to be given; and should the tenant be desirous to have a lease executed for the remainder of the term, he was to be at liberty to require it, subject to the conditions as therein, and the usual covenants; does not give the landlord the option of determining the tenancy. *Fallon* v. *Robins*, 16 Ir. Ch. R. 422.

A proviso in a lease for twenty-one years, that, if either of the parties should be desirous to determine it in seven or fourteen years, it should be lawful for either of them, his executors or administrators, so to do, upon twelve months' notice to the other of them, his heirs, executors or administrators, extends, by reasonable intendment, to the devisee of the lessor, who is entitled to the rent and reversion. *Roe* d. *Bamford* v. *Hayley*, 12 East, 464; 11 R. R. 455.

A letting, in 1845, to a yearly tenant, and if he should wish a lease, that the lessor will grant the same for seven, fourteen or twenty-one years, at the same rent, is sufficiently certain to be specifically performed. It is to be construed an optional lease for twenty-one years from 1845, determinable at the end of seven or fourteen years, at the option of the tenant. *Hersey* v. *Giblett*, 18 Beav. 174; 23 L. J., Ch. 818; 2 W. R. 206.

Under such a contract, the landlord might call on the tenant to exercise his option, and, in default, might determine the tenancy, but this might afterwards be waived by a receipt of rent. *Ib.*

—— **When Option may be Exercised.**]—A person entitled to leasehold premises for a long term of years agreed to underlet them to a tenant for three years, and, whenever called upon to do so by the tenant, to grant to him a lease for three years, seven years, or the remainder of the term that he had it in his power to grant, such lease to contain all the usual covenants for protecting the interests of the grantor. The three years expired without the option being exercised. The tenant, however, continued in possession until he became bankrupt, and his interest in the premises was sold by his assignee to a purchaser, who entered into possession and filed in equity a bill for specific performance of the agreement:—Held, that the option might be exercised at any time during the tenancy. *Buckland* v. *Papillon*, 36 L. J., Ch. 81; L. R. 2 Ch. 67; 12 Jur. (N.S.) 992; 15 L. T. 378; 15 W. R. 92.

C. EXTENT OF PREMISES INCLUDED.

1. GENERALLY.

Outer Wall—Lease of Floor.]—A lease of the rooms on a floor is a lease of a separate dwelling, and includes the outer wall so far as it is solely appropriate to the rooms let. *Carlisle Café Co.* v. *Muse*, 67 L. J., Ch. 53; 77 L. T. 515; 46 W. R. 107.

Fascia—Adjoining Tenement—Common Landlord.]—The plaintiff was lessee of a house numbered 152 in A. Street, but which lay behind Nos. 151 and 153 in that street, and at the bottom of a court approached by a passage from A. Street, half of which passage was under the first floor of No. 151, and the other half under the first floor of No. 153. The passage was closed by a gate in the plane of the front of 151 and 153, which was hung on the wall of 153, but was admitted to be part of the plaintiff's premises. All three houses belonged to the same landlord. Above the gate was a fascia of cement eight feet long, half of which was on the wall of 151, and the other half on that of 153. The fascia had existed from about 1845, and the number of the plaintiff's house and the name and business of the occupier for the time being had always been painted on it. No. 153 was demised to the defendant in 1874 without any express reservation of the fascia, and the plaintiff became lessee of No. 152 in 1876:—Held, that the fascia must be held to be a parcel of the property demised to the plaintiff, and that he was entitled to prevent the defendant from interfering with it. *Francis*

v. *Hayward*, 52 L. J., Ch. 291; 22 Ch. D. 177; 48 L. T. 297; 31 W. R. 488; 47 J. P. 517—C. A.

Gateway under Premises.]—Under a lease of "all that messuage or tenement, called, &c., now or late in the occupation of C.," the boundaries given not accurately defining the premises:—Held, that a gateway under a portion of the messuage, and leading to a yard behind, in which were some small houses not included in the demise, the tenants of which had always used the gateway, did not pass, in the absence of evidence to shew that it had been in the exclusive occupation of C. *Dyne* v. *Nutley*, 14 C. B. 122; 2 C. L. R. 81.

Room Separated by Partition.]—Under a demise of a messuage with all rooms and chambers, with the appurtenances thereto belonging, is to be understood all that is occupied together as an entire messuage at one and the same time; therefore, such a demise will not comprehend a room which had once formed part of the messuage, but which had been separated from it by means of a wooden partition, and had not been occupied with it for many years previously to the demise. *Kerslake* v. *White*, 2 Stark. 508; 20 R. R. 731.

Stable—Not included in Original Lease—Whether included in Reversionary Lease.]—Two adjoining plots of ground, A. and B., were let on building leases to separate tenants. On plot A. a house and stables were built, and on plot B. a house, the stable being situated between the two houses. The leases of both premises having become vested in P., he in the year 1795 blocked up the communication between the stables and A., and attached them to B., with which premises they continued to be occupied until the present action. P. then made an assignment of the lease of A., excepting the stables, but including stables under them. In 1823 the owner of the reversion in both premises granted to the defendant, in whom P.'s estate in the unassigned premises was vested, a reversionary lease of B., by a description and plan corresponding both in measurement and boundaries with the original lease, but with the addition, among the general words, of the following, "with all stables . . . to the said premises belonging or appertaining," and with a covenant to surrender at the end of the term, inter alia, "the racks, mangers, &c., affixed or belonging to the premises," there being no such words in the corresponding covenant of the original lease. There were no other stables belonging to or occupied with B.:—Held, that the stables did not pass under the lease of 1823. *Maitland* v. *Mackinnon*, 1 H. & C. 607; 32 L. J., Ex. 49; 9 Jur. (N.S.) 255; 7 L. T. 427; 11 W. R. 237.

Gas Works erected by Tenant before Agreement for Lease.]—Agreement for lease of factory, with engines, gas-houses, and appurtenants, to contain usual covenants:—Held, that the lease properly added the words "gas works," though the retorts and other gas works had been erected by the tenant when in occupation before the agreement. *Thorpe* v. *Milligan*, 5 W. R. 336.

Right of Way.]—Under a lease of premises, "together with all ways appertaining, or with any parts thereof used or enjoyed," a right of way passes, although not expressly mentioned, upon proof that it is used with the premises at the time the lease is granted. *Kooystra* v. *Lucas*, 1 D. & R. 506; 5 B. & Ald. 830; 24 R. R. 575. But see *Harding* v. *Wilson*, 3 D. & R. 287; 2 B. & C. 96; 1 L. J. (O.S.) K. B. 238; 26 R. R. 287; *Morris* v. *Edington*, 3 Taunt. 24; 12 R. R. 579; *Crisp* v. *Price*, 5 Taunt. 548.

A piece of land having been conveyed, together with a right of way from it over a new road to a high road; the person to whom it was conveyed demised the piece of land by parol to a yearly tenant; the demise being general, and making no mention of the right of way:—Held, that the right of way having been made appurtenant to the land, it passed by the parol demise to the yearly in the tenant, although not expressly mentioned parol demise. *Skull* v. *Glenister*, 11 W. R. 368.

Before the date of the deed, A. was owner of a row of houses running from north to south, with a garden at the back of each to the east. In the rear of the gardens, and divided from them by a wire fence, was a shrubbery with a gravel walk, which was used in common by the occupiers of all the houses. This shrubbery was bounded on the east and north by the fence of S. By the instrument the premises demised to B. were described as the first house south in the row called, &c., with the garden and shubbery to the rear and north side thereof, and extending to S.'s fence, either way, and also liberty of way and passage to and for such persons for the time being occupying the premises intended to be hereby demised, in, along and over the walk in the rear of the houses, inclosed by a wire fence from the garden ground, or ground occupied with such several houses. The fence of S. ran along the south side of the garden belonging to the house demised to B., as far as the wire fence dividing the garden from the shrubbery. Afterwards A., by an indenture, demised to C. another house in the same row, with a reservation of a similar right of way:—Held, that the premises demised to B. included at least some portion of the angle of the shrubbery at the back of his garden, between the wire fence and the fence of S. to the east; and therefore that C. had no right to walk over the whole of the land comprised in that angle. *Curling* v. *Mills*, 6 Man. & G. 173; 7 Scott (N.R.) 709; 12 L. J., C. P. 316.

Soil of Road.]—It is to be collected from the recitals of a lease what is intended by the parties to be demised; and where a lease referred to a former demise of premises described as "fifty-nine acres, provincial measure," and after reciting an intention to demise the "said estate," went on to demise "the same, being forty acres, statute measure":—Held, that the soil of a road, which was set out and made between the times of making the first and second leases, and was part of the premises demised by the first lease, passed by the second. *Doe* d. *White* v. *Osborne*, 9 L. J., C. P. 313; 4 Jur. 941.

Bed of River.]—By an indenture of lease, lands therein described as "bounded on the west by the river Shannon," and as containing thirty-one and a-half acres or thereabouts, and delineated upon a map annexed (which, however, did not shew any boundary either on the bank or middle of the river), were demised at an acreable rent:—Held, that, in the absence of anything in the lease to rebut the ordinary presumption, it carried to the lessee half of the bed and soil

of the river. *Dwyer* v. *Rich*, Ir. R. 6 C. L. 144—Ex. Ch.

Meadow—Lease of House—Parol Evidence.]—On an agreement for a lease of "a furnished house and premises, with gardens, pleasure-grounds, coach-house, and stabling thereto belonging":—Held, that, by these words, a meadow adjoining the premises did not pass to the lessees, and that evidence to shew that it was the intention of the parties that the meadow should so pass was inadmissible. *Minton* v. *Geiger*, 28 L. T. 449.

Waste Land.]—Premises were demised by the description of "all that cottage or tenement, with the garden thereto adjoining and belonging, situate, &c.; and also a piece or parcel of land lying near to the cottage or tenement, containing by estimation three-quarters of an acre (more or less), lately used as garden ground":—Held, that, under such description, an adjoining piece of waste land would not pass, unless it had been theretofore used as an outlet of the garden. *Kingsmill* v. *Millard*, 11 Ex. 313; 3 C. L. R. 1022.

Where Acreage less.]—The plaintiff offered to take a lease of a farm belonging to the defendant at a rent of 500*l.* per annum, specifying in his tender the closes which he wished to take, with their acreage, which amounted in the whole to 249 acres. The defendant's agent desired to let only 214 acres with this farm, but he accepted the plaintiff's offer without looking at the acreage included in it. He had in fact already let one of the closes to another person. Another tender had been made by a former tenant for the same farm, as comprising 235 acres, and the defendant's agent admitted in examination that he thought the plaintiff had tendered for the same quantity of land as the former tenant. The plaintiff commenced an action for specific performance against the defendant, and was willing to take a lease of the 214 acres at a proportionately reduced rent:—Held, that the defendant must grant the plaintiff a lease of 214 acres at a rent reduced from 500*l.*, in the proportion of 214 to 235. *M'Kenzie* v. *Hesketh*, 47 L. J., Ch. 231; 7 Ch. D. 675; 38 L. T. 171; 26 W. R. 189.

Bog.]—By a lease made in 1719 the lessor demised, for three lives, renewable for ever, all that part of the townland of B., containing 509 acres arable, meadow and pasture, bounded on the south by D., on the north and east by L. N., and on the west by T.'s and W.'s land, with all rights thereto belonging, excepting and reserving all mines, quarries of stone and coal, and all royalties, and all timber above and under ground. There were several renewals of the lease in the same terms as to the contents and boundaries of the demised premises:—Held, that 400 acres of bog and land reclaimed from bog, situated within the ambit of the specified boundaries passed under the lease and the renewals thereof in addition to the 509 acres arable, meadow and pasture. *Jack* v. *M'Intyre*, 12 Cl. & F. 151.

Inclusion of Part which cannot Legally be Demised—Effect.]—Where there is a demise of premises, and an entire rent reserved, if any part of the premises could not be legally demised, the whole is void. *Doe* d. *Griffiths* v. *Lloyd*, 3 Esp. 78; 6 R. R. 813.

Falsa demonstratio.]—A lease of land, described by admeasurement "with the houses now erected or being erected thereon" (it being found as a fact, that at the time the lease was executed the foundations of the houses had been laid), is in effect the same as though the lease had been of a specific house, and though the dimensions considerably exceeded those stated:—Held, that it was merely falsa demonstratio. *Manning* v. *Fitzgerald*, 29 L. J., Ex. 24. See also *Magee* v. *Lavell*, 43 L. J., C. P. 131; L. R. 9 C. P. 107; 30 L. T. 169; 22 W. R. 334.

Fixtures.]—*See* FIXTURES.

2. RESERVATIONS AND EXCEPTIONS.

Of Part of Land Demised.]—By a lease, purporting to demise a close containing five acres, at a yearly rent of 10*l.*, the lessor purported to reserve one acre of the close for himself, for such time as he might require it, for his own use, allowing to the lessee 2*l.* out of the thereinbefore specified rent, as long as the lessor should hold the one acre:—Held, that the clause could not be construed as an exception to the lessor of that acre, and that his representatives were not entitled to its possession after his death. *Moroney* v. *Macnamara*, Ir. R. 6 C. L. 181; 20 W. R. 905.

Demise of a whole territory or precinct of land commonly called A., containing in itself by estimation thirty-two poles of land, more or less; the whole territory or precinct of land commonly called B., containing in itself by estimation six poles of land, more or less; the whole territory or precinct of land commonly called C., containing in itself by estimation two poles of land, either more or less; being in all forty poles of land, save and except two poles of G., lying in the manor of A.:—Held, that the exception of the two poles of G. was good. *Ellis* v. *Lord Primate*, 16 Ir. Ch. R. 184.

—— **Uncertain Specification of Acres.**]—An incumbent agreed to grant, at a future period, a lease of his glebe, containing about 437 acres, "except thirty-seven acres thereof," which were not specified:—Held, that the contract was not void for uncertainty; that the right of selecting belonged to the lessor, he having the first act to do; but that if a lease had actually been granted in the uncertain form of the contract, the right of selecting would then have belonged to the tenant. *Jenkins* v. *Green*, 27 Beav. 437; 28 L. J., Ch. 817; 5 Jur. (N.S.) 304; 7 W. R. 304.

Held, also, that this right of selection must not be exercised oppressively, so as to interfere with the beneficial enjoyment of the rest of the farm. *Ib.*

Bog.]—A demise was in these words, "all that part of the lands of G. marked in the map Nos. 10 and 11 and called the Lough Farm, containing twenty-seven acres of green pasture and improvable ground and thirteen acres of bog, reserving and excepting the thirteen acres of bog":—Held, that the words of grant ended with "Lough Farm," the rest being mere description and that, therefore, the exception was good as being of a particular thing out of a general. *McCleary* v. *Cochrane*, Ir. R. 4 C. L. 145; 18 W. R. 362—Ex. Ch.

By a demise of the tract of land called D., "excepted and reserved out of said demise all

royalties, minerals, fullers' earth, clay for bricks, coal pits, quarries of lime, slate, or stone, and bogs and turf mosses whatsoever, together with all woods and underwoods, by whatsoever name or names called or known, then or thereafter standing, lying, or being within or upon the premises, with ingress, egress, and regress to dig for, fell, and carry away all and every the before excepted premises; saving always, and reserved out of this exception, to the lessee, his heirs and assigns, liberty to dig, cut, and take lime, slate, or other stone, and turf-moss, to be spent and employed on the premises, and not elsewhere; and the same not to be cut or digged out without the order and appointment of the lessor, his heirs, and assigns," the soil of the bogs and turf-mosses is excepted, and remains vested in the lessor, his heirs and assigns. *Boyle* v. *Olpherts*, 4 Ir. Eq. R. 241; 1 Longf. & T. 320.

Running Water and Soil.]—A reservation in a lease of "the free running of water and soil coming from any other buildings and lands contiguous to the premises demised in and through the sewers or watercourses made or to be made within, through, or under the premises," extends to water and soil coming to and from—though not actually first arising upon or out of—the contiguous lands or buildings, but does not extend beyond such water and soil as are the product of the ordinary use of the land and buildings for habitation. *Chadwick* v. *Marsden*, 36 L. J., Ex. 177; L. R. 2 Ex. 285; 16 L. T. 666; 15 W. R. 964.

Mines and Minerals—Pre-historic Chattel found beneath the Surface.]—In land demised to a gas company for ninety-nine years, with a reservation to the lessor of all mines and minerals, and covenants under which the lessees were authorised, under the inspection of the lessor's surveyor and according to plans to be previously approved, to erect a gasholder and other buildings, a pre-historic boat, embedded in the soil six feet below the surface, was discovered by the lessees in the course of excavating for the foundations of the gasworks:—Held, that the boat, whether regarded as a mineral, or as part of the soil in which it was embedded when discovered, or as a chattel, did not pass to the lessees by the demise, but was the property of the lessor, though he was ignorant of its existence at the time of granting the lease. *Elwes* v. *Brigg Gas Co.*, 55 L. J., Ch. 734; 33 Ch. D. 562; 55 L. T. 831; 35 W. R. 192.

Building Lease—Right to remove Soil.]—The holder of a building lease where minerals are reserved has a right to dig foundations for buildings about to be erected, and dispose of the materials dug out, but not to do so in order to improve the surface as a building site. *Robinson* v. *Milne*, 53 L. J., Ch. 1070.

Royalties—Right to Raise Limestone.]—The lands of A., on which there was an open quarry of limestone at the time of the demise, were demised for the term of three lives, renewable for ever, reserving to the lessor and his heirs all royalties. The lessee was restrained by injunction from raising the limestone for sale. *Parcell* v. *Nash*, 1 Jones, 625.

Tithes.]—Exception of the tithes of particular lands in a lease, seems to import a claim in the lessor to the tithes excepted; but the parol declaration of a former owner, that he was not entitled to the tithes, gives a construction to the exception in the lease. *Norbury* v. *Meade*, 3 Bligh, 261.

Shooting Rights—Regrant.]—The defendant demised to the plaintiff a large landed estate in Ireland ("excepting and always reserving out of this demise" to the lessor, timber and other trees, mines, minerals and quarries, "and also reserving to the lessor, his heirs and assigns, and his and their servants, agents and workmen, liberty of ingress," &c., to cut, work and take away the trees and minerals; "and also by way of grant, and not of reservation, the exclusive right of hunting, coursing and shooting upon and over the said demised premises, or otherwise to destroy the game and wildfowl thereon being"), to hold the said demised premises with the appurtenances (except as before excepted) to the lessee for a term of years at an annual rent:—Held, that the right of shooting was regranted to the lessor, and that the words "and also by way of grant, and not of reservation," were not a resumption of the parcels of the lease so as to pass the right of shooting to the lessee. *Houstoun* v. *Sligo* (*Marquis*), 55 L. T. 614—H. L. (E.)

Right to use Slip—"Assigns."]—To trespass for entering plaintiff's land, described as land on each side of a certain slip, defendant pleaded that before plaintiff was possessed of the land, in which, &c., a certain railway company were the owners in fee of the said land and slip, and that they demised the land in which, &c., "excepting and reserving thereout the said slip, &c., the dues payable for the use thereof, and excepting and reserving to the said company, their assigns, officers, servants and workmen, free access to and from the said slip, for the purpose of using and working the same or otherwise," and that the company granted their licence to defendant, to work and use such slip, and the plea justified the trespass as being committed in the exercise of such licence:—Held, a good defence, as the reservation in the demise enabled the company to use the slip by themselves or their licensees, and the word "assigns" was not to be construed as limited to persons taking an estate in the land. *Metcalfe* v. *Westaway*, 34 L. J., C. P. 113; 10 Jur. (N.S.) 1202; 11 L. T. 673; 13 W. R. 181.

Right to do Acts in Respect of Premises—Pleading.]—What is excepted in a lease does not pass to the lessee at all; but where the lessor reserves a right to do certain acts in respect of the demised premises, he must in pleading set out the terms of the reservation, and of the instrument by which it was created. *Fancy* v. *Scott*, 6 L. J. (O.S.) K. B. 305.

Timber and Trees.]—*See* post, M. 12.

3. Enclosures and Encroachments.

Presumption of Occupation as Part of Holding.]—When an encroachment by a tenant is on land of which his landlord is not owner, and the power to make it is derived from the tenancy, and it is occupied with and for the purposes of the demised premises, the presumption at the end of the lease is, that the land so encroached upon is part of the demised premises, not that

the encroachment was made for the benefit of the landlord. *Andrews* v. *Hailes*, 2 El. & Bl. 349; 22 L. J., Q. B. 409; 17 Jur. 761; 1 W. R. 366.

When a tenant takes in and incloses adjoining land during his tenancy, the presumption of law that he does it for his landlord, so that the land gained by such encroachment will have to be given up at the end of the tenancy as part of the originally demised premises, is not rebutted by the fact that the landlord expressly assented to the inclosure being made; and where such presumption exists the Statute of Limitations (3 & 4 Will. 4, c. 27, s. 7), does not apply until the original tenancy has ended. *Whitmore* v. *Humphries*, 41 L. J., C. P. 43; L. R. 7 C. P. 1; 25 L. T. 496; 20 W. R. 79.

A tenant taking in land adjacent to his own by encroachment must, as between himself and the landlord, be deemed primâ facie to take it as part of the demised land, but that presumption will not prevail for the landlord's benefit against third persons. *Doe* d. *Baddeley* v. *Massey*, 17 Q. B. 373; 20 L. J., Q. B. 434; 15 Jur. 1031.

Where, by a deed reciting that several persons had encroached on a common and inclosed land and built cottages, those parties conveyed all their interest in the land and cottages to trustees for the commoners, reserving to themselves the right to occupy the premises for the lives of themselves and their wives, paying 1*s.* a year to one of the trustees; and A., after the execution of the deed, and while in possession of his part of the encroachment conveyed, made a fresh encroachment on the waste which adjoined the other, and he occupied the two together for thirty-eight years, but five years before his death conveyed to B. the latter encroachment for a good consideration:—Held, in ejectment by the trustees against B., that as A., when the fresh encroachment was made, was a tenant (for life at most) to the trustees, and occupied it with the land of which he was tenant, it must be assumed that he made the fresh encroachment for the aggrandisement of the estate, and that therefore it was part of the holding when the tenancy expired. *Doe* d. *Croft* v. *Tidbury*, 14 C. B. 304; 2 C. L. R. 347; 23 L. J., C. P. 57; 18 Jur. 468.

Where a tenant incloses land, whether adjacent to, or distant from, the demised premises, and whether the land be part of a waste, or belong to the landlord or a third person, it is a presumption of fact that the inclosure is part of the holding, unless the tenant during the term does some act disclaiming his landlord's title. *Kingsmill* v. *Millard*, 11 Ex. 313; 3 C. L. R. 1022.

The presumption of law, that where a tenant for years encroaches on land in the neighbourhood of that which he holds, he does so for his landlord's, not for his own, benefit, is not rebutted by the fact, that the land taken by encroachment is separated by a brook from that which the tenant occupies; for, in order to fall within the rule, it need not be immediately adjacent; it is sufficient for it to be near. *Lisburne* (*Earl*) v. *Davies*, 1 H. & R. 172; 35 L. J., C. P. 193; L. R. 1 C. P. 259; 12 Jur. (N.S.) 340; 13 L. T. 795; 14 W. R. 333.

Encroachments made by a tenant upon the waste adjoining the demised premises belong to the landlord and not to the tenant, at the end of the term, however long; the possession of the tenant during the term not being adverse against the landlord. Nor does the fact of the landlord being also lord of the manor in which the waste is situate render the possession of the tenant adverse to the lord of the manor in his character of landlord. *Doe* d. *Gonville and Caius College, Cambridge* v. *Stopford*, 9 L. J. (O.S.) K. B. 171.

Action of Trespass by Landlord.]—The tenant under a lease for years encroached upon and occupied a piece of land belonging to his landlord and adjoining the demised premises, for a period of more than twelve years. The landlord during the term brought an action for an injunction and damages for trespass:—Held, that the action would not lie. The tenant must be deemed to have occupied the piece of ground as part of the holding, and he was entitled so to occupy it during the remainder of his lease. *Tabor* v. *Godfrey*, 64 L. J., Q. B. 245.

Building on Adjoining Land—By Tenant.]—A tenant under a lease which contained a covenant to repair, and leave in good repair, all buildings and erections then standing or to be erected during the term, built a farmhouse, partly on the land demised, and partly on the waste adjoining belonging to the lessor:—Held, that his acquiescence in the act of the tenant prevented his dispossessing him of the premises built on the waste, and that it must be assumed by implication that the covenant to repair extended to the whole building, and that the landlord was entitled in a suit for the administration of the tenant's estate, to establish a claim for dilapidations. *White* v. *Wakley*, 26 Beav. 17; 28 L. J., Ch. 77; 4 Jur. (N.S.) 988; 6 W. R. 791.

So, if a tenant builds on his landlord's land, he does not, in the absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings when the tenancy has determined. *Ramsden* v. *Thornton*, L. R. 1 H. L. 129; 12 Jur. (N.S.) 506; 14 W. R. 926.

—— **By Stranger.**]—If a stranger begins to build on land supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a court of equity will not afterwards allow the real owner to assert his title to the land. *Ib.*

But if a stranger builds on land knowing it to be the property of another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all the expenditure upon it. *Ib.*

Duty of Tenant in respect to Boundaries.]—*See* infra, N. 6.

D. AGREEMENTS FOR LEASES.

1. CONTRACT WHEN CONCLUDED.

Correspondence.] — In a correspondence between lessor and lessee respecting the granting of a new lease to the lessee; the latter having spoken of the renewal of the old lease, the lessor did not object to this expression, but adverted to other topics connected with the subject. On a bill filed for the specific performance of the agreement for renewal alleged to be contained in these letters:—Held, that they were so far evidence of such agreement as to warrant the

continuance of an injunction against an action of ejectment brought by the lessor against the lessee. *Price* v. *Assheton*, 1 Y. & Coll. 82; 4 L. J., Ex. Eq. 3.

The defendant, being owner of a public-house, wrote to the plaintiffs, who were a firm of brewers, and offered it to them on lease, at a certain rent, and begged to be informed, at their earliest convenience, if the offer suited them, "as I am giving all the brewers who have left cards the offer in rotation." Subsequently, a clerk of the firm met the defendant on the premises, and discussed the terms of the lease; and afterwards, one of the plaintiffs wrote to the defendant, "I have viewed the premises, having had my clerk's report, and we are willing to take them of you":—Held, first, that such letters constituted a valid agreement for a lease. *Wood* v. *Scarth*, 2 Kay & J. 33; 1 Jur. (N.S.) 1107; 4 W. R. 31.

Held, secondly, that primâ facie, the terms on which the lease was to be granted, must be taken to be those expressed in the first letter. *Ib.*

A party against whom it was sought to enforce specific performance of an agreement said to be contained in a voluminous correspondence, swore that the alleged agreement, even if otherwise valid, was understood by him to be made on certain conditions, of which the other party denied the existence, and on that ground sought to resist specific performance. The court, however, being of opinion that there were no such conditions:—Held, that there should be a specific performance of the agreement. *Baumann* v. *James*, 16 L. T. 165; 15 W. R. 685.

C., a lessee, sub-demised to W. Both the lease and sub-lease were determinable on notice. C. died, leaving the plaintiff his widow. A correspondence between her and W., with reference to a new sub-lease, extended from the 24th December, 1867, to the 4th February, 1869. By the earlier of those letters she distinctly stated the terms on which the new sub-lease was to be granted; and by the latter W. returned certain plans, approved on his part, and asked for, and received, a draft agreement for the new sub-lease. In the meantime, viz. on the 29th September, 1868, the original lease had been duly determined by notice from the plaintiff's lessor, of which fact the defendants were informed, though no notice to determine the under-lease was given. On the 5th of March, 1869, W. returned the draft agreement approved on his behalf, but without prejudice to his rights against the estate of the plaintiff's late husband in respect of not having received notice determining the under-lease. On the 4th of June, 1869, she obtained a new lease of the property at an improved rent, and called upon W. to accept and execute the sub-lease at the increased rent, according to the contract contained in the correspondence. W. refused to do so, on the grounds that the original sub-lease to him was still subsisting; that he was, therefore, entitled to remain in possession at his original rent; that he had never agreed to take a new lease; and that the whole transaction had been carried on under a mistake of the true position of the parties. The plaintiff then filed a bill for the specific performance of the contract:—Held, that there was a concluded agreement between her and W., and that she was entitled to a decree with costs. *Cayley* v. *Walpole*, 39 L. J., Ch. 609; 22 L. T. 900; 18 W. R. 782.

Sending Draft Lease.]—The lessee having signed the memorandum of agreement, gave the names of certain persons as referees for his capabilities. The lessor, without accepting the lessee as tenant, either in writing or by parol, sent him the draft lease for approval. The lessee refused to complete:—Held, upon demurrer to a bill for specific performance, that there had been no unconditional acceptance. Demurrer allowed, but without costs. *Warner* v. *Willington*, 3 Drew. 523; 25 L. J., Ch. 662; 2 Jur. (N.S.) 433; 4 W. R. 531.

The defendant having proposed to take a lease of premises for the term of seven years, a draft lease was prepared, to which the defendant made some objections. He ultimately took it away, to be settled by his solicitors. His solicitors returned the draft to the plaintiff's solicitors, with the following letter:—"We have seen our client, and have altered the draft lease in accordance with his instructions. We trust there will be no impediment to prevent an early completion, and shall be glad to receive the draft as soon as you can, that we may engross the counterpart." The plaintiff's solicitors replied, returning the draft and engrossment of the lease and counterpart, stating that, according to the practice, where there is no definition on the subject, the lessor's solicitor invariably prepares both lease and counterpart:—Held, that there was no evidence of any contract binding the defendant to take the lease, and no memorandum of any contract sufficient for that purpose, within the 4th section of the Statute of Frauds. *Forster* v. *Rowland*, 7 H. & N. 103; 30 L. J., Ex. 396; 7 Jur. (N.S.) 998.

In 1870, A. furnished to B., who had agreed shortly before to take from him a lease for thirty-one years of lands, a memorandum embodying its proposed terms. B., having struck out a clause binding him to keep the fences in repair, returned the draft as accepted. A., in acknowledging its receipt, described that cancellation as "the only thing I now see likely to cause any difference between us," adding, "such a point should not cause any difference between us, as I believe it is the usual custom for a tenant to keep the fences in repair." A. having subsequently filed a bill for specific performance:—Held, that there was a concluded agreement for a lease including the cancelled clause, and that he was entitled to a decree. *Blakeney* v. *Hardie*, Ir. R. 8 Eq. 381.

Subject to Approval of Solicitor.]—A., the defendant, wrote to his solicitor, who was also the solicitor of E., the plaintiff:—"You may make Mr. E. an offer of the T. hotel at 150*l.* per annum from Lady-day, 1881; tenant to pay all rates and taxes, except property tax, and do internal and external painting and repairs; the roof and walls to be kept in repair by the landlord. Term, ten years; a proper lease to be drawn up with all proper clauses, and to be approved by me and my solicitor." This letter was forwarded to the plaintiff, who at once wrote and accepted the offer. There was some evidence that the defendant knew the plaintiff was a brewer:—Held, that the words "to be approved by me and my solicitor" did not prevent the letters forming a complete contract, and that the defendant was not entitled to insist on the lease containing a covenant against underletting. *Eadie* v. *Addison*, 52 L. J., Ch. 80; 47 L. T. 543; 31 W. R. 320.

By a letter which contained all essential terms of a contract, the defendant offered to take a lease of a number of houses from the plaintiff, but there was this provision at the end: "Such lease to be approved in the customary way by my solicitor." The offer contained in this letter was accepted by the plaintiff. The defendant's solicitor subsequently refused to approve the lease, or to complete:—Held, that there was a binding, and not a conditional, contract, which must be specifically enforced. The meaning of the provision was, that the defendant's solicitor was to see that nothing irregular or unusual was inserted in the formal lease which was to carry out the agreement. *Chipperfield* v. *Carter*, 72 L. T. 487.

Subject to Preparation of Formal Contract.]—A paper sent to a solicitor as instructions to prepare a lease, may be treated as a final agreement for the lease, if the evidence shews that it was only so sent to be put into a formal shape; but the act of so sending it is evidence to raise a primâ facie presumption that it did not contain all that the parties meant, but might afterwards be modified by either of them. *Ridgway* v. *Wharton*, 6 H. L. Cas. 238; 27 L. J., Ch. 46; 4 Jur. (N.S.) 173; 5 W. R. 804.

If contracting parties agree on terms of which there is sufficient evidence, but contemplate in addition a more formal document, it becomes a question of intention merely whether they intend it as a memorial of the terms already agreed on, or as the instrument by which alone they meant to be bound. *Ib.*

An agreement for a lease signed by the parties, but expressed to be "subject to the preparation and approval of a formal contract," is not a final agreement, and is not binding within the Statute of Frauds, so that specific performance can be enforced thereof. *Winn* v. *Bull*, 47 L. J., Ch. 139; 7 Ch. D. 29; 26 W. R. 230.

The defendants by letter agreed to take on lease property on terms mentioned, "provided the terms of the draft lease are reasonable in our estimation":—Held, that some terms of the draft lease sent being unreasonable, the defendants were at liberty to decline the contract, without specifying to which particular terms they objected; and an action for performance by the lessor in which he offered to withdraw certain terms mentioned in the defendants' pleadings as unreasonable, was dismissed. *Wilcox* v. *Redhead*, 49 L. J., Ch. 539; 28 W. R. 795.

Subject to Assent of Principal.]—On the treaty for the underlease of a house, the agent for plaintiff tendered an unconditional agreement to be signed, to which the defendant attached his name and initials in pencil, subject to the condition of there being nothing unusual in the covenants of the original lease. The defendant subsequently discovered that there was a nuisance which would prevent his occupation of the house, but which was unknown to the plaintiff, and he therefore abandoned the treaty:—Held, that under these circumstances the court would try the case strictly between the parties, and in the absence of actual evidence that the agent had direct or implied authority to accede to the pencil additions, would not bind the plaintiff, and that until the latter had assented to the alterations, the agreement was only a proposal, and might be abandoned by the defendant. The bill was dismissed with costs. *Lucas* v. *James*, 7 Hare, 410; 18 L. J., Ch. 329; 13 Jur. 912.

Vagueness and Uncertainty.]—*See* infra, col. 759 et seq.

What Sufficient to create Relation of Landlord and Tenant.]—By an agreement between the defendant, as a brewer, and the plaintiff, reciting that the defendant was in possession of premises whereon the sale of beer had been for some time past carried on by A. on the defendant's account, and that the plaintiff was desirous of carrying on such trade for the defendant, to which he had agreed, it was witnessed that the defendant had agreed, for the consideration therein stated, that the plaintiff should enter upon the premises and carry on thereon such trade for the defendant in the place and stead, and in the same manner and with and on the same privileges and terms as A. had done, until the agreement should be determined by notice. And the plaintiff agreed during all the time he should carry on the trade for the defendant, that all beer sold by him should be had by him from the defendant, and that the plaintiff should not part with the premises to any person without the licence of the defendant; and that, when either party should be desirous of putting an end to the agreement, the plaintiff should, on receiving from the defendant a month's notice to quit the trade, deliver up possession of the premises, and should be at liberty to leave the trade, and quit the occupation of the premises on giving one month's notice to the defendant:—Held, that this did not create the relation of landlord and tenant between the parties, but that the occupation of the plaintiff was that of servant to the defendant. *Mayhew* v. *Suttle*, 4 El. & Bl. 347; 3 C. L. R. 59; 24 L. J., Q. B. 54; 1 Jur. (N.S.) 303; 3 W. R. 108—Ex. Ch.

Agreement in 1859, by M., that he would, by indenture, to be forthwith prepared, grant unto A. a lease of a house and premises, to hold the same for the term of three years from the 25th May, at the yearly rent of 84*l.*, payable by four quarterly payments (stating the days and what covenants should be contained in the lease); "and it is mutually agreed that these presents shall operate as an agreement only, and that, until a lease shall be executed, the rent, covenants, and agreements agreed to be therein reserved and contained shall be paid and observed, and the several rights and remedies shall be enforced, in the same manner as if the same had been actually executed." A. entered, and continued in possession until a quarter's rent became due, but no rent was paid:—Held, that the agreement constituted a tenancy, with a rent reserved, or made payable, within 11 Geo. 2, c. 19, s. 1; and therefore there was a right in M. to follow goods fraudulently removed by A. *Anderson* v. *Midland Ry.*, 3 El. & El. 614; 30 L. J., Q. B. 94; 7 Jur. (N.S.) 411; 3 L. T. 809.

See further Cases, post, col. 808.

—— **Notice to pay Rent to Mortgagee—Possession of Tenant after Notice.**]—A mortgagor let the mortgaged premises subsequently to the mortgage. The mortgagees gave a notice to the tenant informing him of the existence of the mortgage, and requiring him to pay to them the rent thereafter to accrue due. The tenant continued in possession after the receipt of the notice, but there was no other circumstance from which an agreement for a tenancy could

be inferred :—Held, that the mere fact of the tenant remaining in possession after notice to pay rent to the mortgagees was not evidence of an agreement that he should become tenant to the mortgagees. *Towerson* v. *Jackson*, 61 L. J., Q. B. 36 ; [1891] 2 Q. B. 484 ; 65 L. T. 332 ; 40 W. R. 37 ; 56 J. P. 21—C. A.

2. Statute of Frauds.

a. Interest in Lands.

Furnished Lodgings.]—A contract to let furnished lodgings is a contract for an interest in land. *Edge* v. *Strafford*, 1 C. & J. 391 ; 1 Tyr. 293. S. P., *Inman* v. *Stamp*, 1 Stark. 12 ; 18 R. R. 740.

Secus, as to board and lodgings. *Wright* v. *Stewart*, 2 El. & El. 721 ; 29 L. J., Q. B. 161 ; 8 W. R. 413.

Fixtures and Alterations.] — The plaintiff agreed to let a house to the defendant, and to sell him the furniture and fixtures therein, and to make alterations and improvements in the house ; and the defendant agreed to take the house and pay for the furniture and fixtures and alterations :—Held, an agreement relating to an interest in land. *Vaughan* v. *Hancock*, 3 C. B. 766 ; 16 L. J., C. P. 1.

Rent free in Consideration of Share of Crops.]—A. agreed with B. to let him land rent free on condition that A. should have a moiety of the crops ; such an agreement need not be in writing. *Poulter* v. *Killingbrick*, 1 Bos. & P. 397. See *Waddington* v. *Bristow*, 2 Bos. & P. 452 ; 2 N. R. 355.

Contract for Use of Dock.]—A corporation, being the owner of a graving dock, issued regulations for its use, that the dock would "be let to parties requiring the same for the repair of vessels" at certain rates ; that a book would be kept by the borough treasurer for the entering of the names of vessels intended for repair, and that as far as practicable priority would be given to vessels in the order of entry. A sum of three guineas was to be paid to the borough treasurer on entering each vessel, which "entrance money, and the right of turn for the use of the dock," were to be forfeited if the vessel did not take her turn at the specified time ; and the corporation was to have a lien for dockage upon the vessel, with a power to detain the vessel for the same. In an action by a shipowner against the corporation for not allowing his vessel, for which the entrance fee had been paid, to enter such dock in her turn, according to these regulations : —Held, that the contract for the use of the dock did not amount to an interest in land within s. 4 of the Statute of Frauds, and that it did not require to be under seal. *Wells* v. *Kingston-upon-Hull Corporation*, 44 L. J., C. P. 257 ; L. R. 10 C. P. 402 ; 32 L. T. 615 ; 23 W. R. 562.

Contract to Procure Assignment of Lease.]—A contract to procure for a person the assignment of a lease of a house is a contract for an interest in or concerning land within the Statute of Frauds (29 Car. 2, c. 3), s. 4, and must therefore be in writing, although it is made by one who has not the lease himself, or any interest under it. *Horsey* v. *Graham*, 39 L. J., C. P. 58 ; L. R. 5 C. P. 9 ; 21 L. T. 530 ; 18 W. R. 141.

Collateral Agreements—To Destroy Game.]—A party agreed to hire of the owner grass land on the terms of a lease which was to be signed at some future time. The tenant having entered on the land, found it was overrun with rabbits, and, on the lease being presented to him for signature, declined to sign it unless the landlord would promise to destroy the rabbits. The landlord refused to put a term in the lease binding him to do so, but agreed by parol that he would destroy them. The tenant thereupon signed the lease, which provided that he should not shoot, hunt, or sport on the land, or destroy any game, but would use his best endeavours to preserve it, and would allow the landlord or friends at any time to hunt, shoot, or sport on the land. Afterwards, the rabbits not having being destroyed by the landlord, the tenant sued him in the county court for the damage done by them to the grass and crops on the land demised. The judge on the trial admitted evidence of the parol agreement, and asked the jury to say whether it had been made, and whether the lease had been signed on the faith of it. They found for the tenant on both points. Upon appeal on the ground of the misreception of evidence :—Held, that the parol agreement was collateral to the written lease, and that the evidence was properly admitted. *Morgan* v. *Griffith*, 40 L. J., Ex. 46 ; L. R. 6 Ex. 70 ; 23 L. T. 783 ; 19 W. R. 957.

A. leased a farm to B. ; before taking it, B. complained to A. of the quantity of game upon it, and A. thereupon told B. that he was about to kill and to keep down the game, and to dismiss most of his keepers, and discontinue letting the shooting, but said that he did not wish this arrangement to be inserted in the lease. The lease was accordingly drawn up and executed, without containing any reference to A.'s undertaking, but it reserved to A., his friends and agents, the game and right of sporting over the farm. The shooting was afterwards re-let during B.'s lease, and a large head of game kept up. A. died, and in a suit to administer his estate, B. brought in as a creditor a claim on account of damage done to his crops by the game :—Held, that the evidence established the fact that there had been a parol agreement collateral to the lease, and upon the faith of which the lease had been executed ; that such agreement was valid, and B.'s claim must be admitted. *Erskine* v. *Adeane, Bennett's Claim*, 42 L. J., Ch. 849 ; L. R. 8 Ch. 756 ; 29 L. T. 234 ; 21 W. R. 802.

—— **As to Improvements.**]—A landlord, who had demised premises for a term of years at 50*l.* a year, agreed with his tenant to lay out 50*l.* in making certain improvements upon them, the tenant undertaking to pay him an increased rent of 5*l.* a year during the remainder of the term (of which several years were unexpired), to commence from the quarter preceding the completion of the work :—Held, that the landlord, having done the work, might recover arrears of the 5*l.* a year against the tenant, though the agreement had not been signed by either party ; for that it was not a contract for any interest in or concerning lands within the statute. *Donellan* v. *Read*, 3 B. & Ad. 899.

A landlord demised to a tenant a messuage in an unfinished state by a written agreement. Before and at the time of the tenant's signing the agreement, the landlord verbally promised the tenant to put the messuage into a condition fit for habitation. Amongst the things which

he so undertook to do upon the messuage was the construction of a water-closet. In an action for the breach of his promise to put the messuage into a condition fit for habitation :—Held, that his verbal promise to finish the messuage was collateral to the written lease ; that evidence of the promise was admissible at the trial ; and that his undertaking to build a water-closet in the messuage was not a contract for an interest in land within the 4th section of the Statute of Frauds, and therefore need not be in writing. *Mann* v. *Nunn*, 43 L. J., C. P. 241 ; 30 L. T. 526.

—— **To Send in Furniture.**]—A declaration alleged that before the making of the agreement thereinafter mentioned, the plaintiff and the defendant had been negotiating for the letting by the defendant to the plaintiff of a messuage and premises, together with the use of the furniture therein ; that the plaintiff had objected to becoming tenant on the ground that the messuage and premises were insufficiently furnished. It further alleged that the defendant, in order to induce, as he did in fact thereby induce, the plaintiff to become tenant, without requiring him to send in furniture previously to the commencement of the tenancy, verbally promised the plaintiff that he, the defendant, would, within a reasonable time after such commencement, send in such additional furniture as might be found necessary ; and thereupon, in consideration that the plaintiff, at the request of the defendant, had become tenant, without requiring him previously to the plaintiff so becoming tenant to send in the furniture, the defendant promised the plaintiff that he would within a reasonable time send in such furniture. Breach, that he did not perform his last-mentioned promise :—Held, that the declaration was good ; that the promise to send in the furniture was collateral to the agreement relating to the tenancy of the house ; and that it was not required by the 4th section of the Statute of Frauds, to be in writing, as not being an agreement for an interest in land. *Angell* v. *Duke*, 44 L. J., Q. B. 78 ; L. R. 10 Q. B. 174 ; 32 L. T. 25 ; 23 W. R. 307.

—— **To Pay Amount of Rent.**]—By articles of agreement not under seal the plaintiff agreed to grant to the defendant a lease at a certain rent for ninety-nine years of a piece of land so soon as the latter should have erected upon it a messuage, and the defendant undertook until the execution of the lease to "hold the said piece of land and other the premises at the rent and subject to the conditions to be contained" in the lease. The defendant never entered upon or took possession of the piece of land :—Held, that although the articles of agreement did not operate as a demise, yet the defendant by a collateral contract to the intended lease had undertaken to pay the amount of the rent, and that it was immaterial that he had never entered upon possession of the land. *Adams* v. *Hagger*, 4 Q. B. D. 480 ; 27 W. R. 402—C. A.

—— **To Enlarge Premises.**]—Where a lease was granted to one who afterwards took another into partnership, and both applied jointly to the landlord to enlarge the premises, agreeing to pay 10*l.* per cent. per annum on the money laid out, which was accordingly done, and the tenants afterwards dissolved partnership :—Held, that the agreement was only collateral to the lease, and not a new demise. *Hoby* v. *Roebuck*, 2 Marsh. 433 ; 7 Taunt. 157 ; 17 R. R. 477.

b. Memorandum.

i. *Contents.*

Names of Parties.]—An offer in writing to take a lease of a theatre, signed by the intending lessees and attested by the lessor's agent, but not naming the lessor and only addressed to him as "Sir," followed by an acceptance in writing by the agent, addressed to and received by the intending lessees but likewise not naming the lessor, which letter was not signed by them nor referred to in any other writing, is not an agreement in writing within the Statute of Frauds so as to entitle the lessor to have the same specifically performed. *Williams* v. *Jordan*, 46 L. J., Ch. 681 ; 6 Ch. D. 517 ; 26 W. R. 230.

A memorandum of agreement for a lease was signed by the lessee, but the name of the lessor did not appear in any part of the memorandum :—Held, that a letter written by the lessee subsequently to the memorandum, referring to the lessor by name, was sufficient to satisfy the statute. *Warner* v. *Willington*, 3 Drew. 523 ; 25 L. J., Ch. 662 ; 2 Jur. (N.S.) 433 ; 4 W. R. 531.

By a memorandum of agreement the plaintiff agreed to let a certain brickfield for five years, "the tenant" to pay a certain rent and royalty. Only the name of the plaintiff appeared in the body of the agreement, but it was sold by the defendant and plaintiff :—Held, that it could not be reasonably inferred that the defendant signed the agreement in any other capacity than that of tenant, and therefore so far as regarded the Statute of Frauds the agreement was valid. *Stokell* v. *Niven*, 61 L. T. 18—C. A.

Property.]—An agreement for a lease, in order to be sufficient within the Statute of Frauds, must state the property, the price paid, and the interest to be parted with. *Dolling* v. *Evans*, 15 W. R. 394.

Term—Commencement.]—Agreement, in substance, as follows :—"Proposals for letting the M. & G. farms in H., quantity, 130 acres, term, 12 years, determinable," &c. "Rent, 162*l.* To farm the arable land upon the four-course system," &c. "All other covenants, except as above altered, contained in a draft lease dated December 1st, 1824, granted by W. P. to J. W." —"June 3rd, 1835 : Agreed to the above rent, provided the house and buildings are put into tenantable repair on a plan to be mutually determined upon and finally settled within one month from the above date." Though signed by the landlord and the party intending to take, this is not a present demise, because the terms were to take effect only upon the performance of a condition, and it was not ascertained when the tenancy was to commence. *Doe* d. *Wood* v. *Clarke*, 7 Q. B. 211 ; 14 L. J., Q. B. 233 ; 9 Jur. 426.

The following letter was written by E. to the plaintiff (after taking the defendant over a house belonging to the plaintiff) : "I have at length let Town Walls House, subject to certain alterations and repairs, at 40*l.* per annum. A list of repairs I herewith send you. I think they are so absolutely necessary and reasonable that I have at once set Mr. B. upon the work, so as to bind the person who has taken it." The defendant had previously offered to take the house :—Held, that the letter was not such a memorandum

of the bargain as to satisfy the 4th section of the Statute of Frauds, inasmuch as it was a mere proposal, and did not specify the commencement or the duration of the term, so as to amount to evidence of a contract. *Clarke* v. *Fuller*, 16 C. B. (N.S.) 24; 12 W. R. 671.

A bill for specific performance alleged a verbal agreement for the lease of a house by the plaintiff to the defendant for seven years from Michaelmas, 1870, followed, first, by a letter from the defendant to the plaintiff, which did not state when the term was to commence; and secondly, by another letter of the defendant to the plaintiff in which, after referring to the previous letter, the defendant stated that he thought it best to say that it was clearly understood, on his part, that the plaintiff agreed to let the house for seven years from Michaelmas, 1870, upon certain conditions therein mentioned, some of which the plaintiff did not admit to form part of the alleged verbal agreement:—Held, that neither the first letter, nor the two together, constituted a memorandum in writing of the alleged agreement sufficient to satisfy the requirements of the Statute of Frauds. *Nesham* v. *Selby*, 41 L. J., Ch. 173; L. R. 13 Eq. 191; 26 L. T. 145. Affirmed, 41 L. J., Ch. 551; L. R. 7 Ch. 406; 26 L. T. 568.

Action for specific performance of an agreement to take a lease of a house. In order to take the case out of the Statute of Frauds the plaintiff relied on a letter, written by the defendant, in which "the term" was stated "to be for twelve years," but the day of the commencement of the term was not mentioned; and in the same letter, referring to certain covenants, the defendant "suggested that they be similar to those contained in A.'s lease":—Held, first, that there never was any concluded agreement between the parties. *Cartwright* v. *Millar*, 36 L. T. 398.

Held, secondly, that if there had been an agreement, there was no memorandum of the agreement, in writing, sufficient to satisfy the Statute of Frauds, as the commencement of the term was not stated. *Ib.*

A memorandum of agreement to grant a lease, not stating any time for the commencement of the lease, construed as an agreement for a lease to commence immediately from the date of the agreement, and held sufficient under the Statute of Frauds. *Jaques* v. *Millar*, 47 L. J., Ch. 544; 6 Ch. D. 153; 37 L. T. 151; 25 W. R. 846.

An executory agreement for a lease does not satisfy the Statute of Frauds unless it can be collected from it on what day the term is to begin, and there is no inference that the term is to commence from the date of the agreement in the absence of language pointing to that conclusion. *Jaques* v. *Millar* (6 Ch. D. 153) overruled. *Marshall* v. *Berridge*, 51 L. J., Ch. 329; 19 Ch. D. 233; 45 L. T. 599; 30 W. R. 93; 46 J. P. 279—C. A. See also *May* v. *Thomson*, 20 Ch. D. 705.

A lessee, D., wrote to his landlord's agents, asking for an extension of his term for twenty-one years from the termination of his present lease, and offering a premium. The landlord wrote to his agents declining D.'s offer, but adding, "As the lease will not run out for the next two years, I think there is plenty of time to think over the matter. However, if Mr. D. is very urgent, I will consent to grant him a lease for twenty-one years at 50*l.* a year, and a premium of 100*l.*" The latter part of the letter was communicated to D., who accepted the offer:—Held, that D. was entitled to a lease for twenty-one years at a rent of 50*l.* a year, and a premium of 100*l.*, commencing from the expiration of his existing lease. *Wood* v. *Aylward*, 58 L. T. 662—C. A.

An agreement for a lease of a public-house, dated 1st April, provided for a term of three years with an option to renew for another seven years, and for possession to be given "within one month from this date":—Held, that the commencement of the term could be collected from the agreement as a whole, and that the day possession was given—a fact on which evidence was admitted—was the date from which the lease was to commence, and consequently that there was a valid contract. *Marshall* v. *Berridge* (19 Ch. D. 233) discussed and applied. *Lander and Bagley's Contract, In re*, 61 L. J., Ch. 707; [1892] 3 Ch. 41; 67 L. T. 521.

Where a tenant agreed to surrender an existing lease in consideration of his lessors granting him a new lease, but no date was fixed for the surrender or for the commencement of the new term, such agreement cannot be specifically enforced. *Oxford Corporation* v. *Crow*, [1893] 3 Ch. 535; 8 R. 279; 69 L. T. 228; 42 W. R. 200.

On the 28th March, 1894, the plaintiff and defendant signed a memorandum of agreement, by which the defendant was to take an underlease of a house on certain terms. The date from which the underlease was to commence was omitted in this agreement, but it was understood by the parties, at the time, that it was to be the 7th April, 1894. This date was specifically agreed to in writing by subsequent letters:—Held, that there was a contract made on the 28th March, 1894, sufficiently evidenced in writing to satisfy the Statute of Frauds. *White* v. *Hay*, 72 L. T. 281.

Where an agreement in writing for a lease for a term of years did not expressly state the date at which the term was to commence, but contained a reference to circumstances from which such date could be clearly ascertained:—Held, sufficient to satisfy the Statute of Frauds, and specific performance of the agreement was decreed. *Phelan* v. *Tedcastle*, 15 L. R., Ir. 169.

The plaintiff made a proposal in writing to the defendant as follows:—June 7th, 1886, to rent same (i.e., licensed house), with fixtures, &c., at 2*l.* 10*s.* a week. This tenancy to be for two years certain. The plaintiff to have the option of purchase at any time within that term, at a sum of 1,200*l.*, to give solvent security in the sum of 500*l.* for the preservation of the retail licence attached to said premises, and for payment of above weekly rent. The defendant accepted the above proposal in the following terms:—"I accept the within proposal, provided Mr. M. C. is the security." An action being brought by the plaintiff to recover possession of the premises, and for specific performance, the statement of claim alleged that M. C. was ready and willing to become security, as the defendant was aware, and that the plaintiff went into possession of the premises under the proposal and continued therein until the defendant resumed possession. The defendant pleaded (inter alia) the Statute of Frauds:—Held, that the proposal and acceptance did not satisfy the requirements of the statute, as no date was fixed expressly or by reference from which the term was to run; also that the acceptance was conditional, and that as performance of the condition was not averred

the documents could neither constitute a present demise nor a complete agreement, entitling the plaintiff to specific performance. *White* v. *McMahon*, 18 L. R., Ir. 460.

An agreement in writing between A. and B., that on paying 20*l.* B. was to get possession of a farm of land, and also a lease for twenty-one years, at the yearly rent of 16*l.* a year; and that B., on giving up possession at the end of twenty-one years, having done no injury, was to get his money returned:—Held, to constitute a valid agreement for an executory demise for twenty-one years from the date of the payment of the 20*l.* *Erskine* v. *Armstrong*, 20 L. R., Ir. 296—C. A.

—— **Duration.**]—One paper, referring to another in which the terms of an agreement are stated, will constitute a contract sufficiently executed according to the provisions of the Statute of Frauds; but where the first paper was in these words: "I agree to let the premises in G. L., containing three stables, &c., for the same rent, and subject to the same conditions that I hold them myself":—Held, that this paper, even though ratified by the proposed lessee, as it did not state the duration of the term, did not contain enough to constitute a memorandum of agreement sufficient to satisfy the statute. *Fitzmaurice* v. *Bayley*, 9 H. L. Cas. 78; 6 Jur. (N.S.) 1215; 3 L. T. 69; 8 W. R. 750.

ii. *Signature.*

Essential.]—There must be a signing, either by an actual signature of the name, or something intended by the writer to be equivalent to a signature; such as a mark by a marksman. *Selby* v. *Selby*, 3 Mer. 2; 17 R. R. 1.

Position of.]—Provided the name is inserted in an instrument, in such a manner as to have the effect of authenticating it, the requisition of the act with respect to signature is complied with and it does not matter in what part of the instrument the name is found. *Ogilvie* v. *Foljambe*, 3 Mer. 53; 17 R. R. 13. See also *Propert* v. *Parker*, 1 Russ. & M. 625.

The signature must be inserted in such a manner as to govern or have the effect of authenticating the whole instrument. *Caton* v. *Caton*, 36 L. J., Ch. 886; L. R. 2 H. L. Cas. 127; 16 W. R. 1.

The mere circumstance of the name of the party being written by himself in the body of a memorandum of agreement for a lease will not constitute a signature within the meaning of the statute. *Stokes* v. *Moore*, 1 Cox, 219; 1 R. R. 24.

Pencil.]—See *Lucas* v. *James*, 7 Hare, 410; 18 L. J., Ch. 329; 13 Jur. 912.

Authority of Solicitor.]—Negotiations having commenced between the plaintiffs and the defendant respecting a lease of a house by the plaintiffs to the defendant, they forwarded a draft lease, which defendant sent to his solicitors, intimating that he would leave the matter in their hands. After a correspondence between the solicitors of each party with reference to the terms of the lease, the defendant's solicitors wrote to the plaintiffs' solicitors, "We have just seen our client, and have altered this draft lease in accordance with his instructions. We trust there will be now no impediment to prevent an early completion; and we shall be glad to receive the draft as soon as you can, that we may engross the counterpart. R. & B." To this the plaintiffs' solicitors replied by letter, forwarding the draft and engrossment of lease and counterpart, claiming, as solicitors to the lessors, to be entitled to engross both at the expense of the lessee, and requesting the defendants' solicitors, when they had compared, to return the engrossments of the lease and counterpart, when they (the plaintiffs' solicitors) would be prepared to exchange. The defendants' solicitors objected to this, the negotiation went off, and the plaintiffs, having brought an action against the defendant for the breach of an agreement to accept a lease on terms previously agreed upon:—Held, that there was no evidence of an authority from the defendant to his solicitors to sign an agreement to accept a lease on terms previously agreed upon; and that, supposing there had been such authority, the letter of the defendants' solicitors was only a proposal, which was not accepted in its entirety, the claim to engross the counterpart lease being a substantial part, and not a consequence of the agreement, and that therefore there was no signed agreement or memorandum thereof to satisfy the 4th section of the Statute of Frauds. *Forster* v. *Rowland*, 30 L. J., Ex. 396; 7 H. & N. 103; 7 Jur. (N.S.) 998.

A person, who was in treaty for taking the lease of a house, stated, in a letter to the owner, that he had authorised his solicitors to settle the terms of the agreement. They subsequently sent the owner a draft agreement, signed by them, stating that its provisions were approved by their client, who afterwards refused to sign or acknowledge it:—Held, in a suit for specific performance, that the solicitors were agents in what they did, and that a defence under the Statute of Frauds failed. Also, that an alteration made by the owner in the terms of the agreement, but not insisted on by him, did not vitiate the contract. *Jolliffe* v. *Blumberg*, 19 W. R. 784.

Of Agent's Clerk.]—A. is a tenant for life, with a power to lease by deed, duly executed under her hand and seal, reserving the best yearly rent. Plaintiff enters into possession, and expends money in building, under an agreement for a lease evidenced only by the memorandum in writing, entered in the book of A.'s authorised agent, signed not by the agent himself, but by his clerk, although in evidence to have been approved by him, and according to the usual course of business. A. dies, and on a bill for specific performance against the remainderman:—Held, first, not sufficient agreement in writing; secondly, the plaintiff not entitled to compensation from A.'s representatives for money laid out by him on the faith of the alleged agreement. *Blore* v. *Sutton*, 3 Mer. 237; 17 R. R. 74.

After Death of Principal.]—After some negotiations, a landlord, by his agent, stated, in a letter to the tenant, the terms on which he would renew his lease, but added, he would expect an answer within a month. The landlord died seven days afterwards, and on the following day the tenant and agent, both of whom were then ignorant of the death, met, and the tenant signed his acceptance of the terms:—Held, that there was no binding contract. *Carr* v. *Levingston*, 35 Beav. 41.

See further CONTRACT, ante, vol. iv., cols. 32 et seq.

iii. *Connected Documents.*

A tenant applied to the landlord's solicitors as to the renewal of his lease. The solicitors sent him a report by a surveyor, who recommended the granting a lease for fourteen years at a given rent if certain repairs were done by the tenant. The tenant wrote back assenting to the repairs and rent, but asking for a term of twenty-one years. No final agreement was come to, but some months afterwards, a negotiation having proceeded between the tenant and landlord without the intervention of the solicitors, the landlord wrote a letter promising the tenant a lease for fourteen years "at the rent and terms agreed upon," to which the tenant wrote back an unqualified acceptance:—Held, that parol evidence was admissible to connect the report and the tenant's previous letter with the subsequent letters; and that, it being conclusively established that there had never been any other rent or terms agreed upon than those mentioned in the report, there was a sufficient memorandum in writing to satisfy the Statute of Frauds. *Baumann* v. *James*, L. R. 3 Ch. 508; 18 L. T. 424; 16 W. R. 877.

The report provided for the tenant doing certain specified works and "other works" upon the property, and estimated the expense from 150*l.* to 200*l.* The specified works being such as must evidently cost nearly that sum:—Held, that there was no such uncertainty as to prevent specific performance. *Ib.*

The person entitled to the reversion in fee of a house, expectant upon a term vested in a lessee, who had demised the premises for a portion of his term to a sub-lessee, agrees by one letter to grant that sub-lessee an extension of lease at a certain yearly rent, and in another letter fixes a time when the term, which he thus proposes to grant, is to expire:—Held, a valid agreement within the Statute of Frauds, and under it the sub-lessee has a right to a lease which shall commence from the expiration of the existing term. *Verlander* v. *Codd*, Turn. & R. 352.

The defendant entered into a verbal agreement with the plaintiff to grant him the lease of a house for a term of years. A draft for the proposed lease was furnished by the plaintiff's solicitor to the defendant's solicitors, and returned by them approved of on behalf of the defendant. The defendant subsequently wrote a letter to the plaintiff complaining that the lease had not been engrossed. Upon the defendant declining to carry out the agreement, the plaintiff applied for a decree for specific performance:—Held, that the letter contained a sufficient reference to the draft of the lease to admit parol evidence to shew that there was such a draft, and thus to connect the draft with the letter signed by the defendant; and that these papers so connected constituted a sufficient writing to satisfy the requirements of the Statute of Frauds. *Craig* v. *Elliott*, 15 L. R., Ir. 257.

Specific performance of an agreement for a lease decreed against the owner of the estate, though not originally binding on him, he having by a letter subsequently written constituted it an agreement, by which, under the provisions of the Statute of Frauds, he was bound. *Powell* v. *Dillon*, 2 Ball & B. 416.

iv. *What Documents amount to.*

Indorsement on Draft Lease.]—An indorsement on the draft of a lease signed by the lessee, and stating that, as circumstances prevented him from performing his agreement, he wished the lessor to let the premises, will satisfy the statute. *Shippey* v. *Derrison*, 5 Esp. 190.

Draft corrected by Counsel.]—A., by parol, agrees with B. for a lease, which is drawn and then perused and corrected by his counsel, and afterwards engrossed and executed by B. Whether this is within the Statute of Frauds. *Lowther* v. *Carill*, 1 Vern. 221.

Steward's Entry.]—The bare entry of a steward in his lord's contract-book with his tenants is not an evidence of itself that there is an agreement for a lease between the lord and tenant, so as to bring it within the Statute of Frauds. *Charlewood* v. *Bedford* (*Duke*), 1 Atk. 497.

Where therefore a steward and land agent, whose powers were specially limited, had in the absence of the owner entered into a written agreement with a farmer, to grant him a lease for twelve years, but without communicating to him the fact that his power was specially limited:—Held, that the agreement did not bind the owner. *Ib.*

Entry in Rent Roll.]—R. agreed to become tenant of certain premises to one S., who instructed an agent, J., to prepare a lease. J. caused his clerk to make an entry in his rent-roll of "lease for 200 years, from 25th March, 1880; yearly rent 100*l.*" S. died, and the lease was never made; but R. went into possession, and expended 3,000*l.* on the premises:—Held, a sufficient agreement for a lease, and specific performance was decreed. *Sullivan's Estate, In re*, 23 L. R., Ir. 255.

Letter of Agent—Answer in Chancery.]—A., having agreed by parol to grant a lease to B., the lease, as agreed upon, was engrossed. A. was afterwards induced not to grant the lease, and his agent wrote to B., informing him that A. had gone away "without executing the lease," and that the matter must stand over; and in another letter A.'s agent wrote declining to carry out "the agreement to grant a lease which your client alleges he has entered into." The answer in the suit admitted the parol agreement and the engrossment of the lease, but insisted on the Statute of Frauds:—Held, that neither the expressions used in the letters of A.'s agent, nor the answer in the suit, constituted a memorandum of the contract in writing within the Statute of Frauds. *Jackson* v. *Oglander*, 2 H. & M. 465; 13 L. T. 16; 13 W. R. 936.

v. *Construction.*

When Conditional.]—The following words in an agreement for letting do not create a condition:—"A. (the tenant) hereby agrees that he will not underlet the premises without the consent in writing of the landlord." *Shaw* v. *Coffin*, 14 C. B. (N.S.) 372.

Rent — Whether Payable before End of Year.]—"Memorandum of an agreement entered into this 31st of January, 1840, between R. of the first part, and T. of the other part. The said

T. hereby agrees to become the tenant of the farm G. at the customary time of entry under the following conditions, viz., that the sum of 260*l.* annual rent shall be paid at the usual time for the house, premises and lands, as agreed upon; and the said R. agrees to lay out in improvements and alterations of the farmhouse and new sheds a sum not exceeding 200*l.*, with the understanding that spars for rafters should be found from the estate; cartage for all materials except stones for walls to be done or found by T. (Signed) R. and T." :—Held, the meaning of this agreement was not that the rent should become payable at the end of the year from the day of entry, but that the contemporaneous or subsequent conduct of the parties might be adduced to shew that they intended the rent to become payable at an earlier date. *Gore* v. *Lloyd*, 13 L. J., Ex. 366; 12 M. & W. 463.

3. DAMAGES OR COMPENSATION ON BREACH.

Lessor not granting Lease.]—To an action for breach of a contract to grant the plaintiff a good and valid lease, the defendant pleaded payment into court, and no damages ultra :—Held, that the plaintiff might recover damages beyond his expenses, for the loss he had sustained by reason of the non-performance of the contract. *Robinson* v. *Harman*, 1 Ex. 850; 18 L. J., Ex. 202.

Held, also, that evidence to shew that the plaintiff knew the defendant had no title was inadmissible, after the plea of payment into court, which admitted the contract. *Ib.*

Granting Lease to Another.]—A. agreed with B. to grant the latter a lease of a house as soon as he became possessed thereof, to bear date from the 21st December, 1825, for fourteen or twenty-one years. At the date of the agreement the house was under a lease which would not expire till Midsummer, 1827, the legal estate being in trustees, first to pay debts, and secondly, to pay an annuity to T., and subject thereto to the use of A., if he attained twenty-four. In June, 1825, after A. had attained twenty-four, but before the outstanding lease expired, he and the trustees joined in a fresh lease to C. for twenty-three years :—Held, that A. was liable to an action before the expiration of the lease, which would not be out until Midsummer, 1827, but that the measure of damages would only be the value of a lease for so much of the term as upon a calculation of the probable period of the annuitant's death would be likely to be subsisting at the arrival of that period. *Ford* v. *Tiley*, 9 D. & R. 443; 6 B. & C. 325; 5 L. J. (O.S.) K. B. 169; 30 R. R. 339.

Former Term still Existent.]—By an agreement between A. and B., reciting that B. had, as he was advised and believed, legally and effectually put an end to a lease granted to C., of a farm, by entry thereon under a power therein contained, by reason of the bankruptcy of C., and that B. had agreed to grant a lease of the farm to A. for twenty-one years, at the same rent as the same had been held by C.; it was agreed, that B. should grant, and A. accept, a lease at a certain rent, payable quarterly; the lease to commence on the 29th of September, 1844, if B. could then legally make and execute the same, or so soon after as he should be in a situation to grant the same; that such lease should contain the same covenants as the lease to C.; and that A. should pay to B., on possession being delivered to him, 500*l.* as a premium for the lease so to be granted. A. was let into possession, and occupied the farm for about two years, paying the rent; and he also within that time paid B. 250*l.*, in part of the 500*l.* premium; but the fiat against C. having been superseded, B. was unable to grant the lease to A. A. thereupon brought an action for the breach of contract, alleging in his declaration, that he had always been ready and willing to accept a lease :—Held, that the recital in the agreement, and proof of a declaration made by B. that C.'s lease was void and good for nothing, were primâ facie evidence as against B. that he had power to grant the lease, but that it appearing also by the recitals in the agreement that the lease to C. was supposed to be void by reason of C.'s bankruptcy, such primâ facie case was rebutted by proof of the supersedeas of the fiat against C., and consequently that B. was entitled to the verdict upon an issue as to his ability to grant the lease. *Wright* v. *Colls*, 8 C. B. 150; 19 L. J., C. P. 60; 13 Jur. 1056.

Held, also, that A. was entitled to recover back the 250*l.* as money paid upon a consideration which had failed. *Ib.*

An agreement for a tenancy in these terms, "Mr. T. engages to complete the whole work necessary by the 14th June next." Then followed an enumeration of the matters to be done by T.; and the agreement concluded, "In consideration of these conditions being fulfilled, Mr. M. engages to take the house, No. 51, B. park, for three years, at the annual rent of 130*l.*, to be paid quarterly. Rent to begin from Midsummer next":—Held, that the completion of the "work necessary" by the day named for that purpose was a condition precedent to the landlord's right to sue M. for not becoming tenant. *Tidey* v. *Mollett*, 16 C. B. (N.S.) 298; 33 L. J., C. P. 235; 10 Jur. (N.S.) 800; 10 L. T. 380; 12 W. R. 802.

Lessor having different Interest—Improvements.]—A. entered into possession of premises under an agreement with B., under which he was to hold them as tenant for two years, at the yearly rent of 50*l.*, with liberty to make, at his expense, such alterations in and additions to the premises as he might think proper, the same being improvements, and A. to have the option of purchasing the premises at any time during the two years for 600*l.*, "it being understood between the parties that B. was possessed of the premises for his own life and the life of C., and of the survivor of them." It being, however, discovered that B. had not the precise interest mentioned in the agreement, A. brought an action to recover damages for the breach of contract, and also compensation for the money expended by him in improvements :—Held, that he was only entitled to recover the value of the proposed lease, and not the value of the improvements. *Worthington* v. *Warrington*, 8 C. B. 134; 18 L. J., C. P. 350.

Not giving Lessee Possession.]—A party who lets premises agrees to give possession, and if he fails to do so the lessee may recover damages against him, and is not driven to bring an ejectment against a wrongful occupier who refuses to quit. *Coe* v. *Clay*, 5 Bing. 440; 3 M. & P. 57; 7 L. J. (O.S.) C. P. 162; 30 R. R. 699.

By an agreement in writing, the defendant agreed to let to the plaintiff premises for the

term of one year from the 29th September, 1854, and so on from year to year so long as the parties should agree :—Held, that there was an implied contract on the part of the defendant to give the plaintiff possession of the premises. *Jinks* v. *Edwards*, 11 Ex. 775 ; 4 W. R. 303.

The plaintiff agreed in writing to take of the defendant a farm at a yearly rent, the plaintiff paying all rates and taxes, and agreeing to keep the buildings in repair, the defendant agreeing to find bricks, &c., for such repairs, and to lay out a sum of money in repairs, "the tenancy to commence from the 29th of September next, for a term of eight years, subject to a lease," to be drawn up by the defendant's solicitor :—Held, no breach of this agreement, that the defendant did not before or on the 29th of September, or at any time subsequently, give to the defendant possession of the farm, or enable him to enter thereon. *Drury* v. *Macnamara*, 5 El. & Bl. 612 ; 25 L. J., Q. B. 5 ; 1 Jur. (N.S.) 1163 ; 4 W. R. 50.

Agreement to enter into Agreement—Damages.]—An agreement was made between W. and F., that W. would enter into an agreement with O. for a lease at a certain rent for such term and subject to such covenants as O. should approve, and would accept such lease and execute a counterpart :—Held, that F. was entitled to recover damages from W. for breach of the agreement between them. *Foster* v. *Wheeler*, 57 L. J., Ch. 871 ; 38 Ch. D. 130 ; 59 L. T. 15 ; 37 W. R. 40—C. A.

Inquiry by Landlord as to Sufficiency of Tenant—Question for Jury.]—If an agreement to let certain apartments and fixtures be delivered over after signature, with an understanding that the result shall be subject to the landlord's inquiries as to the sufficiency of the tenant, in an action for not performing the agreement, it is a question for the jury to say, whether the answer given by the parties referred to was not sufficient to satisfy the condition, notwithstanding the landlord has deemed them insufficient, and refused to permit the tenant to enter, semble. *Ward* v. *Smith*, 11 Price, 19.

In Action for Specific Performance — Lease decreed for Less than agreed Term.]—Under special circumstances, the plaintiffs, who had entered into an agreement with the defendants for a lease of thirty-one years, were decreed to accept a legal lease for twenty-one years and a covenant for a further term of ten years with compensation for the difference in pecuniary value. Although the bill was framed with a view to a different relief, yet inasmuch as upon the whole statement of the bill such appeared to be the equity between the parties, the court, in order to avoid future litigation, made the decree accordingly, under the prayer for general relief. *Hanbury* v. *Lichfield*, 2 Myl. & K. 629 ; 3 L. J., Ch. 49.

In 1863 C., being tenant for life of fisheries (subject to a lease, made in 1811, which would expire in 1872), agreed to grant to L. a lease of a portion of those fisheries, to commence on the expiration of the lease of 1811, and to be for the term of three lives, or thirty-one years. It subsequently appeared that C. had no power to lease for any time beyond his own life, and he declined to fulfil his agreement ; but offered to grant a lease for his own life, but without compensation. L. filed a petition for specific performance of the agreement, or for such a lease as C. could legally execute, and for compensation. The court decreed that C. should, so far as was possible, specifically perform the agreement, and should give compensation for any difference in value between the terms which he had agreed to grant and that which his leasing power enabled him to grant. *Leslie* v. *Crommelin*, Ir. R. 2 Eq. 134.

—— **Building Stipulations.**]—An agreement for a lease of premises, containing a stipulation that the lessees should execute certain building works, and that the lessors should advance 1,000*l.* on mortgage to a limited company, was executed by the directors and secretary of the company as lessees. The money was advanced, and the lessor had in correspondence treated the company as liable to perform the stipulations of the agreement, and evidence was given that the directors and secretary were trustees of the benefit of the agreement for the company :—Held, nevertheless, that the directors and secretary who signed the agreement were personally liable, and decree made for specific performance of the agreement to take a lease, but specific performance of the building stipulations refused, and an inquiry as to damages granted in respect thereof. *Kay* v. *Johnson*, 2 Hem. & M. 118.

—— **Delay—Loss of Trade.**]—The plaintiff agreed with the defendant to take a lease of premises belonging to the defendant for the purpose, as the defendant knew, of carrying on a trade which the plaintiff was about to commence. In consequence of his wilful refusal to fulfil his agreement, the plaintiff was unable for fifteen weeks to commence his trade :—Held, that, in addition to judgment for specific performance of the agreement, damages must be awarded in respect of the loss of profits from his trade during the fifteen weeks ; and 250*l.* damages were awarded. *Jaques* v. *Millar*, 47 L. J., Ch. 544 ; 6 Ch. D. 153 ; 37 L. T. 151 ; 25 W. R. 846.

—— **Not Building House.**]—A plaintiff agreed to grant a lease to the defendant when and as soon as he, the defendant, should have built a new house on the land ; and the defendant agreed to accept such lease when required, and by a certain day to pull down an old house standing on the land, and build a new one on the site :—Held, that the 21 & 22 Vict. c. 27, applied, and that the plaintiff was entitled to damages for the nonbuilding of the house, and to specific performance of the contract to accept the lease. *Soames* v. *Edge*, 1 Johns. 669.

—— **Not making Alterations and Repairs.**]—A. agreed to grant to B. a lease of a public-house, and to make and form therein a spirit vault, and put in plate-glass windows, and do everything therewith necessary at his own expense, and paint new the outside of all the woodwork, as well as put the slates, chimney-pots and roofing in thorough repair. A decree directing specific performance of the agreement to grant the lease, and directing an inquiry as to damages for the nonperformance of the agreement with respect to the vault, windows, painting and repairs, was affirmed on appeal. *Middleton* v. *Greenwood*, 2 De G. J. & S. 142 ; 3 N. R. 694 ; 10 Jur. (N.S.) 350 ; 10 L. T. 149.

—— **Account of Rents and Profits—Lessee Ejected.**]—Bill for specific performance of an agreement for a lease for twenty-one years, and for an account. It appeared that the defendant held the lands for one life, that the agreement was executed by the agent of the defendant, and possession given under it, and money expended in improvements, but the defendant swore that the agent had no authority from her to do so. There was also evidence of her having subsequently recognised the agreement, and promised to execute a lease pursuant thereto. It appeared that a civil bill ejectment was served upon the plaintiff, and another upon two of his under-tenants; the former was dismissed, but the latter being undefended, a decree was obtained thereon, under which he was turned out of possession. In about three years afterwards this bill was filed. Pending the proceedings, the cestui que vie in the defendant's lease died:—Held, that the plaintiff was entitled to an account of the rents and profits of these lands which the defendant had received, or which, without wilful default, she might have received from the day of the execution of the civil bill decree, up to the day of the death of the cestui que vie. *Callaghan* v. *Pepper*, 2 Ir. Eq. R. 399.

Semble, in this case the court would decree a specific performance, if the defendant's interest had not expired. *Ib.*

—— **Landlord having only partial Interest—Abatement.**]—By a memorandum in writing, defendant agreed to let, and plaintiffs agreed to take, business premises for one year, with an option for plaintiffs at the end of the year to have a lease for seven, fourteen or twenty-one years. Plaintiffs, having gone into possession under the agreement, and having laid out money in alterations, at the end of the year gave notice of their intention to exercise the option, but when the defendant's title came to be investigated it was found that she was possessed of only a moiety of the premises, the other moiety being vested in her son, a minor. The defendant was decreed to perform specifically so much of the contract as she was able to perform, with an abatement of one moiety of the rent. An inquiry as to damages was refused, there being no evidence that the plaintiffs had sustained any damage. *Burrow* v. *Scammell*, 51 L. J., Ch. 296; 19 Ch. D. 175; 45 L. T. 606; 30 W. R. 310; 46 J. P. 135.

—— **Where Lessor has no Leasing Power.**]—See *Franklinski* v. *Ball*, post, col. 786.

4. Specific Performance.

a. Contract when Concluded.—*See* supra, 1.

b. Parol Variation.

Alleged by Plaintiff—In his own Favour.]—Agreement for a lease of a farm, referred to a paper containing the terms; bill for specific performance according to such clauses as had been read to the plaintiff; parol evidence to prove that was refused, and the bill dismissed. *Brodie* v. *St. Paul*, 1 Ves. Jun. 326.

Agreement in writing was entered into between landlord and tenant, signed by the landlord, for a new lease to be granted at any time after the completion of repairs to be made by the tenant with convenient speed, but blanks were left for the day of the commencement. The repairs being completed, the landlord tendered a lease to commence from that time, and on refusal filed a bill; the answer admitted that the agreement was accepted, but insisted that the new lease was not to commence till the expiration of the old, and so it was decreed, parol evidence being refused. *Pym* v. *Blackburn*, 3 Ves. 34.

Parol evidence not admissible (in support of a bill for specific performance) to prove from conversations before and at the time of signing an agreement for a lease, that the intent of the parties was apparent from the memorandum, though the same was written by the lessee, and the words "clear of all taxes" (which was the purport of the conversation) were omitted in the memorandum. *Rich* v. *Jackson*, 4 Bro. C. C. 514; 6 Ves. 334, n.

Specific performance of a written agreement varied by writing decreed; not with a variation by parol. *Robson* v. *Collins*, 7 Ves. 130; 6 R. R. 92.

An extension of the term according to a variation of the agreement, also in writing, was refused on the ground of want of consideration. *Ib.*

A suit for the specific performance of an agreement with a variation cannot be supported. *Nurse* v. *Seymour* (*Lord*), 13 Beav. 254.

By an agreement in writing, A. agreed to demise to B. premises which were then in lease to C., and B. undertook to procure a surrender of the existing lease from C., and to accept the new lease. C. having afterwards refused to surrender, A. filed a bill against B. for specific performance, with a modification:—Held, upon demurrer, that the bill could not be sustained. *Beeston* v. *Stutely*, 27 L. J., Ch. 156; 6 W. R. 206.

An agreement to grant a lease had been executed by the lessor and lessee, in which it was stipulated that the lease should be granted "so far as the lessor can grant the same." The allegations in a bill by the lessee were to the effect that the agreement was that the lessor should grant a lease in more ample terms than those which by the written agreement he had engaged to do:—Held, that the lessee could not set up the parol agreement against the written one; and that if the lessee had required production of the lessor's title, he would have seen what the powers of the lessee as to granting leases were. *Londonderry* (*Marchioness*) v. *Baker*, 3 L. T. 546.

A written and signed agreement for a lease from the defendant to the plaintiff was entered into in June, and possession was given and rent paid. Afterwards it was discovered that there were errors as to the nature of the tenures and rentals of the property, and in December a fresh written and signed agreement was entered into. This was afterwards again varied by parol. A bill by the tenant for specific performance of the varied agreement was dismissed. *Price* v. *Salusbury*, 32 Beav. 446. Affirmed, 32 L. J., Ch. 441; 9 Jur. (N.S.) 838; 8 L. T. 810—L.JJ. *And see* 14 L. T. 110—H. L.

—— **In Favour of Defendant.**]—Where the defendant agreed in writing to grant a plaintiff a lease at a specified rent and for a specified term, subject to the same covenants, clauses and agreements as were contained in an expiring

lease under which he then held the property, and the plaintiff then filed a claim for specific performance, stating the above agreement and that it was further agreed that he should pay a premium of 200*l.*, which by his claim he offered to do :—Held, that this additional term did not render the Statute of Frauds a valid defence to the claim. *Martin* v. *Pycroft*, 2 De G. M. & G. 785 ; 22 L. J., Ch. 94 ; 16 Jur. 1125.

Where intended lessors, in executing an agreement for a lease, acted partly upon a representation by the lessee as to what had taken place between their own solicitor and him in its preparation, and their attention was immediately afterwards directed to the point whether this representation was correct ; but they took no step to question it for three years afterwards :—Held, that the delay was strongly confirmatory of the fairness of the transaction. *Ib.*

A. agreed to grant a lease of a public-house to B. upon certain terms ; in addition "the lessor, to make certain alterations suggested, and to make and form a spirit vault, and put in plate-glass windows, and do everything therewith necessary at his own expense, and paint new the outside of all the woodwork, as well as put the slates, chimney-pots and roofing in thorough repair." B. by his bill offered to waive the performance of the agreement so far as regarded any alterations not specifically mentioned therein :—Held, that he was entitled to a decree for specific performance, minus the waiver. *Middleton* v. *Greenwood*, 9 L. T. 572. See *S. C.*, 2 De G. J. & S. 142 ; 3 N. R. 694 ; 10 Jur. (N.S.) 350 ; 10 L. T. 149.

Alleged by Defendant.]—Specific performance of an agreement in writing, for a lease of sixty years, refused, upon parol evidence of an alteration stipulated for at the same time, and upon the faith of which the party executed. Distinction between the case of a defendant refusing and a plaintiff seeking the execution of an agreement under such circumstances. *Clarke* v. *Grant*, 14 Ves. 519 ; 9 R. R. 336.

S. agreed to grant to B. a lease of the lands of T. The agreement contained a provision that the lease should give "exclusive shooting and coursing, but not fishing." B. had previously held T. under a lease from S., which contained an express exception of fishing, fowling and shooting, and there was evidence that S. had intended to retain the exclusive right of fishing in the premises agreed to be demised ; but S. had himself drawn up the agreement :—Held, that the evidence of intention was admissible in favour of S., in a suit instituted by B. for specific performance of the agreement ; and that B. was not entitled to specific performance of the agreement without giving to S. the exclusive right of fishing. *Browne* v. *Sligo* (*Marquis*) 10 Ir. Ch. R. 1.

Specific execution of a written agreement for a lease decreed at the suit of the tenant, with several additions contemporaneously agreed on by parol, set up by the answer but omitted in the bill, the plaintiff paying the costs of the suit. *Warner* v. *Thunder*, 9 Ir. Eq. R. 371.

The plaintiff agreed to take a lease of a public-house from a brewer, but the written contract said nothing as to the restrictive covenants of a brewer's lease. The plaintiff instituted a suit to obtain an unrestricted lease. The restricted parol agreement being established by extrinsic evidence :—Held, that the bill must be dismissed. The plaintiff having then elected to take a brewer's lease, a decree was made, the plaintiff paying the costs of the suit. *Barnard* v. *Cave*, 26 Beav. 253.

Upon a treaty for a lease of a house, the lessor sent to the lessee a letter, specifying the terms on which he would let it. The lessee immediately took possession, but he signed no contract. The lessor having instituted a suit for specific performance, the lessee insisted that, in addition to the terms contained in the letter, the lessor had verbally promised to put the house into thorough repair ; this the lessor denied. The court doubted whether the specific performance could be enforced, and gave the lessee the option, either of a decree for specific performance on the terms of the letter, or a decree to deliver up possession, and to pay an occupation rent. But if he refused to exercise the option, the court directed a decree in the latter branch of the alternative. *Chappell* v. *Gregory*, 34 Beav. 250.

An agreement to grant a lease of a house was contained in three letters, which specified the term and the amount of rent, and stipulated that the intended lessee was to do all repairs, painting, decorating, &c. The intended lessor refused to grant a lease on the footing of the agreement, on the ground that the lessee had at the time of entering into the agreement also verbally undertaken to expend 1,000*l.* on the premises in a particular manner, and to allow covenants to compel him to do so to be inserted in the lease ; that the lessee had not performed that part of his agreement, and had objected to such covenants ; and, further, that the agreement as contained in the letters was too uncertain for the court to enforce :—Held, on a bill filed for specific performance of the agreement as contained in the letters, that the alleged parol collateral agreement was not substantiated by the evidence, and that there was no ground for saying that the terms of the letters were uncertain, and therefore that the lessee was entitled to a decree, with costs. *Dear* v. *Verity*, 38 L. J., Ch. 297. Affirmed, 38 L. J., Ch. 486 ; 21 L. T. 185 ; 17 W. R. 716—L.JJ.

Quære, whether evidence of a prior agreement that no rent shall be paid till a certain act has been done by the landlord can be given when there is a written agreement of tenancy reserving a rent at stated intervals. *Carter* v. *Salmon*, 43 L. T. 490—C. A.

c. Part Performance.

i. *Generally.*

Principle on which Court acts.]—In enforcing contracts of which there has been a part performance, courts of equity proceed upon the ground that it is a fraud in such cases to set up the absence of a binding agreement, and the equity arising from part performance operates against a company in like manner as against an individual. *Wilson* v. *West Hartlepool Ry.*, 34 L. J., Ch. 241 ; 11 Jur. (N.S.) 124 ; 13 W. R. 361.

The enactments of the Companies Clauses Act of 1845, prescribing the mode in which contracts may be entered into on behalf of a company, are affirmative only, and do not preclude the enforcement against a company of the ordinary equity, based on part performance. *Ib.*

Must be referable to the Agreement.]—Parol agreement not enforced, upon the ground of part

performance, when the act is equivocal and easily admits compensation, as by a tenant rebuilding a party wall. So a tenant's possession and cultivation of the land would not sustain a parol agreement to purchase. The act must be unequivocal, and such of itself as to infer some agreement, the terms of which may then be proved by parol. *Frame* v. *Dawson*, 14 Ves. 386; 9 R. R. 304.

Any act which may be referred to a title distinct from the verbal agreement of which specific performance is sought cannot be considered as a part performance thereof, to take the case out of the Statute of Frauds. *Brennan* v. *Bolton*, 2 Dr. & War. 349.

A court of equity will enforce an agreement in writing modified by parol, and partly performed, if the terms of the contract can be established with sufficient certainty, if the part performance is clearly referable to the contract proved, if the plaintiff's contract throughout has been perfectly correct, and if the contract is fair and honest. *Price* v. *Salusbury*, 14 L. T. 110.

When Doctrine Inapplicable.]—The doctrine of part performance of a parol agreement is not to be extended by the court, and it is inapplicable in a case where a trustee has a power to lease, at the request in writing of a married woman, which has not been made. *Phillips* v. *Edwards*, 33 Beav. 440.

Land was vested in a trustee for the separate use of Mrs. E., a married woman, and the deed gave the trustee a power to lease at the request in writing of Mrs. E. The trustee and Mrs. E. agreed by parol to let the property to the plaintiffs, and a lease was prepared, approved of and executed by the trustee and by Mrs. E.; but before their solicitor had parted with it, and before the plaintiffs had executed it, Mrs. E. recalled her assent to it. She had made no request to the trustee in writing:—Held, that there was no contract binding on Mrs. E. and no part performance, and that the plaintiffs could not enforce the agreement. *Ib.*

Of one Side.]—A performance only of one side is not a dispensation of the Statute of Frauds, but a casus omissus against which there is no provision. *Charlewood* v. *Bedford* (*Duke*), 1 Atk. 497.

Mere Parol Agreement not Enforceable.]—Lord-keeper said he would not give help to lease claimed by parol only. *Anon.*, Cary, 7.

ii. *Possession or Outlay.*

Not Necessarily Sufficient.]—The plaintiff and defendant entered into an agreement, that when a certain house belonging to the plaintiff should be completed and finished fit for habitation, the plaintiff would grant to the defendant a lease of such house for twenty-one years. The defendant took possession before the house was completed, and occupied it for a year, but refused to pay rent or execute the lease. The plaintiff filed a bill for specific performance, and moved that the defendant might be ordered to pay the year's rent into court:—Motion refused with costs. *Faulkner* v. *Llewellin*, 31 L. J., Ch. 549; 10 W. R. 378.

Specific performance of a contract partly by parol, though possession had been given, and rent paid, refused on the ground that it would be violating two rules regulating the exercise of the jurisdiction in specific performance; first, that a written agreement cannot be varied by parol; and secondly, that when a parol agreement is sought to be enforced, on the ground of part performance, it must be shewn, plainly and distinctly, what the terms of the agreement are, and that the acts of part performance done are referable to that agreement alone. *Price* v. *Salusbury*, 32 Beav. 446. Affirmed, 32 L. J., Ch. 441; 9 Jur. (N.S.) 838; 8 L. T. 810—L. JJ. *And see* 14 L. T. 110.

Possession given, and payment of rent under one agreement, cannot be considered as a part performance of that agreement as substantially varied subsequently. *Ib.*

The owner of an estate, consisting of freeholds, leaseholds for years and leaseholds for lives, agreed to demise the same in consideration of receiving a year's rent in advance. He signed notices requesting the tenants to attorn to the lessee, but he did not, in the first instance, clearly understand the boundaries, limits and rental of the several estates. The agreement was subsequently added to by a further agreement and by verbal communications, and a sum for the year's rent was paid in advance. These arrangements still left the subject and the terms and conditions indefinite, and difficulties arose in carrying the agreement into effect. Upon a bill by the lessee for specific performance:—Held, that there had been no part performance which had reference to the agreement alleged; that it was too vague and uncertain to be enforced; and that the bill must be dismissed; but, under the circumstances, without costs. *Ib.*

Bill by tenant of a farm for a specific performance of a parol agreement for a new lease, stating improvements made at a considerable expense, and continuance of possession after the expiration of the old lease and payment of an increased rent under the agreement; plea of the Statute of Frauds, ordered to stand for an answer with liberty to except. *Wills* v. *Stradling*, 3 Ves. 378; 4 R. R. 26.

Bill for an execution of a parol agreement for a lease of a house to plaintiff, who in confidence of the agreement had laid out money. Defendant pleaded the Statute of Frauds, &c.: plea allowed. If it had been said to be part of the agreement that the agreement should be put into writing whether defendant must not be answered, quære. *Hollis* v. *Whiteing*, 1 Vern. 151.

Upon a verbal agreement between the plaintiff and one of the defendants (who was the agent of the other defendant) for a lease for three lives, or thirty-one years, of certain lands, at 1*l.* 5*s.* per acre, the plaintiff was put in possession by defendant's bailiff, by the defendant's direction, and the plaintiff paid to the defendant three guineas, entered into possession, stocked the lands and enclosed part of them. The agent subsequently, in a letter to a third person, admitted the agreement, but refused afterwards to execute the leases. To a bill filed for a specific performance of this agreement, a plea of the Statute of Frauds was allowed. *Palmer* v. *White*, Wall. Lyn. 10. And see *Ib.*, 17, n.

Sufficient when Referable to the Agreement.]—Possession by a lessee continued after, though taken previously to, a parol agreement for a lease exceeding three years, is a sufficient act of part performance to take the case out of the Statute of Frauds, provided the continuance in possession

is unequivocally referable to the agreement. *Hodson* v. *Heuland*, 65 L. J., Ch. 754 ; [1896] 2 Ch. 428 ; 74 L. T. 811 ; 44 W. R. 684.

Agreement for lease, in part performed by possession taken, though without express assent, acquiesced in and expenditure permitted ; specific performance, according to the plaintiff's evidence, against the assertion of a right of resumption by the answer, and one witness not proving that it was admitted. *Gregory* v. *Mighell*, 18 Ves. 328 ; 11 R. R. 207.

Specific performance of a parol agreement to grant a lease, decreed on the testimony of one witness, confirmed by circumstances, against the denial in the answer, after part performance by delivery of possession. *Morphett* v. *Jones*, 1 Swanst. 172 ; 1 Wils. Ch. 100 ; 18 R. R. 48.

Where possession delivered under an agreement, and money expended in permanent improvements, parol evidence admitted to prove the agreement. *Toole* v. *Medlicott*, 1 Ball & B. 393.

Parol agreement proved by one witness, corroborated by others, and not denied by answer, enforced upon the ground of part performance. *Ib.*

If possession be distinctly referable to the contract alleged in the pleadings, it is considered as part performance. *Kine* v. *Balfe*, 2 Ball & B. 348.

An agreement in writing for a lease not signed by the party sought to be charged, specifically executed, on the ground of part performance, viz. possession taken and rent paid, according to the terms of the agreement. *Ib.*

Where the agreement was to grant a lease without binding the other party to accept it, yet where he had been in possession under the agreement, so as to bind himself by part performance, the agreement was held valid. *Dowell* v. *Dew*, 1 Y. & Coll. C. C. 345 ; 12 L. J., Ch. 158 ; 7 Jur. 117.

A. B. offered in writing to grant a lease of a coal mine upon certain terms. C. D. verbally accepted the offer. A draft lease was sent to him, and returned with the approval of C. D.'s solicitor. C. D. laid out money in driving shafts towards the coal mine through the adjoining property. Before any lease was executed, and something more than a month after the return of the draft lease, A. B. died :—Held, that the parol acceptance of the written offer of the lessor, coupled with the subsequent acts in the lifetime of A. B., entitled C. D. to specific performance of the agreement from the representatives of A. B. *Benecke* v. *Chadwicke*, 4 W. R. 687.

A parol agreement was entered into for a lease on terms which, by direction of the proposed lessor, the proposed tenant instructed a solicitor to reduce to writing. The solicitor took down the terms as stated by the tenant, and afterwards prepared from them a draft agreement, embodying these and other terms, and sent it to lessor, who afterwards, and without objecting to it, let the tenant into possession, and directed the solicitor to prepare a lease in conformity with the draft agreement, but subsequently objected to the lease so proposed, and gave the tenant notice to quit :—Held, that the delivery and taking of possession were a sufficient part performance of the agreement as expressed in the draft, to exclude a defence founded on the Statute of Frauds. *Pain* v. *Coombs*, 1 De G. & J. 34 ; 3 Jur. (N.S.) 847.

Possession and expenditure on the faith of a parol agreement to grant a lease of a farm are sufficient to entitle the tenant to a lease, although the agreement is denied by the landlord. *Farrall* v. *Davenport*, 3 Giff. 363. Affirmed, 8 Jur. (N.S.) 1043 ; 5 L. T. 436—L.JJ.

A bill was filed for specific performance of an agreement to grant a lease. There had been an unstamped agreement for a lease signed by the lessee, but which had been mislaid. The terms were subsequently embodied in a printed form, the blanks of which had been filled up in pencil by the lessor, but the document was unsigned and unstamped. It was alleged that the lessee took possession with the consent of the lessor, under the terms of this agreement :—Held, that there had been a sufficient part performance of the unsigned agreement to support a decree for its specific performance. *Miller* v. *Finlay*, 5 L. T. 510—L. C.

R. took four houses and land of J., it being agreed by J. to grant a lease for forty years, at 185*l.* a year, and R. agreeing to erect certain buildings within three years. This agreement being embodied in a short memorandum, a more extended agreement in a legal form was drawn up by J.'s solicitor, but neither document was ever executed. R. remained in possession for twenty-five years, and erected some of the buildings, not being able to erect the remainder owing to J. failing to give possession of the requisite land. R. having regularly paid the rent, and there being documentary evidence to shew that J. considered that R. was in possession on the terms of the unsigned agreement, on a bill filed by R. for specific performance of the contract to grant the lease :—Decree made without costs. *Reddin* v. *Jarman*, 16 L. T. 449.

The Statute of Frauds cannot be pleaded to a verbal agreement to allow the occupation of a leasehold house for life on payment merely of ground rent, rates and taxes, if there has been a part performance by possession under the agreement, and the agreement has affected the mode of living of the occupying party. *Coles* v. *Pilkington*, 44 L. J., Ch. 381 ; L. R. 19 Eq. 174 ; 31 L. T. 423 ; 23 W. R. 41.

The plaintiff was a lessee of a house and other premises for a term of thirty-one years at a rent of 60*l.*, and was under a covenant to make certain improvements on the property. He was also tenant from year to year of an adjoining meadow, belonging to a different proprietor, at a rent of 9*l.* The lessor of the house became the purchaser of the meadow ; and by arrangement between him and the plaintiff, the improvements were extended, and part of the house was made to project over the field, and part of the field was attached to the demised premises, the plaintiff paying about half of the expense of the alterations, which far exceeded the sum he had originally covenanted to lay out, and also signing a memorandum, which the lessor drew up, to the effect "that, in consideration of advances made to him by B. for the purpose of additions and improvements, the rent for the house and field should be raised from 69*l.* to 80*l.*":—Held, that the extension of the house into the meadow by the plaintiff with the concurrence of his landlord was evidence of, and was sufficient consideration for, a contract to demise the meadow ; that the act of building part of the house upon the meadow, if it was evidence of any right, was evidence of a right which affected the entire tenement, and that it could not be restricted so as to affect only

the part of the meadow actually built upon; that the extension of the house part of the demised premises into the meadow, and the increase and consolidation of the rents, was evidence that the meadow was to be held for the same term as the demised premises; that the doctrine with regard to the mutuality of contracts had no application to such a case. *Sutherland* v. *Briggs*, 1 Hare, 26; 11 L. J., Ch. 36; 5 Jur. 1151.

Possession of a house, by delivery of the keys. *Guest* v. *Homfray*, 5 Ves. 818; 5 R. R. 176.

By Sub-lessee.]—A., a tenant in possession, filed a bill against B. for the specific performance of a parol agreement for a lease of thirty years. A. had contracted to sub-let, and his sub-lessee had expended money in alterations and repairs with the knowledge and approval of B.:—Held, that the outlay by the sub-lessee was as much a part performance of the agreement as if made by A., who was therefore entitled to specific performance. *Williams* v. *Evans*, 44 L. J., Ch. 319; L. R. 19 Eq. 547; 32 L. T. 359; 23 W. R. 466.

By Assignee.]—In 1840 a railway company, by an instrument under seal, agreed to grant to G. and P., their executors, administrators, or nominees, a lease of an hotel at one of their stations for a term of ninety-nine years; and it was agreed between the parties that G. and P. should have the occupation of the refreshment-rooms at the same station, subject to the same restrictions and provisions as related to the carrying on the business of the hotel, both as regarded the quality and price of provisions and the management thereof. The lease of the hotel was executed; it made no mention of the refreshment-rooms, which, however, were occupied by G. and P. The plaintiff was the assignee of G. and P. of the lease, and all their interest under the agreement of 1840, and occupied the refreshment-rooms:—Held, that he was entitled to have a deed executed by the company granting him the occupation of the refreshment-rooms, subject to the restrictions and provisions in the agreement mentioned. *Flanagan* v. *G. W. Ry.*, 38 L. J., Ch. 117; L. R. 7 Eq. 116.

A director of a railway company had entered into an agreement with the company for the occupation by a firm, of which he was a member, of premises belonging to the company, and had assigned his interest under the agreement to the plaintiff:—Held, that the plaintiff was in the same position as the director, and therefore could not maintain a bill for specific performance of the agreement. *Ib.*

Contract must be clearly Proved.]—Entering into possession under a contract for a lease is a part performance; but the court will not decree a specific performance, unless the terms of the contract are clearly proved. *Mortal* v. *Lyons*, 8 Ir. Ch. R. 112.

Therefore, where a tenant paid a fine and entered into possession, but did not claim a performance of the contract for a lease for thirteen years, and until after the death of the agent with whom the contract was said to have been made, during part of which time he paid an increased rent, and there was evidence that the contract was for a tenancy from year to year, the court refused a specific performance. *Ib.*

Lease not decreed upon expenditure in repairs and improvements, under an alleged agreement, proved by one witness, the answer containing a positive denial of the agreement, which denial was also confirmed by circumstances. *Pilling* v. *Armitage*, 12 Ves. 78; 8 R. R. 295.

Specific execution of a parol agreement, for a lease for three lives, proved by one witness, refused; the answer, admitting an agreement for one life only, supported by the testimony of one witness, and not inconsistent with the evidence of part performance by plaintiff. *Lindsay* v. *Lynch*, 2 Sch. & Lef. 1; 9 R. R. 54. See also *Mortimer* v. *Orchard*, 2 Ves. Jun. 242.

Agreement for New Lease — Continuing in Possession.]—Though a lessee for years on a parol agreement and the credit of a promise of having a lease made to him continuous in possession, yet it is within the Statute of Frauds, and equity will not enforce, especially if no improvements were made by him. *Seagood* v. *Meale*, Pre. Ch. 560.

It is not a sufficient part performance to take a case out of the Statute of Frauds, that the plaintiff to whom a verbal promise of giving a lease for twenty-one years had been made, being tenant from year to year of the lands, had continued in possession. *Brennan* v. *Bolton*, 2 Dr. & War. 349.

A person occupied part of the business offices of a company as tenant from year to year. An agreement was entered into to grant him a lease for twenty-one years of the premises which he occupied at the same rent and under the same conditions. The agreement did not comply with the Statute of Frauds:—Held, that a continued occupation of the same premises after the date of the agreement on the same terms and conditions as before did not entitle him to specific performance of the agreement *Brady, Ex parte, National Savings Bank Association, In re*, 15 W. R. 753.

By memorandum in writing, A. granted to B. a lease for the term of three years, and agreed, upon B. giving him notice in writing, within three months after the expiration of the lease, to grant him a new lease for a further term. At the expiration of the three years B. retained possession and applied to A. (but whether or not in writing did not appear) for a new lease, and the solicitors of A. and B. prepared a draft of the intended lease. In consequence of some difference as to terms, B. refused to accept the lease. On bill filed by A. for specific performance:—Held, that B. having by his answer admitted the demand of a lease, but not having expressly set up the Statute of Frauds, was bound to accept a lease, although his demand might not have been in writing. *Beatson* v. *Nicholson*, 6 Jur. 620.

iii. *Payment of Rent.*

Increased Rent.]—A landlord having verbally agreed with his tenant to grant him a lease for twenty-one years at an increased rent, with the option of purchasing the freehold, died before the execution of the lease. Before his death the tenant had paid one quarter's rent at the increased rate:—Held, that this constituted a sufficient part performance of the agreement to take the case out of the Statute of Frauds, and specific performance was decreed. *Nunn* v. *Fabian*, 35 L. J., Ch. 140; L. R. 1 Ch. 35; 11 Jur. (N.S.) 868; 13 L. T. 343.

F. was tenant to C., with a promise of a lease for twenty-one years, from September, 1851, to

September, 1872, at the rent of 84*l.* 16*s.* Afterwards C. entered F.'s name in his rent-book as tenant of 128 acres at 16*s.* an acre, at the yearly rent of 102*l.* 8*s.*, less 4*l.* for county cess—98*l.* 8*s.* "Tenure thirty-one years from September, 1872, at rent of 16*s.* per acre, allowed 4*l.* for county cess—98*l.* 8*s.*" To which was added the following remark: "F.'s tenure ceased September, 1872. Mr. C. agreed to give a lease of thirty-one years at 16*s.* per acre, and to take the old rent for one year, ending September, 1873, in consequence of failure of potato crop." F. continued in possession, and paid the increased rent from September, 1873. The entry in the rent-book was in C.'s handwriting. In an action after C.'s death by his son, as the owner of C.'s estate, against F. to enforce specific performance of an agreement to take a lease for thirty-one years:—Held, that the continuance in possession of F., and payment of the increased rent being upon the evidence referable solely to the agreement of 1872, were acts of part performance to take the case out of the Statute of Frauds. *Nunn* v. *Fabian* (L. R. 1 Ch. 35) followed. *Conner* v. *Fitzgerald*, 11 L. R., Ir. 106.

Where a new letting at an altered rent is made to a tenant in possession under a pre-existing tenancy, the payment by the tenant, and the acceptance by the landlord, of the altered rent, if shewn to have been paid and accepted on foot of the new tenancy, is a sufficient part performance to enable either party to sustain an action for specific performance of the contract for such new tenancy. *Ib.*

The payment of an increased rent, draining, and planting, done by the tenant in pursuance of a concluded parol agreement with his landlord for a lease, are a sufficient part performance to take the case out of the Statute of Frauds. *Howe* v. *Hall*, Ir. R. 4 Eq. 242.

But where the rent of neighbouring tenants had been increased at the same time as plaintiff's, the sum expended on improvements was small, and such as a tenant from year to year might have prudently expended, and the tenant had on different occasions given different versions of the agreement, the court, not being satisfied on the evidence that a concluded agreement had been proved, refused specific performance after the landlord's death. *Ib.*

When a parol agreement for a lease was entered into with the tenant of the lands, and for a number of years after this agreement he continued to hold the land at the rent stipulated by the terms of the agreement, which exceeded the former rent, a specific performance was decreed against the other party. *Desart* v. *Goddard*, Wall. Lyn. 347.

A party entering into an agreement, which at the time he cannot perform, must, on the bar being removed, execute his agreement. *Ib.*

Amount not Specified.]—It was part of an agreement to purchase a farm that the vendor should, for twelve years from the completion, be at liberty to require, at his own expense, and the purchaser agreed to grant him a lease of the farm, at a rent to be estimated at a specified percentage on the outlay in making the purchase. The vendor, just before the completion, wrote a letter to the purchaser, agreeing to pay the percentage on the amount of the purchase-money (which had been already paid), but stating that the letter was a temporary thing until the completion of the purchase, and the execution of an agreement already prepared and intended to be executed. The agreement referred to had been ingrossed, and provided for the payment of a rent calculated on the aggregate amount of the purchase-money and expenses of the purchase and of repairs, but left the amount in blank. It was never signed, but the vendor remained in possession, and paid rent calculated on the aggregate amount:—Held, that there was a sufficient part performance to exclude a defence founded on the Statute of Frauds, to a bill for specific performance of the agreement to take a lease. *Powell* v. *Lovegrove*, 8 De G. M. & G. 357; 2 Jur. (N.S.) 791.

Alleged Inadequacy.]—M., a tenant of L., was offered a lease of certain lands, and a written agreement was produced for a term of thirty-one years, at 38*l.* rent, and tendered to her for signature. M. objected to 38*l.* as a mistake for 33*l.* Whereupon L.'s agent said that M. should have the farm for 33*l.*, and wrote a memorandum upon the agreement that M. said her rent was 33*l.* M. then signed the agreement. She paid the 33*l.* and continued in possession for six years, when L. commenced an action to enforce specific performance of the agreement at the rent of 38*l.*:—Held, that there was a complete agreement, partly written and partly verbal, for a lease at the rent of 33*l.*: and that the circumstance of M. being permitted to continue in possession after the expiration of her lease, and the payment of rent by her at the agreed amount, constituted part performance sufficient to take the case out of the Statute of Frauds, and to entitle L. to a decree for specific performance. *Lanyon* v. *Martin*, L. R. 13 Ir. 297.

Under a marriage settlement tenant for life, with remainder to his first and other sons by his wife F., in tail, with remainder to himself in fee, had power to grant leases for ninety-nine years in possession at the most improved rent under an indenture of lease to be executed with certain formalities. Twenty-eight years after the marriage, the wife still living, and there being no issue of the marriage, the husband gave a bond conditioned for the granting a lease for ninety-nine years, at a rent of 20*l.* per annum, upon the expiration of a subsisting lease. As soon as the subsisting lease determined, the obligee of the bond entered into possession, and for some years paid a rent of 20*l.*:—Held, notwithstanding some evidence of inadequacy in the rent, that the representatives of the obligee were entitled to a decree for specific performance of the agreement contained in the bond. *Butler* v. *Powys*, 2 Coll. 156; 9 Jur. 959.

iv. *Other Acts.*

Execution of Repairs.]—After an offer had been made by a plaintiff to take a lease of a farm from the defendant, a draft was prepared by the defendant's solicitors, and approved of by the plaintiff with some alterations, and was afterwards altered by the defendant himself, and left by him with his solicitors, for the purpose of its being ascertained whether the plaintiff would agree to the alterations. On their submitting it to him, he agreed to the alterations, but no agreement was signed. A part of the terms was that the plaintiff should execute certain repairs before the lease was granted. The plaintiff was put into possession by the direction of the defendant's solicitors, and

executed some repairs:—Held, that, although the plaintiff might have been let into possession without authority from the defendant, there was a concluded agreement for a lease on the part of the defendant, and a sufficient part performance to take the case out of the Statute of Frauds, and a specific performance was decreed. *Shillibeer* v. *Jarvis*, 8 De G. M. & G. 79.

Building and Granting Leases.]—B., in consideration of a parol agreement with A. for a lease, pulled down houses, erected new ones, granted leases, received rents and acted as owner. A., when sick, bade B. get leases prepared from a precedent he gave him, and then died. Though this agreement was not in writing, yet it was so far materially executed on B.'s part, that it ought to be performed on the other, and so decreed. *Lister* v. *Foxcroft*, Colles, P. C. 108; Gilb. 4, 11.

Equity will relieve in case of a fraud, although there be nothing in writing to charge the party. As if A. agrees with B., by parol, for a lease of ground, B. enters and builds, and then A. refuses to grant him a lease. On a bill by B., to have this agreement executed, A. pleads the Statute of Frauds, the agreement being parol. The court overruled the plea, and afterwards decreed A. to perform the agreement, and to pay the costs. *Floyd* v. *Buckland*, 2 Freem. 268. *Twyne's Case*, 3 Co. 82. *Butcher's Case*, 1 Eq. Abr. 21, pl. 9; 1 Eq. Abr. 20, pl. 5. S. P., 2 Freem. 285. S. P., *Savage* v. *Foster*, 9 Mod. 38.

Preparing Draft Lease.]—Decree for specific performance of agreement to grant a lease, of which only one part signed by plaintiff was found in possession of defendant, upon the circumstances, viz. possession, drafts, prepared and approved, and the execution deferred only till repairs completed. An extension of the term according to a variation of the agreement, also in writing, was refused on the ground of want of consideration. *Robson* v. *Collins*, 7 Ves. 130; 6 R. R. 92.

Specific performance of a parol agreement to grant a lease enforced against the intended landlord, on the ground of part performance, and on evidence consisting of a memorandum by the landlord, the parol testimony of a witness present, and the draft of a lease prepared by the landlord's steward, though the draft of the lease provided that the tenant should do an act for the landlord's benefit, which was not mentioned in the landlord's memorandum or the witness's testimony. Observations on part performance as a ground for avoiding the operation of the Statute of Frauds. *Mundy* v. *Joliffe*, 5 Myl. & C. 167; 9 L. J., Ch. 95; 3 Jur. 1045. Reversing 9 Sim. 413.

Preparing Deed.] — Specific execution of a contract to grant a lease decreed, the contract having been performed in all respects save the execution of the lease; and time, if of the essence of the contract, not being the ground upon which the landlord refused out of court to execute the lease; but without costs, because of the laches of the plaintiff in asserting his right. *Burke* v. *Smyth*, 3 Jo. & Lat. 193; 9 Ir. Eq. R. 135.

Receiving Fines.]—On bill for specific performance of a parol agreement to let lands; evidence that defendant had suffered wife to receive money from the plaintiff in consideration of fines (he being incapable of receiving them), and had written a letter to a third person acknowledging the demise, and stating that he was ready to make leases:—Held, sufficient to take case out of Statute of Frauds. *Hartly* v. *Wilkinson*, 1 Ridgw. L. & S. 357.

Change of Place of Business.]—The plaintiff removed his place of business to a house belonging to the defendant, his father-in-law, upon the faith, as he alleged, of a parol promise by the defendant that he should occupy the house rent-free during his life. During the period of his occupation he spent various moneys in repairs, which were chiefly of the ordinary description, except the putting up a new staircase, and a new roof to an outhouse. The defendant brought an ejectment, and the plaintiff filed a bill for relief:—Held, that the change of the plaintiff's place of business did not constitute a sufficient consideration to support the parol agreement. *Millard* v. *Harvey*, 34 Beav. 237; 10 Jur. (N.S.) 1167; 13 W. R. 125.

Held, also, that he was not entitled to any lien in respect of the moneys spent in repairs. *Ib.*

The plaintiff's wife, without his knowledge, asked the defendant to sell a field belonging to him. She paid the defendant 150*l.*, but he refused to sell the field, and nothing further was then done. A short time afterwards the defendant let the plaintiff into possession, and the plaintiff, without knowing of the transaction between the defendant and his wife, continued in possession for ten years, without paying any rent. During this time no interest upon the 150*l.* was paid by the defendant:—Held, that there was sufficient evidence of a contract, and a decree was made for specific performance. *Ib.*

Miscellaneous.]—Bill for specific performance of a parol agreement to grant a lease for twenty years; plea of the Statute of Frauds, and an answer denying that acts alleged as part performance were done in part performance: the plea was saved to the hearing with liberty to except; Lord Chancellor inclining to the opinion that though the agreement is admitted, the statute may be used as a defence to the suit. *Moore* v. *Edwards*, 4 Ves. 23.

Bill for specific performance of a parol agreement for a lease within the Statute of Frauds charging possession taken under the agreement, and other acts of part performance. Plea of the statute, and answer, not denying the acts alleged as a part performance, but stating that, being advised he entered as tenant at will, he gave notice to quit. Plea overruled. *Bowers* v. *Cator*, 4 Ves. 91.

Tenant for life agrees to grant a lease for lives renewable for ever, having a power to make such leases, and dies. The remainderman will be decreed to execute the contract, though he took his remainder as a purchaser for valuable consideration; but if the contract were by parol, and partly performed, so as to take it out of the Statute of Frauds, though the tenant for life would have been decreed to execute it, yet it seems it cannot be enforced after his death against the remainderman. *Lowry* v. *Dufferin*, 1 Ir. Eq. R. 281.

Specific performance decreed of a parol agreement in part performed for surrendering a lease

and granting a new lease at a reduced rent. *Parker* v. *Smith*, 1 Coll. 608.

In the month of May, 1843, a parol agreement was entered into between A. and B., for a partnership between them, as to certain land intended to be used for building purposes, and a lease of it was afterwards executed by the lessor to B. only, the lessor declining to grant a lease to two persons. Certain acts of ownership were exercised by A., shortly after the agreement was entered into; but afterwards A. permitted B. to lay out his money in the erection of buildings on the land, without interfering therewith. After a lapse of eighteen months A.'s solicitor applied to B. to perform the agreement, which B. repudiated; six months afterwards, A filed his bill against B., seeking specific performance of the agreement:—Held that the circumstances were such as to exclude A. from insisting on the specific performance of the agreement by B.; but, in the order dismissing the bill with costs, directions were given to the master to disallow the defendant the costs occasioned by his setting up the Statute of Frauds, and disputing the parol agreement and part performance thereof. *Cowell* v. *Watts*, 2 Hall & Tw. 224; 19 L. J., Ch. 455.

And see also CONTRACT.

d. Defences.

i. *Vagueness and Uncertainty.*

As to Rent, or Commencement or Duration of Term.]—Where on an agreement for a lease, the particular rent, commencement and duration of the lease are uncertain, or depend upon the approbation of a third person, a court of equity will direct proper issues to ascertain these several facts, before any specific performance of the contract is decreed. *Plunket* v. *Kingsland (Lord)*, 1 Bro. P. C. 322.

An agreement between members of a family to grant a lease from year to year at a fair annual rent, for so long as the lessee should choose:—Held, so vague and uncertain that the court could not execute it. *Thellusson* v. *Rendelsham (Lord)*, 11 Jur. 29.

P. being seised of an estate by lease for life, renewable for ever subject to a rent equal in amount to a rent which a sub-tenant paid him for part of the estate, agreed in writing to let the other part in his own possession to D., his brother, for the lives of D. and two others, and the life of the survivor, free from rent and assessments during D.'s life, to be subject to a rent of 350*l.* during the other lives or life surviving D.: leases to be executed at the request of either party. A memorandum was added of the same date, signed by both parties, stating "rent to be payable half-yearly, every 1st of May and 1st of November henceforward." Prior to the agreement, D. being elected member of parliament for a city, was required to take the members' qualification oath; and a petition was threatened against his return for want of qualification, but was abandoned at the date of the agreement. P. died intestate, without executing a lease or parting with possession:—Held, by the lords (affirming a decree, dismissing a bill filed by D. against P.'s heir-at-law for specific performance), that the circumstances and evidence shewed that the object of the agreement was to give D. a qualification for parliament, that no interest in the property passed, and that the parties never intended that the agreement should be executed, and therefore the execution of it could not be enforced either as an agreement for valuable consideration (which was the case made by the bill) or as a gift. Courts of equity do not decree specific performance of incomplete gifts. The uncertainty which the above memorandum made in the agreement would of itself make it impossible to decree specific performance without paying the rent of 350*l.* from its date. *Callaghan* v. *Callaghan*, 8 Cl. & F. 374. And see *S. C.*, 4 Ir. Eq. R. 441.

A plaintiff by her bill alleged that an agreement to take a house had been entered into by the defendant, and charged that though no formal note thereof was ever made, yet that the same was proved and made out of the letters of the defendant and his agent, and that such letters were a sufficient note thereof. A letter of the defendant's was proved, containing an agreement to take the house, and give 50*l.* more of premium, "provided I get the profit rent of the present tenant." Upon evidence aliunde, shewing what, in fact, these words meant, specific performance was decreed. *Skinner* v. *M'Donall*, 2 De G. & Sm. 265; 17 L. J., Ch. 347; 12 Jur. 741.

Lease for three Lives—Lives not named.]—Specific performance decreed of an agreement for a lease for three lives unnamed. *Kensington (Lord)* v. *Phillips*, 5 Dow. 61; 16 R. R. 96. *Fitzgerald* v. *Vicars*, 2 Dr. & Wal. 298. See also *Pentland* v. *Stokes*, 2 Ball & B. 68.

As to Subject-matter.]—A contract for a lease of "coals, &c.," or "minerals," is too ambiguous to be carried out by this court. *Price* v. *Griffith*, 1 De G. M. & G. 80; 21 L. J., Ch. 78; 15 Jur. 1093.

A contract by the owner of one undivided moiety of a colliery, for a lease of the whole colliery, will not (in the absence of fraud or collusion) be decreed to be specifically carried out as to his own moiety, either with or without compensation. *Ib.*

Semble, in such case the parties will be left to damages at law. *Ib.*

Where terms for letting farms provided that all materials required for buildings proposed to be built, or that might thereafter be built, should be led at the expense of the tenant; that the landlord should drain, the tenant leading tiles; that gates, buildings, "&c.," should be left in repair by the tenant, the landlord finding new gates when required; that the landlord reserved to himself all customary rights and reservations, such as liberty to cut and plant timber, search for and work mines or minerals, "&c.," allowing the tenant for any reasonable damages:—Held, that these stipulations did not render the agreement uncertain, so as to be incapable of being enforced specifically. *Parker* v. *Taswell*, 2 De G. & J. 559; 27 L. J., Ch. 812; 4 Jur. (N.S.) 1006; 6 W. R. 608.

Where an agreement for a lease of mineral property did not clearly define the mineral area to be comprised in the lease, the court refused, at the instance of the proposed lessee, to decree specific performance of the agreement. *Lancaster* v. *De Trafford*, 31 L. J., Ch. 554; 8 Jur. (N.S.) 873; 7 L. T. 40; 10 W. R. 474.

A plaintiff, under the power reserved to him in the agreement, had worked the mine on trial, and expended a considerable sum in so doing. The defendant had refused to agree to the limits of the mineral area being fixed, because he con-

sidered it a part of the agreement that the plaintiff should associate with himself some responsible person to work the mine, and give security for the performance of the covenants in the lease, which the plaintiff neglected to do. The court, therefore, refused to direct an inquiry as to the amount expended by the plaintiff in working the mine, and dismissed the bill, but without costs. *Ib.*

A., by contract in writing, agreed with B. to take a lease of "those two seams of coal, known as the two-feet coal and the three-feet coal, lying under lands hereafter to be defined in the Bank End estate," and B. agreed to let to A. "the before-mentioned seams of coal":—Held, that the contract was sufficiently definite to enforce, and that the true construction of it was, that the boundaries of the estate, which consisted of about twenty-seven acres, were to be thereafter defined. *Heywood* v. *Cope*, 25 Beav. 140; 27 L. J., Ch. 468; 4 Jur. (N.S.) 227; 6 W. R. 304.

—— **Exception.**]—An incumbent agreed to grant, at a future period, a lease of his glebe, containing about 437 acres, "except thirty-seven acres thereof," which were not specified:—Held, that the contract was not void for uncertainty. *Jenkins* v. *Green*, 27 Beav. 437; 28 L. J., Ch. 817; 5 Jur. (N.S.) 304.

As to Repairs to be Executed by Tenant.]—See *Baumann* v. *James*, ante, col. 739.

Condition.]—The defendant by letter offered to take a lease of the plaintiff's house for a certain term, at a specified rent, "if put into thorough repair," stating also, "the drawing-rooms we should require to be handsomely decorated according to the present style. Paint is required both inside and outside, although perhaps for some parts one coat might be sufficient." The plaintiff wrote to accept the offer:—Held, that the conditions as to repairs and decorations made the agreement too uncertain for the court to enforce. *Taylor* v. *Portington*, 7 De G. M. & G. 328; 1 Jur. (N.S.) 1057; 3 Eq. R. 781.

A lessee of an hotel from a company applied for a renewal of his lease, on the understanding that he would spend money on improvements. A meeting of the company, informally convened, agreed to grant the renewed lease, and the lessee continued in possession, and expended money on improvements:—Held, that the agreement could not be enforced, as the lessee's undertaking to improve the premises was a material part of the arrangement, and was too uncertain to be inserted as a covenant in the lease. *Gardner* v. *Fooks*, 15 W. R. 388.

B. agreed with C. to take a lease of a house which C. was building when it was "complete, finished and fit for habitation." B. took possession, but afterwards found various objections to it, contending that it was not properly finished. The matter being referred to an expert, he reported that, although there might be some objections, yet the house was "complete, finished and fit for habitation." A decree for a specific performance of the agreement was granted. *Faulkner* v. *Llewellyn*, 9 L. T. 251; 11 W. R. 1055. Affirmed, 9 L. T. 557; 12 W. R. 193—L.JJ.

Bill for specific performance of an agreement to renew a lease, dismissed, the agreement being too vague and uncertain to be executed by the court. *Price* v. *Assheton*, 1 Y. & Coll. 441.

Which of Two similar Papers.]—One of two tenants in common entered into a negotiation for a lease, and wrote a letter stating his willingness to grant a lease on the terms of a paper referred to in the letter. There were two papers, each of which, in some respects, answered the description in the letter. In a suit, by the proposed lessee, for specific performance as to the moiety belonging to the tenant in common who had written the letter:—Held, that the paper to which the letter referred was not sufficiently identified. *Price* v. *Griffith*, 1 De G. M. & G. 80; 21 L. J., Ch. 78; 15 Jur. 1093.

ii. *Inadequacy of Consideration.*

Inadequacy of value is not an objection to decreeing specific performance, unless the inadequacy is so great as to prove fraud, or that the parties could not have intended to execute the contract. *Callaghan* v. *Callaghan*, 8 Cl. & F. 374. *See* 4 Ir. Eq. R. 441.

Valuable.]—Specific execution was decreed of the following contract for a lease: "From the love and affection I have for you as my first cousin, I now promise and engage to you, your heirs, or assigns, during my natural life, in reversion, the farm of C., as now in your actual possession, at 1*l.* 2*s.* 9*d.* per acre, as now paid and payable by you." *Moore* v. *Crofton*, 3 Jo. & Lat. 438; 9 Ir. Eq. R. 344.

The continuance of the rent which was reserved by the former lease is a valuable consideration for the promise to grant the lease in reversion. *Ib.*

An engagement by a landlord with an improving tenant is not to be considered as merely voluntary. *Pulmer* v. *Hamilton*, 2 Ridgw. P. C. 549. And see *Crop* v. *Norton*, 2 Atk. 74; 9 Mod. 233; Barnard. 179.

Lease by Charity.]—A lease by charity for ninety-nine years of a charity farm, as a husbandry lease, cannot stand, without proof of consideration shewing that it is fair and reasonable, and for the benefit of the charity. *Att.-Gen.* v. *Owen*, 10 Ves. 555.

Duty of Lessee.]—A lessee, taking an unusual lease, is bound to see that the consideration is fully stated on the face of the instrument. *Keating* v. *Keating*, Ll. & G. t. Sugd. 133.

iii. *Mistake.*

Omission of Term.]—Party held entitled to resist a suit for specific performance of an agreement to let a public-house, by proving that he had made a mistake in his letter of offer. *Wood* v. *Scarth*, 2 K. & J. 33; 1 Jur. (N.S.) 1107; 4 W. R. 31.

Held, that such mistake was well proved, by shewing that the defendant had previously to writing this letter to the plaintiffs, offered the premises to other brewers upon terms which included the stipulation which he stated had been omitted in such letter by mistake; because such previous offer must be taken to be the offer which he had stated in such letter that he was giving to the applicants in rotation. *Ib.*

Held, also, that want of memory and inaccuracy on the part of the defendant only affected the credibility of his evidence, and did not prejudice his right to relief, as the mistake was clearly proved by other evidence. *Ib.*

Where a material ingredient in the terms of a contract has been omitted, equity considering it

as only resting in treaty will not decree a specific execution. *Bayly* v. *Tyrrell*, 2 Ball & B. 363; 12 R. R. 99.

Although specific performance of an agreement may not be enforced against a defendant who reasonably misunderstood its terms, a mere case of inadvertent omission to propose an intended term is different; and therefore, where an occupant of land under an expiring tenancy had always paid the tithe rent-charge, and afterwards entered into a written agreement with the landlord for a lease at the old rent, but without any stipulation being introduced as to the tithe rent-charge:—Held, that the landlord could not insist on such a stipulation being inserted as a condition of specific performance being enforced against him. *Parker* v. *Taswell*, 2 De G. & J. 559; 27 L. J., Ch. 812; 4 Jur. (N.S.) 1006; 6 W. R. 608.

As to Extent of Premises.]—Where a tender for a lease of a farm was accepted under the mistaken impression that the quantity of land inserted therein by the person making the tender was the same as that intended to be let, and it was subsequently discovered that the quantity of land inserted in the accepted tender was of larger amount than was intended to be let:—Held, that as the mistake was one which related to quantity only, it did not touch the essential terms of the contract, and that specific performance could be granted with an abatement. *McKenzie* v. *Hesketh*, 47 L. J., Ch. 231; 7 Ch. D. 675; 38 L. T. 171; 26 W. R. 189.

Contract by a railway company to grant a lease of the whole of a house No. 1, and part of a house No. 2:—Held, that part of the house No. 1 being evidently intended to be retained by the company, only that other part of it designated in a plan was meant to be included in the lease, and a bill to compel a lease of the whole house dismissed. *Richards* v. *North London Ry.*, 20 W. R. 194.

Agreement not according to Intention of Principal.]—It was held a ground for refusing specific performance of an agreement by defendant's agent to grant a lease, that such agreement was not, in regard to some restrictions on a particular sort of building, in conformity with the defendant's intentions, which intentions he had communicated to his agent, if he had authorised him at all, which was doubtful. *Helsham* v. *Langley*, 1 Y. & C., C. C. 175.

iv. *Misrepresentation or Concealment.*

Misrepresentation.]—Bill for specific performance of an agreement to take a lease of a limestone quarry. In the course of the treaty the plaintiff had represented that the limestone was of a certain quality; the fact being that a quarry in the immediate neighbourhood had been worked, and the stone ascertained not to be of the specified quality. The result of this trial was not known to either party, but might have been ascertained on inquiry; and it appeared that the plaintiff had no knowledge of the quality of the limestone. The defendant afterwards, and before signing the agreement, made a cursory inspection of the old quarry, and satisfied himself that the stone was limestone, but ascertained nothing as to its quality:—Held, that the misrepresentation was a bar to a decree for specific performance. *Higgins* v. *Samels*, 2 John. & H. 460; 7 L. T. 240.

Where a house was described as substantial and convenient, and having five bedrooms; on a bill for specific performance:—Held, that this was no misdescription, although the house was out of repair, and the wall in some places only half-brick thick, and some of the bedrooms extremely small inner rooms, and without fireplaces. *Johnson* v. *Smart*, 2 Giff. 151; 2 L. T. 307.

Suppressing Fact.]—Specific performance of an agreement for a lease, in consideration of the surrender of an old lease, refused, the tenant suppressing that the life on which the old lease depended was, when the agreement was signed, in extremis; and as the new lease would, under a power of leasing, at the highest rent, be void, the surrender of the old lease forming part of the consideration. *Ellard* v. *Llandaff* (*Lord*), 1 Ball & B. 241; 12 R. R. 23.

Equity will not direct a lease, void under a power, to be executed, as it would not bind the inheritance, and might embarrass remainderman. *Ib.*, 251.

Reticence—Uninformed Party.]—There being no fiduciary relation between a vendor and a purchaser, the purchaser is not bound to disclose any fact exclusively within his knowledge which might be expected to influence the price of the subject to be sold. Simple reticence does not amount to legal fraud, but a word or a gesture intended to induce the vendor to believe in the existence of a non-existing fact, which might influence the price of the subject to be sold, would be a sufficient ground for a court of equity to refuse a decree of specific performance; and so, à fortiori, would any contrivance on the part of the purchaser, better informed than the vendor as to value, to hurry the vendor into an agreement without giving him an opportunity of being fully informed on that subject, or taking advice as to the terms of the bargain. *Walters* v. *Morgan*, 3 De G. F. & J. 718; 4 L. T. 758.

Where, therefore, an intended lessor and lessee of minerals were in the above position as to knowledge, and the intended lessee brought to the lessor a lease ready prepared, without previous negotiation as to the details of it, and induced the latter to sign it, saying that he might trust to the proposed lessee for making a fair allowance if the minerals turned out more valuable than was supposed:—Held, that a bill for specific performance by the intended lessee, offering to make a fair extra allowance, could not be sustained, and its dismissal was confirmed on appeal. *Ib.*

Unfairness.]—A bill for specific performance of an agreement for a lease signed by the grantor only, and contrary to his leasing power, of which the plaintiff had notice afterwards, amended, praying an execution of the agreement for the life of the grantor, without requiring compensation for the difference of interest, dismissed, the case proved for the plaintiff creating doubts and suspicions of the fairness of the transactions. *O'Rourke* v. *Percival*, 2 Ball & B. 58; 12 R. R. 68.

v. *Illegality.*

When the plain intent of an agreement is unobjectionable, this court will decree specific performance of it according to such intent, though in its terms the agreement was contrary to a statute; thus an agreement for a lease with a covenant by the tenant to pay all composition for tithes, entered into after the 2 & 3 Will. 4,

c. 119, will be enforced by decreeing a lease to be executed, reserving a rent compounded of the rent agreed upon, and the rent-charge in lieu of tithes, where such is the intention of the parties. *Daly* v. *Duggan*, 1 Ir. Eq. R. 311. S. P., *Davies* v. *Fitton*, 4 Ir. Eq. R. 612; 2 Dr. & War. 225; *Carolan* v. *Brabazon*, 9 Ir. Eq. 124; 3 Jo. & Lat. 200.

vi. *Hardship.*

Extensive Repairs Necessary.]—A tenant under an agreement to take a lease of a house, then unfinished, but which the lessor agreed to finish, is not bound to accept it if the house, upon a competent survey, is found defective, and finished in such a manner that it is likely to subject the tenant under the covenant to repair, to an unusually large annual outlay to maintain it. *Tildesley* v. *Clarkson*, 30 Beav. 419; 31 L. J., Ch. 362; 8 Jur. (N.S.) 163; 6 L. T. 98; 10 W. R. 328.

Specific performance of an agreement to take a lease decreed, where the defendant, knowing that the premises were greatly out of repair, stipulated for certain specific repairs, which were done accordingly, but took possession after being warned that much more extensive repairs were required, and it turned out on examination, after he had taken possession, that it was necessary to take down and rebuild a wall at great expense. *Cook* v. *Waugh*, 2 Giff. 201; 6 Jur. (N.S.) 596; 8 W. R. 458.

Rent unfairly Fixed by Umpire.]—Two parties treating for a lease, agreed that the amount of rent should be fixed by two arbitrators, with power to call in an umpire, whose decision, with that of one of the arbitrators, should determine the rent. The umpire being chosen, he and the arbitrator for the lessee fixed the rent, the former stating as the ground of his decision, that the lessee had agreed with the arbitrators to lay out a large sum upon the premises, but which agreement the lessor had no power to enforce. The arbitrator, too, made his valuation at the instigation of the lessee's wife:—Held, that in these circumstances a specific performought not to be granted. *Chichester* v. *M'Intyre*, 1 Dow (N.S.) 460; 4 Bli. (N.S.) 78.

Interfering with Enjoyment.]—Bill for specific performance dismissed with costs, where the agreement had been procured by the plaintiff under circumstances of great suspicion. A., B. and C. being jointly interested in certain property, A. contracts with B. to take a lease of the whole of it; and the contract expresses that B. is to be bound by the contract, only so far as it is to be performed by him, but that A. is to be answerable to B., even for what is to be done by C.:—Held, that B. will not be precluded from enforcing the contract against A., by the circumstance that C. has taken proceedings in a court of equity, which deprive A. of that possession and enjoyment of the property, the subject of the contract, which it was the purport of the contract to give him; nor by the circumstance that B., A. having declared his resolution not to perform the agreement, has supported C. in some of the applications which he has made, tending to interfere with A.'s enjoyment and possession of the property. —— v. *Ogden*, 5 L. J. (O.S.) Ch. 104.

Sub-Lease—Expiration of Time for obtaining Consent of Superior Landlord — Liquidated Damages.]—An agreement for an under-lease contained a covenant by the lessee with the intended under-lessees that, if the lessors should refuse to grant a licence to him to underlet to them, or in case such licence should not be obtained before the 24th of June, 1864, the lessee should pay to the under-lessees 1,000*l.* as liquidated damages:—Held, that this clause did not give the lessee a right to abstain from applying for a licence, and to pay the penalty in lieu of granting the lease; and specific performance was decreed, although the time specified for obtaining the licence had, in consequence of his not having applied for it, expired. *Long* v. *Bowring*, 33 Beav. 585; 10 Jur. (N.S.) 668; 10 L. T. 683; 12 W. R. 972.

vii. *Failure of Condition.*

Approval of Plans.]—A. agreed to grant a lease to B. as soon as B. should have built a house, with the necessary outbuildings on the land, of the value of 1,400*l.* at the least, "according to a plan to be submitted to and approved by A." B. agreed to build, and take the lease. No plan had been approved of:—Held, that no decree could be made for specific performance. *Brace* v. *Wehnert*, 25 Beav. 348; 27 L. J., Ch. 572; 4 Jur (N.S.) 549; 6 W. R. 425.

Quære, whether, in the absence of the condition as to approval, specific performance would have been decreed. *Ib.*

See also *Cubitt* v. *Smith*, 10 Jur. (N.S.) 1123; 11 L. T. 289.

Formation of Company.]—A lessee wrote to his lessor offering to surrender his lease and to take a fresh lease for twenty-one years to a nominee, or to a company which he intended to form, at an increased rent, but otherwise on the same terms as the existing lease; and by a subsequent letter offered to instruct his solicitor to prepare a draft lease. The lessor telegraphed to him in reply to get the lease prepared. Afterwards correspondence took place between the solicitors as to the form of the lease, and the lessee's solicitor prepared a formal agreement. Differences having arisen, the lessor refused to grant the lease, and the lessee brought an action for specific performance of the agreement to grant a lease and for damages. No company had been formed and no nominee appointed by the plaintiff before the trial of the action:—Held, that assuming that there was a binding agreement for a lease, the formation of a company or appointment of a nominee was a condition precedent, and that the plaintiff could not maintain an action for specific performance of the contract, as he had not performed the condition. *Williams* v. *Briscoe*, 22 Ch. D. 441; 48 L. T. 198; 31 W. R. 907—C. A.

But held, also, on the construction of the correspondence, that there was no binding agreement between the parties, and therefore the action entirely failed. *Ib.*

Non-fulfilment of Promise—Acquiescence.]—When the subject of contract was an agreement to take the lease of a house, and the proposed tenant went into possession at once, and occupied for two years, but, while continuing in occupation, from time to time called on the landlord to fulfil promises which the tenant alleged to have been the inducement for the contract, and paid rent, but always paid it under protest:—Held, that these circumstances did not amount to such

acquiescence as to prevent the tenant from ultimately refusing to perform the contract, but that the payments were to be treated as merely made in respect of the actual use and occupation, and in no other character. *Lamare* v. *Dixon*, 43 L. J., Ch. 203; L. R. 6 H. L. 414; 22 W. R. 49.

A. was the owner of some land, on which he was about to erect buildings; B. wished to have cellars there for wine vaults. A. promised that they should be made dry, but would not introduce that promise into the written agreement. B., however, confiding in the promise, signed the agreement, by which he undertook to accept from A. a lease of the vaults for a certain term, and at a certain rent. B. was to pay down 100*l.*, and was to pay another 100*l.* on the execution of the lease. B. paid the first 100*l.*, and, for his own convenience, before the day fixed, took possession of the vaults, and placed therein a large quantity of wine, but soon complained that the vaults had not been made dry. These complaints he constantly renewed, and every time he paid the rent paid it under protest; and, finally, after more than two years' actual occupation of the cellars, refused to sign the lease, on the ground that the cellars had not been made fit for his occupation, and he did not pay the second sum of 100*l.*, but removed his stock of wines to another place. On a bill for specific performance, the court granted a decree against B., but accompanied it with a direction that there should be an inquiry whether a certain thing suggested by B. in the course of the long correspondence between the parties, but neglected by A., should not be done:—Held, that the decree in this form was erroneous. *Ib.*

Held, also, that the taking possession of the vaults, and the payment of the rent, which payment must be attributed to the actual use and occupation of the premises, did not prevent B. from setting up as a defence the non-performance of the promise which had been the inducement to the contract. *Ib.*

Held, also, that as there had been delay on both sides, though the plaintiff's bill ought to be dismissed, it must be dismissed without costs. *Ib.*

Disclaimer of Part—Separable Conditions.]—When the conditions of an agreement between landlord and builder, whereby the landlord agrees to grant leases of successive plots of land as the houses upon each of them are built to a certain stage, are by the terms of the contract separable, there is no rule of equity to prevent them from being separately enforced by way of specific performance. Therefore, where the assignee of the builder's interest had completed the houses upon some only of the plots agreed to be built upon:—Held, upon a bill for specific performance, that he was entitled to the leases of those plots, even though disclaiming all interest in the remaining plots. *Wilkinson* v. *Clements*, 42 L. J., Ch. 38; L. R. 8 Ch. 96; 27 L. T. 834; 21 W. R. 90.

viii. *Inability of Lessor to Grant Lease.*

Action by Lessee.]—Contract for a lease conditional on the lessor's ability to grant it. A bill for specific performance by the lessee is premature if filed before he can shew that the lesser is able to grant the lease. *Abbott* v. *Blair*, 8 W. R. 672.

But the lessor's acceptance of a deposit on a premium for the lease, and subsequent interest on the balance, sufficiently removes the condition, so as to entitle the lessee to file a bill, and is so far an estoppel. *Ib.*

A bill was filed for specific performance of a contract to grant a lease of premises. The defendant was unable to grant a lease of the entirety, and offered previously to filing the bill to release the plaintiff, and to reimburse him the amount of the repairs which he had done; the plaintiff claimed, however, to be paid for costs and expenses incurred by him in and about entering into the contract, and for other damage sustained by him. Stuart, V.-C., on account of the offer that had been made previously to the institution of the suit, ordered the plaintiff to pay the costs, and directed an inquiry as to the expenses incurred in respect of the repairs only. On appeal:—Held, that the plaintiff was entitled to an additional inquiry, as to the costs and expenses incurred by him up to filing the bill; and that the plaintiff ought to have proceeded at law for damages by reason of the breach of the contract; that, as a reasonable offer had been made to the plaintiff before the institution of the suit, he was properly directed to pay the costs. *Bauman* v. *Matthews*, 4 L. T. 783—L. C.

Action by Lessor.]—A lessee entered into an agreement to let a part of the premises to the defendant, with the option of taking a lease for twenty-one years. The defendant subsequently discovered that the lessee's own lease was for twenty-one years and a quarter, and that the covenants were such as to prevent him from granting the proposed lease. After some negotiations he broke off the contract. Bill for the specific performance dismissed with costs, although the lessee was able, before the hearing of the cause, to grant the lease on the terms of the agreement. *Forrer* v. *Nash*, 11 Jur. (N.S.) 789; 14 W. R. 8.

ix. *Defect in Lessor's Title.*

If a party agrees to let an estate, and files a bill for the specific performance of the agreement, it will be dismissed, with costs, if, in the course of the suit, it should appear that the intended lessor had a defective title; even though the objections, on which the refusal to take the lease was grounded, were frivolous and untenable. *Baskcomb* v. *Phillips*, 29 L. J., Ch. 380; 6 Jur. (N.S.) 363; 1 L. T. 288.

Where it appears from the bill that the plaintiff is unable, from causes which he cannot control, to make a good title, a demurrer will be allowed, and the plaintiff will not be permitted to bring the cause to a hearing on the chance that he may by that time, or before certificate, be enabled to sue the defendant. *Reeves* v. *Greenwich Tanning Co.*, 2 Hem. & M. 54.

An agreement by the vendors to let to the vendees, for the term of sixty-one years, the premises then occupied by the vendors, "as held under A. B.," does not absolve the vendors from the duty of proving the title of their lessor, A. B. And on its appearing that A. B. was himself only a lessee for three lives, with a covenant for perpetual renewal:—Held, that the vendors could not make a good title to grant a lease for a term of sixty-one years. Held, also, that the fact of other premises (besides those proposed to be let to the vendors) being comprised in the lease to A. B. was a fatal objection to the title. *Leathem* v. *Allen*, 1 Ir. Ch. R. 683.

Lease by Tenant for Life—Covenant not binding Successors.]—Agreement to grant a lease for twenty-one years of a house in H.

place, according to proposals, by which it was stipulated that the lease should contain a covenant by the lessor not to let land near H. place for the purpose of making or burning bricks; and that the lease should be in the form of one to be inspected at the office of the lessor's solicitor. The form of lease referred to contained a covenant by the lessor not to let land near H. place for the purpose of making or burning bricks, during the term of twenty-one years, if the lessor should so long live; and it turned out, on inspection of the abstract of the lessor's title, that the lessor was only tenant for life of land near H. place, and unable to bind his successors in the ownership by the covenant not to let:—Held, on exception to the Master's report (finding in favour of the plaintiff's title to grant the lease in a suit by the lessor for specific performance), that this fact, in the circumstances of the case, formed no ground for resisting the performance of the contract. *Dawes* v. *Betts*, 12 Jur. 709.

—— **Release of Mortgage Charge—Trust for unborn Children.**]—The plaintiff was tenant for life in possession, with power of leasing, of certain premises, subject to a mortgage charge in trustees. The trusts of the mortgage were for the plaintiff and wife, for their respective lives, with remainder to their unborn children. To enable the plaintiff to grant a lease of a portion of the property in mortgage, the trustees and the plaintiff and the wife (as cestuis que trustent) joined in releasing that portion from the mortgage; and the plaintiff thereupon agreed to grant a beneficial lease, under the power, of such portion to the defendant. Upon an objection being taken, in a suit for specific performance, to the title to grant a lease, on the ground that the release of the mortgage would be inoperative as against the wife and ulterior cestuis que trustent:—Held, that whether this was or was not a breach of trust on the part of the trustees (there being no legal title by which the position of the lessee could be affected), a court of equity would, under no circumstances, interfere with the title of the lessee, and that, therefore, the objection could not be supported. *Ib.*

Waiver of Right to call for Title.]—By an agreement of the 12th November, 1853, G. S. agreed to take leases of two houses from Christmas following, but to enter into possession of the premises on the 21st November. The agreement contained no stipulation as to investigation of title or delivery of abstract. The fixtures were to be taken by G. S. at a valuation. G. S. on the 12th November took possession of part and on the 21st November took possession of the remaining part of the premises. On the 25th November G. S. requested the lessor's solicitors to defer the preparation of the leases, "as he had a prospect of finding a partner, who he thought should be included therein." On the 10th December drafts of the leases were sent to G. S. for perusal, and on the 18th January, 1854, he was requested to return them approved. On the 16th March G. S.'s solicitor, for the first time, requested the lessor's solicitors to furnish him with an abstract of title, which being refused, G. S. declined to complete the contract, and he gave notice that he should give up possession of the premises on the 31st March. Whilst in possession, G. S. had, inter alia, advertised the premises to be let, with immediate possession, and had been assessed to and had paid rates and taxes. Upon a claim for specific performance of the agreement:—Held, that G. S. had by his conduct waived his right to call upon the lessor for an investigation of the title, and that the agreement be specifically performed:—Held, also, that the lessor was entitled to recover the amount of rent due, and the amount of the valuation of the fixtures. *Simpson* v. *Sadd*, 23 L. J., Ch. 873; 18 Jur. 938; 2 W. R. 578. Affirmed, 3 Eq. R. 263; 1 Jur. (N.S.) 457; 3 W. R. 118—L. C.

—— **Disclosure of Defect during Proceedings.**]—In a suit for the specific performance of an agreement to accept a lease, the court, considering the defendant (the intended lessee), by his conduct, to have waived all objections to the vendor's title, decreed a specific performance of the agreement, and referred it to the Master to settle the lease. In settling the lease, it became necessary, for identifying the premises, to produce before the Master the original lease under which the plaintiff was entitled to the property, from which lease it appeared that the property in question was held, with other property, at one entire rent, and under some special covenants, no provision with respect to which was made in the agreement between the plaintiff and the defendant. On the hearing for further directions, these facts being brought before the court in the shape of exceptions to the report:—Held, that though the defendant had, by his conduct, waived his right to the production of the lessor's title, yet, as, in the course of the proceedings, it had become necessary to produce that title, and that production shewed that a sufficient lease could not be made to the defendant according to the agreement, the court would not enforce a specific performance, and the bill was dismissed, but without costs. *Warren* v. *Richardson*, Younge, 1.

x. *Possibility of Forfeiture.*

A lease of a theatre, with a covenant for renewal, contained a proviso that the lessee should not let any box, with the exception of forty-one specified boxes, for more than the season, or than from year to year. On assignment of the term, the assignor reserved the right for himself and his nominees, during the existing or any renewed lease, to occupy box No. 124, not being one of the excepted boxes. On a renewal being obtained, a similar covenant as to forty-one boxes was inserted in the renewed lease, but they were not specified. The lessee, under the renewed lease, obtained the renewal by means of the covenant in the old lease, and with notice of the reservation as to box No. 124. He granted long leases of forty-one boxes, exclusively of No. 124:—Held, that the possibility of a forfeiture being incurred, if he performed the agreement as to No. 124, was no defence to a suit for its specific performance. *Helling* v. *Lumley*, 3 De G. & J. 493; 28 L. J., Ch. 249; 5 Jur. (N.S.) 301; 7 W. R. 152.

Equity will not decree specific execution of a covenant in a lease violating the restrictions of a prior settlement, of which the lessee had notice. *Crafford* v. *Oliver*, 3 Ridgw. P. C. 315.

xi. *Breach of Intended Covenant.*

Specific performance of articles to grant a lease to the plaintiff decreed, though he had contracted to underlet contrary to those articles. *Williams* v. *Cheney*, 3 Ves. 59.

Bill for specific performance of parol agreement to grant farm lease, with usual covenants of neighbourhood, and injunction to prevent ejectment, plaintiff having taken possession. Upon answer stating insolvency of plaintiff, and various breaches of agreement during five years' possession, to the ruin of estate, the injunction was continued on an undertaking to give judgment in ejectment, go to commission, and set down cause for next term, paying rent into court: defendant also insisted on covenant not to assign; that is subject of inquiry as to custom of neighbourhood. *Boardman* v. *Mostyn*, 6 Ves. 467.

Tenant having committed breaches of covenant, by waste, treating the land in an unhusband-like manner, &c., not entitled to specific performance of an agreement for a lease. *Hill* v. *Barclay*, 18 Ves. 63; 11 R. R. 147.

An injunction, though not to be continued with a view to specific performance of an agreement to grant a lease, if under a clause for re-entry the lease, when granted, would be at an end by the tenant's acts, was maintained upon undertaking to give possession, when required by the court, and paying the rent due, by waiver of the forfeiture if incurred, viz., distraining for subsequent rents. *Gourlay* v. *Somerset* (*Duke*), 1 Ves. & B. 68; 13 R. R. 234.

Whether, even without a right of re-entry, the court seeing a gross case of waste and breach of covenant, not to be indemnified by damages, would leave the tenant to his remedy at law, refusing relief, quære. *Ib.*

A bill was filed by a person in possession of certain lands, for the specific performance of an illegal parol agreement to grant him a lease for seven years, and for an injunction to restrain an ejectment. The defendant by his answer admitted that he had been disposed to permit, and would have permitted, the plaintiff, if he had been satisfied with his conduct, to remain in possession for the time and on the terms alleged to have been specified in the supposed agreement, and that the plaintiff probably expected to remain in possession for that time and on those terms, but he expressly denied that any such agreement had been made; and he insisted that the plaintiff was tenant only from year to year, and had done many acts which would have been breaches of the covenants of the lease supposed to have been contracted. The court upon this answer refused to make the order nisi absolute, and continued the injunction upon terms. *Attwood* v. *Barham*, 2 Russ. 186.

Observations on the landlord's setting up as a defence, in an action for specific performance, that the tenant had done acts which would be breaches of the covenants of the intended lease. *Mundy* v. *Joliffe*, 5 Myl. & C. 167; 9 L. J., Ch. 95; 3 Jur. 1045.

The landlord of a workshop, which he held under a lease, agreed, in writing, to underlet it at a yearly rent, with an option to the tenant to take an under-lease upon the same terms for twenty-one years from the previous Lady-day. The tenant continued in possession under this agreement for four years, when he received notice to quit. He then applied to his landlord for a lease for twenty-one years, according to the agreement. Some months afterwards, the landlord obtained possession of the premises under a warrant of possession from a district court. The tenant filed a bill against the landlord for specific performance and an injunction. It appeared, at the hearing, that the tenant had not kept the premises in repair. The court dismissed the bill with costs, and expressed a doubt whether the plaintiff had not, by his delay alone, lost his option to renew. *Nunn* v. *Trustcott*, 3 De G. & Sm. 304; 13 Jur. 114.

A. agreed, in 1814, for a lease of building ground for seventy-five years, at a ground rent, containing the usual building covenants to insure, repair, allow lessor to enter and view repairs, &c.; and that in case of non-payment of rent, or breach of any covenant, the lessor was to have the right to re-enter. The lease was never executed, but the tenant entered, and built, at considerable expense, and continued in possession up to his decease in 1843. Up to that time the rent was paid regularly, but the covenants to repair and insure were neglected. Upon the decease of the lessee, dispute arose in the Ecclesiastical Court as to the right to representation to his estate, and probate was not granted until 1847. During these four years the rent was in arrear, and the covenants to insure and repair were totally neglected. The lessor threatened to bring ejectment. A bill was filed to restrain the ejectment, and to have a specific performance of the agreement of 1814:—Held, first, that inasmuch as the lessor, if the lease had been formally executed in 1814, would now have had a right to determine it for breach of covenant, the court would not decree a specific performance of it; secondly, that the disputes in the Ecclesiastical Court, as to the right of succession to the lessee, did not afford sufficient grounds for relief. *Gregory* v. *Wilson*, 16 Jur. 304.

The plaintiff claimed, as assignee of four plots of land comprised in a building agreement, that the defendant might be ordered to execute to him separate leases of the plots. It was a necessary part of the plaintiff's case to shew that the houses on the plots of land had been roofed in at the time when he acquired the title, and the statement of claim contained an allegation that the plaintiff's predecessor in title had roofed in the houses by March, 1887. The defendant did not deny this or traverse the allegation by his defence, but alleged, as grounds for resisting the plaintiff's claim, that there had been breaches of the conditions in the building agreement under which the plaintiff's predecessor in title held with regard to building and payment of rent. At the trial of the action it came out in the evidence that small portions of the roofs of the four houses were not thoroughly completed:—Held, that plaintiff was entitled to judgment on the facts. *Lowther* v. *Heaver*, 58 L. J., Ch. 482; 41 Ch. D. 248; 60 L. T. 310; 37 W. R. 465—C. A.

Usual Covenant.]—Where there is an agreement for a lease, of such a nature that, in the usual course, a certain covenant would be introduced in it, and the intended lessee has done that which would be a breach of such covenant, he cannot compel the specific performance of the agreement. *Tunno* v. *Lewis*, 1 L. J., Ch. 177.

Form of Decree where Breach Doubtful.]—A landlord had in 1827 agreed to grant his tenant a lease, but none had been granted though the tenant had been in possession. On a bill by the tenant for specific performance, the landlord set up by way of defence that the tenant had committed waste. The court directed the lease to be executed and antedated, and the question

of waste to be tried at law. *Poyntz* v. *Fortune*, 27 Beav. 393. S. P., *Browne* v. *Sligo* (*Marquis*), 10 Ir. Ch. R. 1.

An agreement was made between A. and B. that A. should grant to B. a lease of a farm, upon the same terms as those contained in a lease already granted by A. to C., and that B. should be at liberty to repair and alter the farm buildings, and that A. should find or pay for the requisite materials. B. was let into possession, and paid rent for some years, but no lease was granted, and ultimately he filed a bill for specific performance, and an account of and payment for materials. A. objected that B. had committed breaches of covenant, which would have entitled A. to determine the lease. The court, being of opinion that it was doubtful whether A. could, under the circumstances of the case, have determined the lease for breaches of covenant, decreed specific performance, but ordered the lease to be antedated, so that the question might be tried at law. *Lillie* v. *Legh*, 3 De G. & J. 204.

The court does not refuse specific performance of an agreement to grant a lease, because of an alleged breach of covenant, unless the breach is clear, but directs the lease to be antedated, in order that further inquiry may be made. *Blachett* v. *Bates*, 2 Hem. & M. 270; 34 L. J., Ch. 515; 11 Jur. (N.S.) 500; 12 L. T. 844; 13 W. R. 736.

Where an award directs a lease to be made containing certain specific covenants, and it is alleged, on the part of the defendants, that the plaintiff has acted in contravention of the terms of the covenant since the date of the award, the court will, if the case is at all doubtful, order the leases to be antedated, so as to enable the defendant to rely on the alleged breaches at law. *Ib.*

If there has been a breach of an agreement for a lease, or what would have amounted to a breach of the covenants which ought to have been introduced into the lease had it been granted, which would have worked a forfeiture, and that is clearly made out, a specific performance will not be decreed; but if there is a conflict of evidence as to whether any breach has been committed, the proper decree, on a suit for specific performance, is to direct the lease to be dated at a time antecedently to the alleged breach, and to require from the plaintiff an undertaking to agree, in any action, that the lease was executed on that day. *Rankin* v. *Lay*, 2 De G. F. & J. 65; 29 L. J., Ch. 734; 6 Jur. (N.S.) 685; 8 W. R. 591.

Nature of Breach.]—The breach must be wilful and deliberate, and such a breach as would work a forfeiture, and render the lease void, had it been granted. *Ib.*

Where a specific performance of an agreement for a lease is refused, on the ground of waste, or acts amounting to breach of ordinary covenants in a lease, the defence can only prevail on clear evidence of gross breaches of the covenant, without any waiver or acquiescence by the landlord. *Pain* v. *Coombs*, 3 Sm. & G. 449; 3 Jur. (N.S.) 307.

Specific performance refused of an agreement to grant a lease for a term expired before the hearing of the cause, the acts of waste committed during the possession of the premises not entitling the plaintiff, in an action on the covenants inserted in the lease, to more than nominal damages. *Nesbitt* v. *Meyer*, 1 Swanst. 223; 1 Wils. Ch. 97; 5 W. R. 340.

By Under-lessee.]—A. agreed to grant a lease to B., who knew that A. held under a leasehold title:—Held, that B. must be deemed to have known that A. could only grant a lease with such restrictions as those under which he held. *Lewis* v. *Bond*, 18 Beav. 85.

Specific performance of an under-lease refused, the intended lessee having, with notice, committed acts which would have been a forfeiture of the original lease. *Ib.*

Act amounting to Nuisance to Landlord.]—Specific performance of agreement to grant building lease decreed generally, although plaintiff had erected brewhouse on land, injurious to lessor's property. *Gordon* v. *Smart*, 1 Sim. & S. 66; 1 L. J. (O.S.) Ch. 36.

xii. *Tenancy from Year to Year.*

The court refused to enforce specific performance of an agreement for a mere tenancy from year to year. *Clayton* v. *Illingworth*, 10 Hare, 451.

xiii. *Delay.*

Specific performance of agreement to grant lease, refused, plaintiff having delayed to file his bill for more than two years since notice from defendant that he would not perform contract on account of plaintiff's non-fulfilment of his part thereof. *Heapy* v. *Hill*, 2 Sim. & S. 29.

Specific performance of agreement to take lease for purpose of trade refused, lessor having long delayed to make title and give possession. *Parker* v. *Frith*, 1 Sim. & S. 199.

F., tenant for life, with a power of leasing for thirty-one years, demises in 1749 for three lives to his attorney. M., his son, tenant in tail, four years afterwards, in consideration of 20*l.* executes an agreement, which was indorsed on the part of the lease in the attorney's hands, to confirm the demise, and renew for a further term of three lives. Eleven years after this F. dies, and the articles are then registered. The last of the three lives died in 1817, and the representative of the attorney files a bill for the specific performance of the son's agreement:—Held, that the case was too suspicious to come within the principle of specific performance, and the length of time elapsed under circumstances which did not imply acquiescence. *Blakeney* v. *Baggott*, 1 Dow (N.S.) 405; 3 Bli. (N.S.) 237.

A. conveys or assigns his interest in lands to B., in consideration, among other things, that B. shall make or give a lease back again to A. of half a portion of the lands, and in consideration also of a loan of 200*l.* by B. to A. B. covenants to execute the lease accordingly, subject to the repayment of 200*l.*, for which B. has a judgment; no lease actually made, but A. remains in possession of his portion upon his equitable title; B. lends further sums of money to A., and obtains judgment for these sums, and then conveys the lands, and assigns judgment to C. C. issues writs of fi. fa. on the judgments, and in 1781 procures a sale by the sheriff of A.'s equitable interest, and on ejectment brought on the demises of the purchaser and of C., A. is turned out of possession. A., in 1782, files his bill in chancery for relief and execution of a lease to him according to the agreement, but from embarrassment in his circumstances does not further prosecute the suit till 1801; no steps taken between 1782 and 1801

to dismiss the bill. In 1808 the bill dismissed below, but House of Lords reversed decree, and decreed specific performance. *Moore* v. *Blake*, 4 Dow, 280. Reversing 1 Ball & B. 62.

A., by an instrument, demised, or agreed to demise, lands to B. for three lives, not named, at a yearly rent, and further agreed that leases should be perfected at the request of either party. As an essential part of the contract, the nomination of the lives, was wanting, this cannot operate as a lease for three lives, nor as a lease for the life of the tenant, that not being the intention of the grantor, but merely as an executory agreement for a lease. B., being in possession under the agreement, on his marriage conveyed his interest in the lands to trustees in strict settlement. A. afterwards served an ejectment for non-payment of rent on B., but not on the trustees or the eldest son of the marriage, and recovered the lands, which he then leased to C., and sold the reversion. Neither B. nor the trustees ever attempted to recover the possession. A bill on the death of B., twenty years after, by the eldest son of the marriage, and for a specific execution of the agreement, dismissed, as the title of the plaintiff, after such lapse of time, and from the circumstances, could not be sustained against a bonâ fide purchaser of the legal interest, accompanied by twenty years' possession. *Pentland* v. *Stokes*, 2 Ball & B. 68.

Under an agreement to let a house for three years at a yearly rent, by which the landlord agreed, at the request of the tenant, to grant him a lease for a term from the expiration of the three years' occupancy, at the same rent, the tenant undertaking to keep the house in repair: —Held, that the tenant is entitled, four years after the expiration of the three years' occupancy, to have the agreement for a lease specifically performed, and neither an application made by him two years previously for a lease at a reduced rent (which was refused), nor an application to the landlord for payment of an amount expended in repairs (which has been allowed the tenant), amounts to a waiver of his rights, though the tenant is bound to refund the cost of the repairs. *Moss* v. *Barton*, 35 Beav. 197; L. R. 1 Eq. 574; 13 L. T. 623.

Specific performance of an agreement for a lease decreed, after a refusal by the tenant to execute any lease and a delay of six months, though the agreement was to execute a lease on a given day, the landlord having at first insisted on an untenable term, and never prepared or tendered a lease to the tenant according to the usual practice. *Burke* v. *Smyth*, 9 Ir. Eq. R. 135; 3 Jo. & Lat. 193.

Possession and Payment of Rent.] — The doctrine of laches does not apply to a bill for the specific performance of an agreement for a lease, which is in point of fact executed, both parties being from the time of the contract in possession of the benefits thereby given them. *Clarke* v. *Moore*, 1 Jo. & Lat. 723; 7 Ir. Eq. R. 515.

In cases between landlord and tenant, where the tenant has been in possession under the agreement, and has not been required by the landlord to take out a lease, lapse of time is not a good defence to a suit for specific performance. *Curtan* v. *Bury*, 10 Ir. Ch. R. 387.

An agreement to take a lease, the landlord to put the premises in repair. The tenant took possession, and on his application the repairs were made after delay. A lease was then tendered containing certain covenants in the landlord's lease:—Held, that the delay in doing the repairs, and the tenant's previous ignorance of the covenants, would not excuse him from accepting the lease. *Nash* v. *Cochrane*, 3 Jur. 973.

In 1855 A. agreed with B. that, "in the event of B. marrying his daughter," he would grant him a ninety-nine years' lease of a shop at C., "should he at any time require it," at a rent of 30*l.* per annum. B. was let into possession of the shop and married A.'s daughter, and duly paid the rent to A. and his assigns until March, 1874, when his then landlord gave him notice to quit. On a bill for specific performance of the agreement:—Held, that B. by his laches and his acts had precluded himself from the relief to which he might have been entitled. *Davenport* v. *Walker*, 34 L. T. 168.

The fixed rule of equity that specific performance of an agreement for a lease will not be granted after a long lapse of time will not be relaxed merely on account of possession and payment of rent during the whole of such time. *Powis* v. *Dynevor* (*Lord*), 35 L. T. 940.

In 1844 the plaintiff verbally agreed with the agent of a predecessor in title of D., to build a shop, and hold the same on lease at a rate of 5*s.* per annum. The plaintiff built a shop and occupied and paid rent for it up to the time of action brought, but no lease was executed, nor were negotiations for a lease had. In 1876 the plaintiff sued D. for specific performance:—Held, that specific performance ought not to be decreed. *Ib.*

At the expiration in July, 1857, of a lease under which by assignment he was in possession of property, B. signed an agreement to accept from A. a new lease for thirty-one years, at the same rent as was reserved by the old lease, and payment of 600*l.* on the day fixed for completion (1st August, 1857), with interest if the lease should not be completed on the day fixed. A draft lease was sent to B. for his approval, but was not returned, and no steps were taken by A. to press for completion. B. remained in possession and paid rent, but no payment of the 600*l.* or interest was ever made or demanded. In 1871 A. died. On a bill by her legal personal representative:—Held, that as B.'s possession and payment of rent must be referred to the new agreement, and not to a holding over after the expiration of the former lease, the lapse of time did not operate as a bar to specific performance, which was accordingly decreed, with interest on the 600*l.* from the 1st of August, 1857. *Shepheard* v. *Walker*, 44 L. J., Ch. 648; L. R. 20 Eq. 659; 33 L. T. 47; 23 W. R. 903.

Expense Incurred by Tenant.]—A tenant having entered into possession of a farm, and expended moneys, under an agreement that the landlord would grant a lease for twenty-one years and make such improvements and repairs as he and the landlord should jointly agree:—Held, that the stipulation as to repairs was not of the essence of the agreement; and that the impossibility of the strict performance of that stipulation, in consequence of the death of the landlord, was no sufficient reason for allowing a demurrer to a bill for specific performance, where the tenant had so long a possession, and had expended money on the faith of the agreement. *Norris* v. *Jackson*, 3 Giff. 396; 8 Jur. (N.S.) 930; 5 L. T. 576; 10 W. R. 228.

New Tenant Substituted.]—In August, 1856, the plaintiff agreed to let a house to the defendant for seven, fourteen or twenty-one years, the defendant to keep the premises in repair, and paint and paper as therein mentioned, and the defendant was let into possession. In 1859 the plaintiff agreed with the defendant to accept W. as tenant in his room upon the same terms, the defendant guaranteeing the rent. W. had just before this period been let into possession by the defendant, and he paid rent till 1863. In that year the defendant gave a notice to determine his tenancy at the end of the first seven years. W. and the defendant having both denied their liability to paint and paper according to the terms of the original agreement, the plaintiff in November, 1864, filed a bill to compel the defendant to accept a lease:—Held, that the defendant could not be compelled to accept a lease. *Moore* v. *Marrable*, L. R. 1 Ch. 217; 13 L. T. 725.

The agreement of 1859 was substitutionary for the agreement of 1856, and although the plaintiff, if he had within a reasonable time called upon the defendant to procure W. to take the lease, would probably, upon the defendant failing to do so, have been entitled to call for performance of the original agreement, he was not so entitled after the time which had elapsed. *Ib.*

Time Essence of Contract.]—An agreement to let lands contained a clause that the tenants should repair the dwelling-house within two years, and put a new roof on it; the landlord to bear one-half of the expense, the tenants to execute and complete a lease, at their own expense, within six months from the date of the agreement:—Held, that in equity time was not of the essence of the contract. *Curtan* v. *Bury*, 10 Ir. Ch. R. 387.

The plaintiff agreed to take certain lands from the defendant, provided the defendant took a store consisting of two parts from the plaintiff for five years, "this agreement to be carried into effect before the 1st of April next, or to be annulled." The plaintiff took possession of the lands, and the defendant of part of the store, but the plaintiff was unable to give possession of the other part until May, and on the 2nd of April the defendant quits. Semble, the time would not have prevented the specific execution of the agreement. *Molloy* v. *Egan*, 7 Ir. Eq. R. 590.

—— **Distinction between Purchase and Lease for Lives.**]—Distinction between a purchase and a lease for lives. As time is not essential in a purchase, any delay may be compensated, either by receipt of the rents and profits, or, in case a title cannot be made out, by interest on the deposit; but in a lease depending on lives where time is most essential, delay does not admit of any compensation. *Ormond* v. *Anderson*, 2 Ball & B. 370; 12 R. R. 103.

Mining Lease.]—In contracts for the lease of working mines, time, though not named, is, from the fluctuating nature of the property, considered as of the essence of the contract; and the intended lessee may therefore fix a reasonable time for completion, and, on the lessor's default, may rescind the contract. *Macbryde* v. *Weeks*, 22 Beav. 533; 2 Jur (N.S.) 918.

A., on the 4th of October, contracted to grant a mining lease to B., and no time was mentioned for completion. On the 10th of December, B. gave notice to A., that unless he completed the contract within a month, he would rescind the contract:—Held, on A.'s default, that B. was justified in giving the notice; that the time was reasonable; and a bill by A. for specific performance was dismissed with costs, although there were matters essential for the completion, which did not depend on A. but on third parties. *Ib.*

Lands were conveyed to a trustee in trust to grant a lease of the mines under the same to certain persons for forty-two years, and at the request of the lessees made at any time thereafter to grant a further lease of the same mines for twenty-one years, to commence at the expiration of the first term, the first lease to contain a covenant for renewal or the second term. The lease of forty-two years was made accordingly. Shortly before the expiration of the first term the lessees applied for the renewal, which was refused. No proceedings were taken to enforce the performance of the covenant or trust for upwards of two years after the refusal:—Held, that so far as the title to renewal depended on the covenant, the delay or acquiescence would be a defence in equity. *Walker* v. *Jeffreys*, 1 Hare, 341; 11 L. J., Ch. 209; 6 Jur. 336.

Semble, that the lessees had an equitable interest in the trust, which would not be devested by the delay alone. *Ib.*

In 1850 the defendant agreed to grant the plaintiff a lease of a coal mine. Three months after the defendant gave notice to the plaintiff that, unless he commenced working in a month, he should consider the agreement abandoned. Two years after, the plaintiff entered and commenced working, but was resisted by the defendant; the working however proceeded, but was abandoned in 1853. Five years afterwards, the plaintiff attempted to resume the work, and filed a bill for specific performance. It was dismissed with costs on the ground of delay. *Sharp* v. *Wright*, 28 Beav. 150.

The specific day for the commencement of a lease, which a tenant had an option of taking, being uncertain:—Held, although the lease was not applied for until nearly eight years after the date of the agreement and after a notice to quit, that the tenant was entitled to the lease, and that it was to commence from the time when the tenancy commenced. *Ib.*

A plaintiff filed a bill for specific performance of an agreement to grant a lease of certain coal mines, entered into on the 28th February, 1872. A dispute arose as to the terms of the agreement, and on the 26th September, 1872, the defendant gave the plaintiff notice that, unless he acquiesced in his views, he should rescind the contract, and on the 29th October following, the defendant stated his intention of abiding by that notice. On the 4th November, 1872, the plaintiff's solicitor wrote to the defendant's solicitor that he was instructed to file a bill for specific performance of the contract. The bill was not filed until the 2nd April, 1873:—Held, that the effect of the notice of September, 1872, was to put the parties at arms' length, and that the plaintiff, if he intended to insist on his rights, ought to have proceeded at once, and that the delay in filing the bill was fatal to the application for specific performance. *Huxham* v. *Llewellyn*, 28 L. T. 577; 21 W. R. 570.

Lease from Ecclesiastical Corporation.]—Time is, to a great extent, of the essence of contracts

entered into with an ecclesiastical corporation. Therefore where A. agreed to take a concurrent lease of a dean and chapter, and to pay the fine in January, but was not ready with the money in March following, a bill filed by him for a specific performance was dismissed with costs. *Carter* v. *Ely* (*Dean*), 7 Sim. 211 ; 4 L. J., Ch. 241.

xiv. *Repudiation of Agreement.*

By Conduct.]—Specific performance of an agreement for a lease will not be decreed in favour of a tenant, who shews by his conduct and representations that he has abandoned the agreement. *Garrett* v. *Besborough* (*Earl*), 2 Dr. & Wal. 441 ; 2 Ir. Eq. R. 180.

xv. *Refusal to Execute Lease.*

Refusal of tenant to execute a lease tendered as satisfied with, not as repudiating, the agreement, is no ground for refusing him a specific performance. *Gourlay* v. *Somerset* (*Duke*), 19 Ves. 429 ; 13 R. R. 234.

Waiver of Option to take Lease.]—A tenant under an agreement, with an option of taking a lease :—Held, not to have waived the option by declining to take a lease when asked so to do, no step being taken to determine the tenancy. *Hersey* v. *Giblett*, 23 L. J., Ch. 818 ; 18 Beav. 174.

xvi. *Expiration of Term.*

Whether specific performance of an agreement to grant a lease, will in any case be decreed after the expiration of the term, quære. *Nesbitt* v. *Meyer*, 1 Swanst. 223 ; 1 Wils. Ch. 97.

Bill for specific performance of a contract to make a lease to the defendant, dismissed, the plaintiff having after answer given a notice to quit according to a proviso for determining the lease. *Western* v. *Perrin*, 3 Ves. & B. 197.

The term in an agreement for the lease of a house expired after a bill was filed for specific performance, but before the hearing of the cause. The bill was dismissed without costs, on the ground that the plaintiff should have moved the court to advance the cause. *De Brassac* v. *Martyn*, 9 L. T. 287 ; 11 W. R. 1026.

A lessor agreed with the lessee to grant a lease of certain specified property if within a specified time the lessee erected certain specified buildings, the time having nearly expired and the buildings not having been begun :—Held, at the suit of the lessor, that the court could not decree specific performance of this contract. *Female Orphan Asylum* v. *Waterlow*, 16 W. R. 1102.

The plaintiff, under an agreement not under seal with the defendant for a lease of a house and land, and the right to sport during the term over other lands, entered into possession, and enjoyed the right of sporting in accordance with the terms of the agreement. Towards the end of the term the coverts on the lands on which the plaintiff had leave to sport were destroyed by P., who was a tenant under the defendant of part of such lands, and their agent as to the remainder. Upon a bill filed for the execution of a lease by deed for the purpose of enabling the plaintiff to bring an action for damages, and praying for an injunction, and for an inquiry as to damages in lieu of specific performance :—Held, the term having then expired, that the plaintiff had had the enjoyment of all that he had contracted for, and that the court would not decree the execution of the lease, and the bill was dismissed accordingly. *Turnor* v. *Clowes*, 20 L. T. 214 ; 17 W. R. 274.

In 1841 a long lease of a coal-mine, pursuant to an agreement, was made by O. to a trustee for a joint-stock company, at a certain fixed rent, and a taleage rent ; the lease was determinable every third year, upon the lessee giving a year's notice. The company worked the mine for a short time, and then ceased to work it. The company was ordered to be wound up in 1850, and in 1852 the official manager, protesting against the validity of the lease as binding upon the company, gave notice to terminate it the following year. Upon a bill filed in 1853 by the party claiming under O. against the company, seeking to have it declared that ten years' arrears formed an equitable debt from the company, and that the company was bound to make compensation for all breaches of covenant :—Held, that looking at the bill as a bill for specific performance of an agreement to take the lease, no relief in the nature of specific performance could be granted, the plaintiff not having taken any steps until just before the expiration of the term. *Walters* v. *Northern Coal Mining Co.*, 5 De G. M. & G. 629 ; 25 L. J., Ch. 633 ; 2 Jur. (N.S.) 1 ; 4 W. R. 140.

The case must be very special indeed which should induce the court to decree specific performance of an agreement for a lease after the stipulated term has expired. *Ib.*

Looking at the bill not as one of specific performance, but for the recovery of the rent as an equitable debt due from the company in respect of their past occupation :—Held, that there was no authority for enforcing such an equity. *Ib.*

The circumstance that there is a relation of an equitable character subsisting between the lessee and the actual occupier cannot give any equitable rights to any person who claims by a title paramount both to the trustee and the cestuis que trustent. *Ib.*

Recovery of Rent or Damages.]—Where the defendant had agreed to take of the plaintiff a lease of tithes at a certain rent, and had entered into possession under the agreement, and had let the rent fall into arrear ; a bill for specific performance having been filed before the expiration of the stipulated term, but that term having expired before a decree could be obtained :—Held, that the plaintiff was nevertheless entitled to recover in equity the arrears of rent, according to the terms of the agreement, though specific performance could not be granted. *Wilkinson* v. *Torkington*, 2 Y. & Coll. 726 ; 7 L. J., Ex. Eq. 30.

A sub-lessee having been evicted on the expiration of the term granted by his lease sued on a covenant to grant an additional term ; but the term covenanted to be granted having nearly expired at the time of the decree instead of a specific performance, an account in the nature of an inquiry quantum damnificatus was directed. *M'Nulty* v. *Hamill*, Beat. 541.

e. By what Persons.

Assignee.]—The assignee of an agreement to grant a lease is entitled to specific performance against the lessor, but only upon the terms of giving him the benefit of the personal liability of the party to the agreement. *Dowell* v. *Dew*,

1 Y. & Coll. C.C. 345 ; 12 L. J., Ch. 158 ; 7 Jur. 117.

A. agreed to demise certain premises to B., who undertook to build houses thereon, at the rate of so many in each year. A. was to grant a separate lease of each house to B., as soon as it was covered in ; but if the houses were not built within a specified time, A. had a power of re-entry on the demised part of the premises. B. subsequently contracted with C. for the building of some of the houses, and C. was to have two of them conveyed to him as a payment ; A. agreeing, by letter, to grant to C. such leases as B. would be entitled to under the first-mentioned contract. C. had fulfilled his contract, but B. had not satisfied the condition of his contract with A., who had in consequence recovered by ejectment the two houses which were to have formed C.'s remuneration. The bill sought from A. a specific performance of the agreement to grant leases of the two houses to C. And upon a motion for an injunction to restrain A. from granting leases to any person except the plaintiff, the equity of it was discussed ; but held, that the plaintiff had no equity against the original lessor ; and the only right the plaintiff had was, according to A.'s engagement, to such a lease as B. would be entitled to claim. *Anon.*, 1 L. J. (o.s.) Ch. 25.

Reversioner.] — Where lessees corresponded with the tenant for life for a new lease which he had not under the will power to grant, the reversioner, though able to grant the lease, was held not entitled to enforce specific performance. *Ricketts* v. *Bell*, 1 De G. & Sm. 335 ; 11 Jur. 918.

Trustee for Sale.]—The court will not enforce an agreement for an under-lease at the suit of trustees for sale of a leasehold, as such an agreement is primâ facie inconsistent with the trust, and as, though there may be circumstances to justify it, the court cannot enter into consideration of them in a suit to which the cestuis que trustent are not parties. *Evans* v. *Jackson*, 8 Sim. 217 ; 6 L. J., Ch. 8.

Sub-lessee.]— A lessee of a house agreed to sub-let two rooms for a part of his term, taking a fine ; he afterwards became bankrupt and his trustee disclaimed the lease. The landlord commenced an action of ejectment against the sub-lessee. The sub-lessee filed his bill to restrain the action, and to compel the landlord to grant him a lease according to the terms of his agreement with the first lessee. The provisions of the agreement differed from those of the lease :—Held, that the sub-lessee had no equity to enforce the provisions of the agreement against the landlord. *Taylor* v. *Gillott*, 44 L. J., Ch. 740 ; L. R. 20 Eq. 682 ; 32 L. T. 795 ; 24 W. R. 65.

Felon.]—The court will not execute an agreement to grant a lease to a man who had committed a felony. *Willingham* v. *Joyce*, 3 Ves. 169. *See* 8 R. R. 372, n.

Insolvent.]—Insolvency is a good ground upon which the court will refuse specific performance of an agreement to grant a lease ; but there must be proof of general insolvency ; and a particular default in the payment of rent to the landlord of the premises last occupied by the person contracting for the lease will not disentitle him to the specific performance of the contract, when there is the testimony of unexceptionable witnesses to his responsibility. *Neale* v. *Mackenzie*, 1 Keen, 474.

The subsequent insolvency and continuing embarrassment of the tenant are good grounds for refusing specific performance of an agreement for a lease, especially if there has been also laches. *Plunket* v. *Dease*, 10 Ir. Eq. R. 124.

Plea to a bill for specific performance of an agreement for a lease to the plaintiff, and an injunction against an ejectment, &c., that the defendant had, since the bill filed, taken the benefit of an insolvent act, overruled. *De Minckwitz* v. *Udney*, 16 Ves. 466.

Upon contract for lease, the solvency or insolvency of the tenant is an objection of weight, depending upon the circumstances ; upon that and other circumstances, an injunction against an ejectment by the landlord was dissolved. *Buckland* v. *Hall*, 8 Ves. 92 ; 7 R. R. 1.

The insolvency of the intended lessee is a good ground of objection to a bill brought by him for the specific performance of a contract to renew a lease. *Price* v. *Assheton*, 1 Y. & Coll. 441.

In a suit for specific performance of an agreement for a lease the defendant may, by his answer, put in issue any fact tending to shew the insolvency of the plaintiff, however it may impeach the plaintiff's respectability ; but mere imputations on the moral character of the plaintiff are impertinent. *Pearson* v. *Knapp*, 1 Myl. & K. 312.

Bill for specific performance of parol agreement to grant farm lease, with usual covenants of neighbourhood, and injunction to prevent ejectment, plaintiff having taken possession. Upon answer, stating insolvency of plaintiff, and various breaches of agreement, during five years' possession, the injunction was continued, on undertaking to give judgment in ejectment, go to commission, and set down cause for next term, paying rent into court. *Boardman* v. *Mostyn*, 6 Ves. 467.

An insolvent had previously entered into a contract for a lease at a rent. No creditors' assignee was appointed :—Held, that he could not sue for a specific performance of the contract. *McNally* v. *Gradwell*, 16 Ir. Ch. R. 512.

The court will not decree the specific performance of a contract for a lease to an insolvent tenant. *Ib.*

—— **Rights of Tenant's Assignee.**]—It is no defence to a bill filed against a landlord for specific performance of an agreement for a farming lease, by a person to whom the benefit of the agreement has been assigned, that the party with whom the landlord contracted has become insolvent, provided the assignee is solvent, and in a condition to enter into the usual covenants, and there is no evidence that the contract was entered into upon considerations personal to the assignor. *Crosby* v. *Tooke*, 1 Myl. & K. 431 ; 2 L. J., Ch. 83.

When a landlord agrees to grant a lease to A., his executors and assigns, upon certain conditions, and A. assigns his interest in the contract to B., and then becomes bankrupt, B., on performing the conditions, has a right to enforce the agreement specifically, notwithstanding his assignor's bankruptcy ; and this right is not affected by a proviso, that, in case of the bankruptcy of A., the landlord shall have power

to re-enter and sell the benefit of the contract and the premises, and hold the proceeds, subject to his own claims, for the use of A.'s estate. *Morgan* v. *Rhodes*, 1 Myl. & K. 435.

Though bankruptcy supersedes an agreement not to assign without licence, that has been held only in favour of general creditors, and where there is no actual lease, but it rests in agreement to grant a lease, an individual cannot have a specific performance in opposition to such provision, and it is very disputable whether the general assignees could obtain it, even if there were no such provision. *Weatherall* v. *Geering*, 12 Ves. 504; 8 R. R. 369.

Agreement by Trustee for Insolvent under Secret Trust.]—A., being in insolvent circumstances, suffers another person to become the apparent owner of his farm (though under a secret trust from him). A. shall not have against the landlord a specific execution of an agreement made by him with the trustee, the landlord supposing the trustee to have been the rightful owner, and confiding in his solvency. *O'Herlihy* v. *Hedges*, 1 Sch. & Lef. 123; 9 R. R. 23.

The interest which a third party may have against the specific performance of a contract, may preclude the execution of it, as between trustees and cestui que trust; as, where an insolvent tenant made over his lease to another, who treated for a renewal under a secret agreement, in trust for the original tenant. *Featherstonhaugh* v. *Fenwick*, 17 Ves. 313; 11 R. R. 77.

f. Against what Persons.

Commissioners of Woods and Forests.]—The commissioners of woods and forests are not, under the 7 Geo. 4, c. 77, entitled to sue or liable to be sued for the specific performance of contracts entered into with and by them. *Nurse* v. *Seymour* (*Lord*), 13 Beav. 254.

The commissioners were authorised, with the consent of the lords of the treasury, to demise, or, previous to any demise, to contract to demise. The bill alleged that the commissioners having first obtained the consent required, determined to demise, and afterwards contracted to demise to the plaintiff, and prayed a specific performance:—Held, on demurrer, that the bill could not be sustained. *Ib.*

Corporation.]—If regular corporate resolution has been passed, and upon faith of it expenditure has been incurred, the court will compel corporation to make a legal grant, in pursuance of a resolution, although not under corporate seal. *Marshall* v. *Queenborough Corporation*, 1 Sim. & S. 520; 24 R. R. 220.

A proposal was made by D. to a corporation, to take out a lease of part of their lands, at a certain rent. The proposal was accepted, and the acceptance entered on the corporation books. This was immediately communicated to D., who soon after took possession, and paid the first year's rent, when due. He then refused to complete his contract by taking out the lease:—Held, in a suit for specific performance, that there were sufficient acts of part performance to take the case out of the general rule, by which corporations can contract only under their common seal. *Steevens' Hospital* v. *Dyas*, 15 Ir. Ch. R. 405; 10 L. T. 882.

Married Woman.]—A married woman, with the concurrence and in the presence of her husband, signed an agreement in writing to grant a lease. At the date of the agreement it was believed by all parties that she was entitled to two-thirds of the property for her separate use, and that the remaining one-third belonged to her brother in India, whose concurrence it was represented that she could procure. It was soon afterwards discovered that the wife was entitled to one-fourth only for her separate use; that to another fourth she was entitled absolutely; that another fourth had belonged to a deceased sister of the wife; and that the remaining fourth belonged to the brother in India. The fourth which had belonged to the sister was purchased by the husband soon after the state of the title was discovered. Upon a bill for specific performance against husband and wife:—Held, that there could be no decree against her in personam; and that her agreement did not bind the husband as to the interests in the property which he had at the date of the agreement, or which he afterwards acquired. *Aylett* v. *Ashton*, 1 Myl. & C. 105; 5 L. J., Ch. 71.

Infant.]—Tenant for life agreeing to grant lease dies. Next tenant in tail being his son, an infant, and father having a right to appoint testamentary guardian, which he does, the agreement was carried into execution against the son during his minority, it being first modified by court to advantage of son. *Brummell* v. *Clavering*, 3 Swanst. 690.

—— **Costs.**]—A., having agreed to grant a lease to B., died before granting it, leaving an infant heir. B. filed a bill against the infant for specific performance, which was decreed:—Held, that each party should bear his own costs. *Longinotto* v. *Morss*, 26 L. T. 828.

A lessor by his will subsequent to the date of the lease devised the property to his infant sons. The right of the plaintiff to maintain the suit was not disputed; the only question in the cause related to the costs:—Held, that the parties should abide their own costs. *White* v. *Beck*, Ir. R. 6 Eq. 63; 20 W. R. 275.

Tenant in Common.]—One of two tenants in common of an estate agreed to grant a lease of the mines under it:—Held, that the lessee was entitled to a decree for specific performance, and for a partition of the estate. *Heaton* v. *Dearden*, 16 Beav. 147.

Remainderman.]—A written proposal to take lands at a rent of 1*l.* 5*s.* per acre, for three lives or thirty-one years, was sent by F. to a tenant for life. He replied that he had not power to execute such a lease, but "if you choose to take a lease in the usual way, I will allow you 20*l.* to get up a cottage and a lease for your own life." F., who had been previously in possession of the lands, remained in possession, but continued to pay the rent previously payable, which was less than 1*l.* 5*s.* per acre, and never made any claim for the 20*l.*:—Held, that there was not on the proposal, answer, and subsequent occupation, a sufficient agreement to bind the remainderman. *O'Fay* v. *Burke*, 8 Ir. Ch. R. 511.

F. entered into an agreement for a lease with a tenant for life, which was not binding on the remainderman. In March, 1854, the tenant for life being dead, F. communicated the contract

to the agent for the remainderman, requesting the grant of a lease, which the remainderman refused to execute. In April, 1854, the agent informed F. that he had been directed to serve notices to quit on all the tenants, but that if F. would send a proposal to pay 1*l.* 5*s.* per acre (the rent reserved by the alleged agreement), he would not serve a notice on F. F. replied by setting out the agreement, and stating that he was not tenant from year to year, but saying that he left his case in the agent's hands for the present, "particularly as a lease will not be granted of any part of this property." After this F. expended large sums in the improvement of his farm. Notice to quit was served on F. in 1856: —Held, that F. was not entitled to specific performance, against the remainderman, of the invalid agreement. *Ib.*

Executors.]—A. leased premises to B. for ten years; and B. covenanted not to assign the premises without A.'s consent. A. agreed to grant to C. a lease for ten years, from the end of B.'s term, subject to the same covenants as were contained in B.'s lease. C. died before the lease was executed to him. A. filed a bill against C.'s executors (who admitted assets) for a specific performance of the agreement, and offered so to qualify the covenants of the lease as that the executors should be no further liable thereon than they would have been on the covenants which ought to have been entered into by the testator in case a proper lease had been made to him. Specific performance of the agreement decreed, with a reference to the master to settle the lease. *Phillips* v. *Eccard*, 5 Sim. 102.

Administrator — Insertion of Restrictive Covenant.]—The owner of six leasehold houses agreed in writing to let one of them, numbered 737, to a tradesman, the agreement saying nothing about a restrictive covenant. On the same day he also agreed to let another of the houses, numbered 735, to a grocer, and he agreed with him that the business of a grocer should not be carried on in any of the other five houses. Afterwards he contracted to sell the house No. 737 and a third house numbered 739, to T., also a grocer, and the agreement, which was in writing and dated the 6th of July, 1870, contained nothing about a restrictive covenant, but an under-lease was prepared and engrossed which did contain a covenant that the premises should not be used for a grocer's business. An appointment was made for the execution of the under-lease and counterpart on a certain day; but on the previous evening T. died suddenly intestate. It was stated, but on the plaintiff's evidence only, that after the written agreement of the 6th of July, and before T.'s death, T. verbally agreed to the insertion of the restriction, and there was other evidence that he was prepared to execute a counterpart of the engrossment. It having been shewn that the insertion of such a restriction would considerably diminish the value of the property:—Held, that the administrator of the intestate could not be compelled to execute a counterpart of a lease containing such a restriction. *Snelling* v. *Thomas*, 43 L. J., Ch. 506; L. R. 17 Eq. 303.

The written agreement of the 6th of July stipulated that the property should be bought "subject to the existing tenancies." The plaintiff alleged that on the 6th of July the lessee of the house No. 737 was under an agreement to consent to a restrictive covenant, and in proof of this the counterpart of a lease, bearing date the day before the agreement of the 6th of July, was produced, containing such a covenant. It having been shewn that the lease was antedated and was not in fact executed till after the 6th of July, 1870:—Held, that the administrator was not by this clause bound to execute the counterpart of a lease containing the restriction. *Ib.*

Person not in Possession.]—The contract for a present demise, by a person out of possession, not enforced in equity. *Bayly* v. *Tyrrell*, 2 Ball & B. 358; 12 R. R. 99.

Person not Party to Contract.]—A lessee of premises covenanted with his under-lessees of part, that in case he obtained an extension of the term or a renewal of his lease, he would give to the under-lessees a like renewal or extension of his under-term. A lease was subsequently taken from the ground landlord for an extended term in the name of a trustee for the separate use of the lessee's wife. The under-lessees filed a bill against the lessee, his wife, and her trustee, charging that the extended lease had been taken in a trustee's name, in order to defeat their rights under the lessee's covenant, and praying that the wife and her trustee might be decreed to grant an under-lease to the plaintiffs for the extended term:—Held, that the relief sought could not be given, as the suit was virtually one for specific performance against persons who were not parties to the original covenant or contract to renew the under-lease. *Lumley* v. *Timms*, 28 L. T. 157; 21 W. R. 319. *S. C.*, 28 L. T. 608; 21 W. R. 494—L.JJ.

Mortgagee.]—A. made an equitable mortgage to B., and afterwards agreed to grant a lease to C., who had notice of the mortgage. B. afterwards purchased the equity of redemption with notice of C.'s agreement, and took a conveyance to himself:—Held, that B. was bound out of his whole interest to grant the lease to C. *Smith* v. *Phillips*, 1 Keen, 694; 6 L. J., Ch. 253.

A mortgagee of leaseholds with a power of sale, but no leasing power, entered into a written agreement to grant a lease for the whole term, at a rent and premium. It was the understanding of both parties, although not expressed in the agreement, that it was subject to the concurrence of the mortgagor being obtained. The latter refused to concur:—Held, that the intended lessee could not insist on the lease being granted to him, although he was willing to take it without the mortgagor's concurrence. *Franklinski* v. *Ball*, 33 Beav. 560; 10 Jur. (N.S.) 606; 10 L. T. 447; 12 W. R. 845.

Held, also, that it was not a case for giving damages in equity, and the bill was simply dismissed, without any express reservation of leave to bring an action. *Ib.*

After the date of an agreement for an under-lease the lessee mortgaged his lease by demise to parties who had notice of and took subject to the agreement:—Held, that the mortgagees were not proper parties to a suit for specific performance by the under-lessee. *Long* v. *Bowring*, 33 Beav. 585; 10 Jur. (N.S.) 668; 10 L. T. 683; 12 W. R. 972.

Agreement not to raise Rent or give Notice to Quit—Whether Binding on Lessor's Successors.] —The owner of premises agreed to let them by

a written agreement, not under seal, specifying a certain rent, and containing the following clause: "I will agree not to increase your rent, and not to give you notice to quit, so long as you desire to continue my tenant":—Held, that this constituted a mere personal agreement between the landlord and tenant, so as not to bind a subsequent purchaser of the landlord's interest, with or without notice. *Roberts* v. *Tregaskis*, 38 L. T. 176. But see *Kusel* v. *Watson*, ante, col. 711.

Principal, where Contract made with Agent.]—A land agent has not authority to enter into contracts for leases. *Mortal* v. *Lyons*, 8 Ir. Ch. R. 112.

In a suit for specific performance, a contemporaneous letter of a deceased agent, with whom a contract for letting land was made, was admitted, to prove the terms of the contract, the tenant having relied on the acts of the agents to establish that he had authority to contract. *Ib.*

Decree for the execution of a lease to the plaintiffs, according to the terms of an agreement entered into between the two defendants; it appearing that one of the defendants who resisted the decree and claimed the benefit of the agreement for himself, acted as agent of the plaintiffs in negotiating the lease from his co-defendant, so that his own intention was immaterial; and the court being satisfied, moreover, upon the evidence, that the real object and understanding of the contracting parties was an agreement for a lease for the benefit of the plaintiffs. *Taylor* v. *Salmon*, 4 Myl. & C. 134.

—— **Evidence of Agents' Authority.**]—The authority of an agent to contract for a lease of lands need not be in writing. A proposal in writing for a lease to an agent, who has not power to enter into a contract for such lease, may be acknowledged by parol by the principal, so as to be binding on the principal, semble. *Cullaghan* v. *Pepper*, 2 Ir. Eq. R. 399.

Specific performance of a covenant to grant, on the death of the survivor of three cestui que vies, a new lease for one life, to be named within twelve calendar months after the death of the first of the said three lives, decreed; though the new life not named within the time prescribed by the covenant: the lessee being surprised by the misinformation of the lessor's agent, and therefore could not name the life at the proper time, and there being no difficulty in ascertaining the compensation; the lessor affected by letters written to lessee by his land agent and receiver of his rents, who had the key of his record chamber; that being sufficient to constitute him agent for the purpose, and to protect the tenants in their fair transactions with such agent. *Firman* v. *Ormond* (*Lord*), Beat. 347.

g. Insertion of Covenants.

Where intending Lessor dies.]—Parties having an equitable estate only agreed to grant a lease to A. B., which was to contain special covenants, both on the part of the lessors and lessee. The intended lessors died before the lease had been granted, and their interest became vested in bankrupt assignees and an heir-at-law, against whom a decree for specific performance was made:—Held, that receiving the benefit of the lessee's special covenants, the assignees and heir were themselves bound to the extent of their interest in the property, to enter into the special covenants which the original intended lessors had contracted to enter into. *Page* v. *Broom*, 3 Beav. 36.

Bankruptcy of Party.] — On a bill by the assignees for the specific performance of the agreement, the court decreed that the assignees were entitled to a lease according to the agreement, on personally entering into those covenants which the bankrupt, if solvent, would have been bound to enter into. *Powell* v. *Lloyd*, 2 Y. & J. 372; 31 R. R. 598.

Usual Covenants.]—*See* post, COVENANTS, I.

—— **No Provision as to.**]—Whether an agreement for a lease does or does not provide that the usual covenants shall be inserted in the lease, each party is entitled to have such covenants inserted as are incidental to and necessary to protect the rights given or reserved to each. Accordingly, under an agreement for a lease of minerals, the payments to be accelerated with an increase in the quantity of work, it was held that the lessor was impliedly entitled to have a right of entry and inspection secured to him by this lease. *Blakesley* v. *Wieldon*, 1 Hare, 179; 11 L. J., Ch. 164; 6 Jur. 54.

To Repair.]—Though the court will not ordinarily decree specific performance of an agreement to repair, it is the habit of the court to decree specific performance of agreements involving the execution of leases, or other instruments containing covenants to repair. *Paxton* v. *Newton*, 2 Sm. & Giff. 437.

Bill for a specific performance of articles, for a lease of lands in Norfolk, where by custom the landlords repair; but the rent reserved on this lease appearing to be under the value:—Decreed, the tenant should covenant to repair. *Burrell* v. *Harrison*, 2 Vern. 231; Pre. Ch. 25.

For Quiet Enjoyment.] — Under a contract in writing for a lease of land, containing no words shewing an intention to exclude the under surface and mines, which did not, in fact, belong to the intended lessor, but containing an agreement for an absolute covenant for quiet enjoyment:—Held, that the lessee was entitled to a lease, according to the contract, with an unqualified covenant for quiet enjoyment. *Onions* v. *Cohen*, 2 Hem. & M. 354; 34 L. J., Ch. 338; 11 Jur. (N.S.) 198; 12 L. T. 15.

Not to Assign.]—A. leased premises to B. for ten years, and B. covenanted not to assign the premises without A.'s consent. A. agreed to grant to C. a lease for ten years from the end of B.'s term, subject to the same covenants as were contained in B.'s lease. C. died before the lease was executed to him. A. filed a bill against C.'s executors (who admitted assets) for a specific performance of the agreement, and offered so to qualify the covenants of the lease as that the executors should be no further liable thereon, than they would have been on the covenants which ought to have been entered into by the testator, in case a proper lease had been made to him. Specific performance of the agreement decreed, with a reference to the Master to settle the lease. *Phillips* v. *Everard*, 5 Sim. 102.

Not to Sublet—Sublease already granted.]—An agreement to grant a lease subject to such clauses as the landlord chooses to insert will not be specifically performed, where the landlord insists on a clause for avoiding the lease on subletting, and the tenant has already sublet; and although the court would not allow him to specify unreasonable clauses, yet, semble, if he decline to name any, the agreement is too uncertain to be enforced. *Plunket* v. *Dease*, 10 Ir. Eq. R. 124.

Against Noxious Trade—Tannery.]—Specific performance of an agreement to take a lease of lands for the purpose of a tannery will not be enforced when the proposed lease contained the usual covenant against carrying on noxious trades, although the defendants had represented that they were about to conduct their business in a way which could not be open to objection on that score. *Reeves* v. *Greenwich Tanning Co.*, 2 Hem. & M. 54.

That Rent be increased in Proportion to Property Tax—Covenant in Original Lease—New Lease.]—Where an agreement for a lease had been decreed to be specifically performed, and to contain the same covenants and provisions as were in the original lease, one of which covenants was, that so long as any tax upon property or income should be imposed upon the rents, the reserved rent of 690*l.* should be increased in proportion to the amount of the tax:—Held, that notwithstanding the provisions in the 5 & 6 Vict. c. 35, the new lease must contain the same covenants and provisions as were inserted in the original. *Beadel* v. *Pitt*, 11 Jur. (N.S.) 152; 11 L. T. 592; 13 W. R. 287.

B., in 1847, became lessee of two farms, held under a lease which expired in 1853. The tenant for life of three undivided parts, on the expiration of the term, agreed that B. should, as to them, continue as tenant from year to year at the same rent; but the owner in fee of one-fourth in possession, and of the three-fourths in remainder, refused to grant a lease, except at an increased rent, which B. agreed to pay, and he continued in possession. In March, 1856, the owner signed a memorandum, whereby he agreed to grant a new lease of his quarter share for fourteen years at the increased rent, to contain covenants and provisions similar to those in the expired lease. In 1861 the tenant for life of the three undivided parts died, and a negotiation was entered upon between B. and the owner for a lease of those three-fourths. The owner, in a letter of March, 1862, acknowledged that B. had a right to hold one-fourth of the property, but required rent at the higher rate for the other three-fourths, which B. agreed to pay. Disputes arose, and in February, 1863, the owner gave B. notice to quit:—Held, that the owner was bound by the memorandum of March, 1856, and that B. was entitled to a lease of the entirety of the farms for fourteen years, at the increased rent, with covenants similar to those contained in the expired lease. *S. C.*, 9 Jur. (N.S.) 1194; 9 L. T. 318.

Rejection of Immaterial Conditions.]—Decree for specific performance of an agreement to grant a lease, rejecting one term (for such conditions, &c., as shall be judged proper by J.), and substituting a reference to the Master, the agency of J. not being of the essence of the contract. *Gourlay* v. *Somerset* (*Duke*), 19 Ves. 429; 13 R. R. 234.

Option of Determining Lease.]—Where lessees of way-leaves (colliery) entered into a correspondence with the tenant for life with power of leasing for a new lease, proposed as a renewal of the former, which contained a usual clause giving the lessees an option of determining the lease on notice, but the correspondence was silent as to the insertion of such a clause:—Held, that the lessees might reasonably have understood (whether it were mutual or not) that the new lease was to contain such a clause, and that they ought not to be compelled to accept the lease without it. Quære, in executory agreements, whether there is a presumption in favour of the insertion of such customary stipulation. *Ricketts* v. *Bell*, 1 De G. & Sm. 335; 11 Jur. 918.

And see post, COVENANTS.

5. OTHER REMEDIES AND PROCEEDINGS.

Mandamus.]—The 17 & 18 Vict. c. 125, s. 68, which gives an action for a mandamus "to fulfil any duty in the fulfilment of which the plaintiff is personally interested," does not apply to a personal contract, and, therefore, a declaration on an agreement for the lease of a house, claiming a writ of mandamus commanding the defendant to prepare a lease in accordance with the agreement, is bad on demurrer. *Benson* v. *Paul*, 6 El. & Bl. 273: 25 L. J., Q. B. 274; 2 Jur. (N.S.) 425; 4 W. R. 493.

Injunction—To restrain Ejectment of Tenant.]—Where proceedings were taken to enforce a legal right, consisting of the residue of a term of which three days only were unexpired, for the purpose of obtaining an improper advantage against a tenant in possession who had contracted for a new lease, the court restrained the proceedings by injunction. *Buckland* v. *Gibbins*, 32 L. J., Ch. 391; 9 Jur. (N.S.) 781; 8 L. T. 129; 11 W. R. 483.

—— **To restrain Action for Alleged Trespass.**]—A., relying upon a formal written agreement, in pursuance of which B. was to accept from him, on the terms therein mentioned (subject to an unsettled question relative to taxes, which was to be left to the decision of a third party), a lease of certain lands, possession of which had accordingly been taken, filed a bill for specific performance, and to compel B. to execute the lease. A few days after, B., adopting as the basis of their agreement a letter which he had written to A. during the progress of their treaty, brought an action against him for breach of contract and trespass, whereupon A., having amended his bill by denying as matter of fact the breaches complained of, and by stating that the alleged trespass consisted of making certain repairs on the premises, in execution of his part of the contract, moved to restrain B. from prosecuting the action:—Held, that A. was entitled to the interlocutory injunction sought. *Blakeney* v. *Hardie*, Ir. R. 7 Eq. 472.

Rescission of Contract—Defendant Absconding after Decree for Specific Performance.]—After a decree for specific performance of an agreement by defendant to take a lease and for payment by him of the costs and damages, he absconded:—Held, that the plaintiff was entitled to an order

rescinding the contract. *Watson* v. *Cox*, 42 L. J., Ch. 279; L. R. 15 Eq. 219; 27 L. T. 814; 21 W. R. 310.

Recovering for Work done under an Agreement.]—The plaintiff, in a letter, proposed to take a lease of the defendant's house for a term of years, if the defendant would carry out certain alterations. A correspondence and interviews followed, and it was ultimately agreed that the alterations should be made, the plaintiff to pay 75*l.* towards them. The plaintiff wished to have the drawing-room painted in a particular way, and the defendant consented that the plaintiff should send in his own workmen to paint it, which he accordingly did, and also laid down gaspipes with the defendant's consent. Ultimately the plaintiff was prevented from taking possession of the house owing to the default of the defendant in carrying out the alterations to be performed by him, and brought an action for breach of the agreement, with the common counts for work done. The correspondence disclosed no agreement sufficient to satisfy the Statute of Frauds:—Held, that the plaintiff could, under the common counts, recover for the value of the work done by the defendant's consent. *Pulbrook* v. *Lawes*, 45 L. J., Q. B. 178; 1 Q. B. D. 284; 34 L. T. 95.

Granting Lease when a Condition Precedent to Right of Action.]—Defendant agreed with plaintiffs to grant to them a lease of certain land for the term of five years, and to pay to them on the termination of the term, by efflluxion of time, or by notice, a certain sum in respect of fixtures to be put by them on the land during the term. No lease was granted, but the plaintiffs entered and occupied for five years, and during their occupation put certain fixtures on the land:—Held, that the granting of a lease by the defendant was not a condition precedent to the right of the plaintiffs to be paid in respect of the fixtures. *Bowes* v. *Croll*, 6 El. & Bl. 255; 4 W. R. 484.

By an agreement between the plaintiff and the defendant, the former agreed that upon payment to him by the latter of 1,440*l.*, by instalments on certain days, he would grant the defendant a lease of a certain parcel of land, and the defendant agreed to accept such lease and execute a counterpart. A declaration assigned for breach non-payment of the moneys:—Held, that the declaration disclosed a sufficient cause of action, the granting of a lease not being a condition precedent to the plaintiff's right to demand payment of the money. *Baggallay* v. *Pettit*, 5 C. B. (N.S.) 637; 28 L. J., C. P. 169; 5 Jur. (N.S.) 868.

Pleading — Variance.]—Where a declaration stated, that, in consideration that the plaintiff would procure S. to grant a lease to the defendant, the latter promised to pay the plaintiff 170*l.*, and it was proved that S., having agreed to grant a lease to the plaintiff, the latter originally undertook to assign it to the defendant for the consideration mentioned: but that afterwards a lease, to which the plaintiff was a party and assented, was granted immediately by S. to the defendant, in which the consideration to be paid by the latter to the plaintiff was not mentioned:—Held, that the evidence merely amounted to proof of the substitution of a new contract to procure a lease from S. to the defendant, in lieu of the original contract; and, consequently, that there was no variance. *Boone* v. *Mitchell*, 1 B. & C. 18; 1 L. J. (O.S.) K. B. 25.

The plaintiff, in the first and third counts, alleged that, at the time of making the agreement with the defendant, he was possessed of a house, for a certain term of years, to expire on the 25th December, 1826; and, in the second, that he was entitled to the term, under and by virtue of a certain contract. The proof was, that the plaintiff was possessed for a term of only twelve years; and there was no contract or agreement under which he was at that time entitled to an extension of the term:—Held, that this was a variance, although it appeared that he had since become possessed of a lease to expire in December, 1826. *Routledge* v. *Grant*, 1 M. & P. 717; 4 Bing. 653; 3 Car. & P. 267; 6 L. J. (O.S.) C. P. 166; 29 R. R. 672.

Tender of Lease for Execution.]—In a declaration on an agreement between the plaintiff and the defendant, that the defendant would take a house of the plaintiff and execute a lease for the same term as the plaintiff held, less ten days, an averment that the plaintiff accepted the defendant as tenant, and tendered him a lease for his execution, is sufficient, although there was no averment of the plaintiff's readiness and willingness to grant the lease. *Collins* v. *Willmott*, 11 L. T. 340; 13 W. R. 204.

A contract provided that a lease should be drawn, prepared and executed at the sole expense of the lessor. In an action on the agreement by the lessee:—Held, that it was not necessary to aver that a lease was tendered to the lessor for execution. *Price* v. *Williams*, 1 M. & W. 6; 1 Gale, 362; 1 Tyr. & G. 197; 5 L. J., Ex. 129.

To an action for breach of an agreement to execute a lease, it is no answer to allege that the intended lessee had not prepared the lease and tendered it for execution to an intended lessor. *Cantley* v. *Powell*, Ir. R. 10 C. L. 200.

Cost of Preparing Agreements.]—Lessee of a house and fixtures agreed to pay the expense of preparing the agreements:—Held, that he was liable to pay the costs of preparing, and of copies of an inventory of the fixtures referred to by the agreement. *Thomas, In re*, 8 Beav. 145.

6. Title of Lessor.

When it can be called for.]—By the terms of a letter from the plaintiff, which was accepted and signed by the defendants, it was agreed that the "plaintiff should set to the defendants or assigns, if preferred, for the longest time he could grant":—Held, on a bill filed for a specific performance, that the defendants were bound to take such title as the plaintiff had at the time the agreement was made, and that under the terms of the agreement, the defendants were not entitled to call upon the plaintiff to shew his lessor's title. *Molloy* v. *Sterne*, 1 Dr. & Wal. 585.

Objection to title between vendor and purchaser on the ground of non-production of lessor's title overruled in the case of a bishop's lease. *Fildes* v. *Hooker*, 2 Mer. 430.

On a bill by vendor for specific performance of an agreement to take a lease for twenty-one years at a rack-rent, the Master having reported in favour of the title shewn by the abstract, and

an exception being taken to the report, the question was, whether, where the agreement is silent, the vendor of a leasehold interest is not bound to produce the title of his lessor; and the exception was allowed. *Id.* 424.

How far Guaranteed.]—By agreeing to grant a lease, a party does not impliedly engage for a general warranty, nor undertake to deliver an abstract of his title. *Gwillim* v. *Stone*, 3 Taunt. 433.

Nor that he has a good title to the fee-simple, and will deliver a written abstract. *Temple* v. *Brown*, 6 Taunt. 60.

An agreement to grant a lease contains an implied undertaking on the part of the intended lessor that he has title to grant such lease; and if he has not, he is liable to an action at the suit of the intended lessee. *Stranks* v. *St. John*, 36 L. J., C. P. 118; L. R. 2 C. P. 376; 16 L. T. 283; 15 W. R. 678.

Upon a contract for the sale of an agreement for a lease, it is not an implied condition that the lessor has power to grant the lease. *Kintrea* v. *Preston*, 1 H. & N. 357; 25 L. J., Ex. 287.

A declaration that the defendant had agreed to let premises to the plaintiff on certain terms, and that, in consideration that the plaintiff, at the request of the defendant, had promised to perform all things in the agreement contained on his part to be performed, the defendant promised the plaintiff that he had good right and title, and full and lawful power and authority, to let the premises to the plaintiff without restriction as to the purpose for which the same should be occupied:—Held bad, inasmuch as the promise alleged could not be implied from the relation of landlord and tenant, and was without consideration to support it. *Jackson* v. *Cobbin*, 1 D. (N.S.) 96; 8 M. & W. 790; 10 L. J., Ex. 389.

Defects in.]—*See* supra, 4, *d.* ix. (ante, col. 768).

In Case of Lease.]—*See* post, E. 8 (post, col. 857).

7. Agreement, how far Equivalent to Lease.

The defendant on the 29th of May, 1879, agreed to grant and the plaintiff to accept a lease of a mill for seven years at the rent of 30*s.* a year for each loom run, the plaintiff not to run less than 540 looms. The lease to contain such stipulations as were inserted in a certain lease of the 1st of May, which was a lease at a fixed rent made payable in advance, and contained a stipulation that there should at all times be payable in advance on demand one whole year's rent in addition to the proportion, if any, of the yearly rent due and unpaid for the period previous to such demand. The plaintiff was let into possession and paid rent quarterly, not in advance, down to the 1st of January, 1882, inclusive, having run, in 1881, 560 looms. In March, 1882, the defendant demanded payment of 1,005*l.* 14*s.* (840*l.* as one whole year's rent for 560 looms at 30*s.*, and 165*l.* 14*s.* as the proportionate part of the rent from the 1st of January last), and put in a distress. The plaintiff thereupon commenced his action for damages for illegal distress, for an injunction, and for specific performance, and moved for an injunction. Fry, J., granted the injunction on the terms of the plaintiff paying the 1,005*l.* 14*s.* into court. The plaintiff appealed:—Held, that since the Judicature Acts the rule no longer holds that a person occupying under an executory agreement for a lease is only made tenant from year to year at law by the payment of rent, but that he is to be treated in every court as holding on the terms of the agreement. *Walsh* v. *Lonsdale*, 52 L. J., Ch. 2; 21 Ch. D. 9; 46 L. T. 858; 31 W. R. 109—C. A.

Held, therefore, that the plaintiff holding under the agreement was subject to the same right of distress as if a lease had been granted, and that if under the terms of the lease a year's rent would have been payable in advance on demand a distress for that was lawful. *Ib.*

Semble, that such lease ought to reserve a minimum rent of 810*l.* (30*s.* apiece on 540 looms), and that the stipulation in the lease of the 1st of May as to payments in advance would be applicable to such minimum rent though not to the whole rent. And the defendant being willing to submit to the injunction on having 810*l.* paid into court, order varied accordingly, the court being inclined to the view that there was a right of distress for that amount though the time had not arrived for finally determining the question. *Ib.*

See the above case approved in *Maughan, In re*, 14 Q. B. D., at p. 958, and *Allhusen* v. *Brooking*, 26 Ch. D., at p. 565. See also *Coatsworth* v. *Johnson*, 55 L. J., Q. B. 220.

Jurisdiction of County Court.]—The defendant entered on premises under an executory agreement for a lease. He subsequently gave six months' notice to quit, as if on a yearly tenancy, and left the premises. An action was brought in the county court for a quarter's rent accruing due after the defendant had given up possession. The value of the premises exceeded 500*l.*, so that the judge had no jurisdiction to decree specific performance of the agreement; but he was of opinion that it was a case in which specific performance would be decreed, and that he was therefore bound to treat the defendant as tenant under the terms of the agreement, and he gave judgment for the plaintiff:—Held, that the equitable doctrine that a person who enters under an executory agreement for a lease is to be treated as in under the terms of the agreement, can only be applied where the court in which the action is brought has concurrent jurisdiction in law and equity, and that the plaintiff could not recover. *Foster* v. *Reeves*, 61 L. J., Q. B. 763; [1892] 2 Q. B. 255; 67 L. T. 537; 40 W. R. 695—C. A.

8. Agreement as Distinct from Lease.

An instrument on an agreement stamp, reciting that A., in case it should turn out that he is entitled to certain premises on the death of B., would immediately demise the same to C., declaring that he did thereby agree to demise and let the same, with a subsequent covenant to procure a licence to let from the lord, operates as an agreement for a lease, and not as an absolute demise. *Doe* d. *Coore* v. *Clare*, 2 Term Rep. 739. S. P., *Perring* v. *Brook*, 7 Car. & P. 360.

An agreement by which A. agreed to let her house to B. "during her life, supposing it to be occupied by B. or a tenant agreeable to A.," and containing a stipulation that "a clause was to be added in the lease" for a particular purpose, is

only an agreement for a lease, and not a perfect lease, the stipulation clearly shewing it to be executory. *Doe* d. *Bromfield* v. *Smith*, 6 East, 530; 2 Smith, 570.

The following instrument is an agreement for a lease, and not a lease:—H. agrees to make and execute to E. a good and valid lease of all that messuage, &c. to hold to E., his executors and assigns, for the term of seven years, from the 24th day of June next, at and under the yearly rent of 105*l.*, clear of all taxes and assessments (except the land tax), payable half-yearly, the first half-yearly payment to be made on the 25th day of December next. And the lease shall contain a covenant on the part of E. to pay the rent, also to keep the premises in repair (damages by fire excepted); also a proviso for re-entry on non-payment of the rent by the space of twenty-one days after the same shall become due, or on non-performance of any of the covenants on the lessee's part to be performed. And E. agrees to accept such lease, upon the terms and conditions above specified, and to execute a counterpart; and E. agrees (when and so soon as the messuages or dwelling-houses on either side of the messuage hereby agreed to be demised shall become tenanted and occupied) to pay to H. an additional yearly rent of 15*l.* during the remainder of the term of seven years. And H. agrees, on or before the 24th day of June next, to erect eight light panels in front of the drawing-room windows, and fence-blind to same windows, to paper the hall and staircase, and all the rooms, save those on the basement and attics. And it is agreed, that by the lease hereby agreed to be granted, the rent therein reserved shall be 120*l.*; and that by a separate deed, to bear date the next day after the indenture of lease, H. shall release to E., out of the annual rent of 120*l.*, the annual sum of 15*l.* E. to prepare lease at his own cost, to be approved of by lessee's solicitor. *Rawson* v. *Eicke*, 2 N. & P. 423; 7 A. & E. 451; W. W. & D. 675; 7 L. J., Q. B. 17.

By articles, dated 2nd May, 1838, the defendant agreed with the plaintiff that he would grant him a lease of a messuage, for twenty-one years from Midsummer-day then next, at the rent of 45*l.*, payable quarterly, on the usual days of payment, in every year during the term, the first payment to commence on the 29th September then next; to be entered upon immediately by the plaintiff, he having, on the day of the date, paid 25*l.* to the defendant; and in the lease were to be contained covenants to pay the rent, to repair, &c., and all other usual and reasonable covenants, with a power to either party to determine the lease at the end of seven or fifteen years:—Held, that this instrument amounted to an agreement for a lease only, and not to an actual demise, and that the plaintiff was not entitled to recover as for the breach of an implied promise for quiet enjoyment. *Brashier* v. *Jackson*, 6 M. & W. 549; 8 D. P. C. 784; 9 L. J., Ex. 313.

By a memorandum, the plaintiff agreed to let to the defendant, and the defendant agreed to take a house, from the 24th June then next ensuing, for the term of twenty-one years, determinable at seven and fourteen years; that the lease to be granted was to contain a covenant on the part of the defendant to purchase the fee-simple for 600*l.*, at any time within the first seven years of the term to be granted, and a covenant on his part for payment of the rent of 35*l.*, quarterly, clear of all deductions for taxes whatsoever, and that the insurance on 500*l.* was to be paid by the plaintiff, and to be repaid by the defendant, as an increased rent, to lay out within twelve months 100*l.* on the premises, to keep the premises in substantial repair, and all other usual covenants, as in leases of houses in B.; and that the defendant should execute a counterpart of the lease when tendered to him by the solicitor of the plaintiff, and that the expense of the lease and counterpart was to be borne and paid by the defendant:—Held, that this was an agreement for a lease, and not an actual demise, and that the defendant, having entered and paid rent under the agreement, became tenant from year to year, which tenancy could only be determined by a regular notice to quit, or a surrender in writing. *Chapman* v. *Towner*, 6 M. & W. 100; 9 L. J., Ex. 54.

Words of present contract with an agreement that the lessee should take possession immediately, and that a lease should be executed in future, operate only as an agreement for a lease, and not as a lease itself. *Goodtitle* d. *Estwick* v. *Way*, 1 Term Rep. 735.

A party possessed of the residue of a term of years in premises, entered into a written agreement with another to grant him a lease of the same, together with certain fixtures, for a definite period, at a certain rent, payable quarterly; the lease to contain certain covenants: and the agreement further contained a covenant by the lessor to execute such lease when required; and that, until then, it should be lawful for the lessor, at any time after the execution of the agreement, to distrain for any rent due in respect of the demised premises:—Held, that this instrument did not amount to an actual demise. *Bicknell* v. *Hood*, 5 M. & W. 104; 2 H. & H. 86; 3 Jur. 774; 8 L. J., Ex. 193.

Where A. agreed "that he would by indenture demise to B. a house for fourteen years from the 25th day of December last past, at the yearly rent of 40*l.* payable quarterly; but if B. should pay A. the 40*l.* before the expiration of the first quarter, which would be at Lady-day then next, in that case the rent should be reduced to the rate of 33*l.* per annum, payable quarterly":—Held, that the agreement was no demise. *Hegan* v. *Johnson*, 2 Taunt. 148.

An agreement executed on the 24th November upon an agreement stamp, setting forth the conditions of letting a farm, and the regulations to be observed by the tenant, that the term was to be from year to year, the lands to be entered upon on the 3rd February, 1808, and the housing on the 12th May, and that a lease was to be made upon these conditions, with all usual covenants, at the foot of which the tenant wrote, "I agree to take Lot 1 (the premises in question), at the rent, &c. subject to the covenants," is an agreement for a lease, and not a present demise, there being no present occupation, and an express stipulation for a future lease, as well as time given to prepare it. *Tempest* v. *Rawling*, 13 East, 18.

A memorandum, dated the 23rd of June, 1842, made between A., as agent for and on behalf of the churchwardens of the parish of St. M. (not naming them), of the one part, and B. of the other part, by which it was agreed (provided a licence could be obtained from the lord of the manor, and upon B. putting the premises into repair) that the churchwardens should grant a lease to B. for twenty-one years from Midsummer-day then next, under the clear yearly rent of 30*l.*, such lease to contain covenants for

payment of rent and taxes, and to repair, insure, not to commit waste, and all other usual and proper covenants, and B. agreed to accept such lease, and execute a counterpart, and that until such lease and counterpart should be granted the yearly rent should be payable and recoverable by distress or otherwise, in like manner as if such lease and counterpart had been executed, is properly stamped as an agreement. *Doe* d. *Bailey* v. *Foster*, 3 C. B. 215; 15 L. J., C. P. 263.

"Memorandum of an agreement entered into this 31st of January, 1840, between R. of the one part, and T. of the other part. The said T. hereby agrees to become the tenant of the farm G. at the customary time of entry under the following conditions: viz. that the sum of 260*l.* annual rent shall be paid at the usual time for the house, premises and lands, as agreed upon; and the said R. agrees to lay out in improvements and alterations of the farmhouse and new sheds, a sum not exceeding 200*l.*, with the understanding that spars for rafters should be found from the estate; cartage for all materials except stones for walls to be done or found by T. (Signed) R. and T.": —Held, that the above memorandum was a mere agreement for a future tenancy, and not an actual demise, and therefore required a 1*l.* stamp only. *Gore* v. *Lloyd*, 13 L. J., Ex. 366; 12 M. & W. 463.

Where A. agreed under seal to take and hire of B. a house and premises at a certain annual rent, but the instrument contained no words of demise, and there was nothing to shew when the interest was to commence or determine:—Held, that it was no more than an agreement for a lease. *Clayton* v. *Burtenshaw*, 7 D. & R. 800; 5 B. & C. 41.

An instrument under seal, whereby A. (tenant for life, with a leasing power) "sets" to B. certain lands for the term of one life (not naming the cestui que vie); lease to be forfeited at the request of A. and the costs of B., with the usual clauses between landlord and tenant; and on which was indorsed a memorandum, stating the name of the cestui que vie, is not an actual demise, but only an agreement for a lease. *Clarke* v. *Moore*, 1 Jo. & Lat. 723; 7 Ir. Eq. R. 515.

Although an agreement between an intended lessor and lessee may possibly amount at law to a present demise or assignment, yet if, upon the face of the instrument, it appears that a further instrument is necessary to carry the intention of the parties into execution, a court of equity will treat it as an agreement to be specifically performed in that particular. *Fenner* v. *Hepburn*, 2 Y. & Coll. 159.

A., by an instrument, demised, or agreed to demise, lands to B. for three lives not named, at a yearly rent, and further agreed, that leases should be perfected at the request of either party. As an essential part of the contract, the nomination of the lives, was wanting, this cannot operate as a lease for three lives, nor as a lease for the life of tenant, that not being the intention of the grantor, but merely as an executory agreement for a lease. *Pentland* v. *Stokes*, 2 Ball & B. 68.

Paper entitled "Memorandum of an agreement between A. and B.," and signed by them, expressing, that in consideration of 40*l.* A. "doth agree to let and B. doth agree to take a messuage," &c., at 40*l.* per annum rent; "and it is further agreed that A. shall not raise the rent, nor turn out" B. so long as the rent is duly paid quarterly, and he does not sell any article injurious to A. in his business. Though the terms do not exclude the construction of actual demise, yet the import of the whole, looking to some future instrument, and a more permanent interest than from year to year, a demurrer to a bill for specific performance against A., who had succeeded in an ejectment, was overruled. *Browne* v. *Warner*, 14 Ves. 156; 9 R. R. 259.

Privity of Estate.]—A landlord, creditor for rent against the estate of a deceased tenant, is entitled to rank above the ordinary simple contract creditors, under a decree for administration. But this right arises out of the relation of landlord and tenant, and is founded on the sacred regard which the law of England shews to rights arising from tenure, and does not apply to a debt claimed against the estate of a deceased debtor who had entered upon the land under an agreement of such a nature, that his entry did not create a tenancy at a certain rent. Agreement to grant and accept a lease of property in Jamaica, from the 1st of December, 1847, for twenty-one years, at the clear yearly rent of 2,000*l.*, the lease to contain certain covenants. The tenant entered into possession, and died in August, 1849, without having paid rent:—Held, that this agreement would not have been an actual demise before the 8 & 9 Vict. c. 106, and that the entry thereunder created no tenancy, so as to give the landowner a right of distress, or to make any privity of estate between him and the intended lessee, and that, therefore, the owner in such case had not the right of priority. *Vincent* v. *Godson*, 22 L. J., Ch. 747; 17 Jur. 295; 1 W. R. 254.

This curious result of the law of tenure does not apply to a demise of lands in Jamaica. *Ib.*

Where there are Words of Present Demise.]—A landlord and tenant, between whom there was a subsisting tenancy, agreed in writing for a letting of the farm upon different terms, the amount of the rent to be settled by valuation, and the tenant to find sureties for his paying the rent. The amount was not settled, the sureties were not given, nor was any rent ever paid:—Held, that the instrument, although it contained words of present demise, did not operate as a lease, or alter the terms of the existing tenancy. *John* v. *Jenkins*, 1 C. & M. 227; 3 Tyr. 170; 2 L. J., Ex. 83.

Tenant in Possession.]—Where a tenant was in possession under a memorandum, whereby the lessor agreed to let a house on lease for twenty-one years, at the net clear rent of 63*l.* per annum, the tenant to enter at any time on or before a particular day, on paying 50*l.* on entry; and there was a purchasing clause in the lease:—Held, that this only amounted to an agreement for a future lease, and that no lease had been executed. *Dunk* v. *Hunter*, 5 B. & Ald. 322; 24 R. R. 390.

Letters containing Terms.]—The following letters constitute an agreement only, and not a demise. On the 21st February, 1825, the defendant wrote to the plaintiff: "I shall be happy to take a lease of your iron ore at a royalty of 1*s.* per ton, and I will engage to work the several veins of ironstone, limestone, ore and manganese, in such relative proportions as that the average produce of iron shall not exceed the usual average of the common ores (which I believe to be about 40 per cent.), the term to be about forty years from the 24th June next,

and the sleeping rent 150*l.* per annum. The relative proportion of the iron ores in weight to be worked together, to be ascertained by a competent person." The plaintiff wrote to the defendant in answer: "I agree to the terms contained in your letter. I shall be ready to grant a lease conformable thereto." *Jones* v. *Reynolds*, 1 G. & D. 62; 1 Q. B. 506; 10 L. J., Q. B. 193.

When Conditional.]—G. having agreed to let premises to P. for a term of years, P. paying 100*l.* for the fixtures, a lease by deed was prepared and engrossed on parchment: P. paid down only 50*l.*; it was agreed between G. and P. that P. should be let into possession as tenant from year to year on the terms of the intended lease, until he paid the balance of the 100*l.* At the same time G. signed, sealed, and delivered the deed, which, however, he retained in his own possession. No third person was present. No words qualifying the delivery, or expressly stating that it was an escrow till the payment of the balance, appeared to have been used. G. brought an action for use and occupation against an assignee of P.'s interest; and on those facts appearing, objection was taken that the action ought to have been on the covenants contained in the deed:—Held, that the circumstances warranted an inference in fact that it was agreed by both G. and P., at the time of the execution of the instrument, that it should not operate as a lease until the payment, and that if there was such an agreement by both, though no express words of delivery, as an escrow, it would operate as a deed till then, and consequently P. was tenant from year to year under the terms in the instrument, and not tenant under a deed, and that the action for use and occupation would lie against him or the assignee of his interest. *Gudgen* v. *Besset*, 6 El. & Bl. 986; 26 L. J., Q. B. 36; 3 Jur. (N.S.) 212; 5 W. R. 47.

Varied in Performance.]—A declaration stated, that it was agreed between the plaintiff and the defendant that the plaintiff should purchase of the defendant a house and shop fixtures, specified in an inventory, for 150*l.*; that 125*l.* should be paid on taking possession, and the remainder by bills of exchange; and that the defendant should grant, and the plaintiff should take, a lease of the messuage for twenty-one years, at the rent of 60*l.* The indenture tendered by the plaintiff stated that, as well in consideration of 150*l.* paid by the plaintiff to the defendant as of the yearly rents and covenants, the defendant demised and leased all that messuage:—Held, that the consideration was not truly stated, and, therefore, that the instrument was not such a lease as was agreed to be granted by the defendant to the plaintiff. *Vonhollen* v. *Knowles*, 12 M. & W. 602; 13 L. J., Ex. 140.

Under the repealed Statute 7 & 8 Vict. c. 76.]—While the act was in force A. and B. entered into a written agreement, not under seal, that A. should let and B. should take premises from a certain day for the monthly rent of 36*s.*, to be paid every four weeks:—Held, that the 4th section prevented this document from taking effect as a lease. *Burton* v. *Reevell*, 16 M. & W. 307; 16 L. J., Ex. 85; 11 Jur. 71.

A., who held a long lease of premises, and B., by writing agreed, by words of present demise, for a lease of three years from the 29th of September, 1845, by A. to B., and that if B. should, at the end of the term of three years, desire to renew his tenancy, then, on notice given by B. six months before the end of such term, A. should renew the tenancy for a further term of three years, or grant an under-lease of A.'s term, at the option of B. B. was let into possession, and paid rent, and afterwards gave notice that he desired a renewal of the tenancy, but the renewal was not agreed upon, and the original term of three years expired. A., without giving notice to quit, brought ejectment, laying the demise on the 30th of September, 1848. The 7 & 8 Vict. c. 76, was in force from the 1st of January, 1844, to the 1st of October, 1845:—Held, that the demise, not being under seal, operated as an agreement for a lease, and that by the payment of rent B. became tenant from year to year, subject to the terms of the agreement; that his interest expired of itself at the end of the term of three years first mentioned in the agreement, without any notice to quit; and that his having exercised his option to take a renewed term, and given notice accordingly, gave him no interest in the land. *Doe* d. *Davenish* v. *Moffat*, 15 Q. B. 257; 19 L. J., Q. B. 438; 14 Jur. 935.

In an action by A. against B. for rent on a demise from quarter to quarter, with the rent payable one quarter in advance, a written agreement for this quarterly letting, made while the 7 & 8 Vict. c 76, s. 4, was in force, was put in, which was signed by B., but not by A.:—Held, that this was evidence of a parol demise by A., and that it was put an end to by a parol notice to quit. *Bird* v. *Defonville*, 2 Car. & K. 415.

An agreement of demise for three years, executed in March, 1845, in writing, but not by deed, was prevented from operating as a lease by 7 & 8 Vict. c. 76, and was not re-established as a lease by 8 & 9 Vict. c. 106, which repealed the former act, but took effect only as from October, 1845. *Arden* v. *Sullivan*, 14 Q. B. 832; 19 L. J., Q. B. 268; 14 Jur. 712.

8 & 9 Vict. c. 106, s. 3.]—This statute, which enacts that a lease required by law to be in writing shall be void at law unless made by deed, has made no difference in the interpretation of written instruments. *Stratton* v. *Pettit*, 16 C. B. 420; 3 C. L. R. 925; 24 L. J., C. P. 182; 1 Jur. (N.S.) 662; 3 W. R. 549. But see *Rollason* v. *Leon*, 7 H. & N. 73; 31 L. J., Ex. 96; 7 Jur. (N.S.) 608.

The intention of the parties, as declared by the words of the instrument, must govern the construction; and where there is an instrument by which it appears that one party is to give possession of premises, and the other to take it, that is a lease, unless it can be collected from the instrument itself that it is an agreement only for a lease to be afterwards made. *Ib.*

An agreement not under seal between two persons, by which one agrees to let, and the other to take premises for the term of seven years, and by which it is agreed that a good and sufficient lease of the premises shall be prepared, may be good as an agreement; so that an action may lie upon it for not accepting the lease when prepared, although it would be void as a lease, in consequence of the 8 & 9 Vict. c. 106, s. 3. *Bond* v. *Rosling*, 1 B. & S. 371; 30 L. J., Q. B. 227; 8 Jur. (N.S.) 78; 4 L. T. 442; 9 W. R. 746.

What Constitutes an Actual Demise.]—*See* post, cols. 801–804.

E. LEASES.

1. REQUISITES OF.

Intention of Parties.]—Whether an instrument is to be construed as a lease or an agreement depends upon the intention of the parties, to be collected from the instrument itself, and the nature of the subject-matter, without reference to any extrinsic circumstances or subsequent acts of the parties. *Doe* d. *Morgan* v. *Powell*, 8 Scott (N.R.) 687; 7 Man. & G. 980; 14 L. J., C. P. 5; 8 Jur. 1123. S. P., *Morgan* d. *Dowding* v. *Bissell*, 3 Taunt. 65.

An instrument is not a devise, although it contains the usual words of demise, if its contents shew that such was not the intention of the parties. *Taylor* v. *Caldwell*, 3 B. & S. 826; 32 L. J., Q. B. 164; 8 L. T. 356; 11 W. R. 726.

A clause for a future lease does not of itself necessarily intend that the instrument must be only an agreement for a lease, if the intention of the parties appears to be otherwise. *Poole* v. *Bentley*, 12 East, 168; 2 Camp. 286.

Power to Lease.]—When it appears, upon the face of an instrument, that the party intending to demise has no power to demise, the instrument is not a lease. *Hayward* v. *Haswell*, 1 N. & P. 411; 6 A. & E. 265; W. W. & D. 158; 6 L. J., K. B. 116; 1 Jur. 54.

Lease under power to lease in possession was dated in March to hold from Michaelmas, but not delivered till Michaelmas:—Semble, that it is good. *Doe* d. *Mount* v. *Roberts*, 4 Doug. 306.

Words of Present Demise.]—A memorandum of an agreement to let, which contains words of present demise, and sufficiently ascertains the terms of the intended tenancy, will operate as a present demise, although it provides for the preparation of a future lease. *Warman* v. *Faithful*, 3 N. & M. 137; 5 B. & Ad. 1042; 3 L. J., K. B. 114. S. P., *Doe* d. *Jackson* v. *Ashburner*, 5 Term Rep. 163.

B. being wrongfully dispossessed of premises, executed the following deed: "Be it remembered that B. hath let, and by these presents doth demise to F. (the premises), as now held by W. F., for the full term of twenty-one years, to commence the 1st day of May or the 1st day of November, whichever first happens after B. recovers the lands from the heirs, &c., F. covenanting and agreeing, on the foregoing conditions, to pay to B. the sum of, &c. Leases with power of distress, and clauses of re-entry, and all other clauses usual between landlord and tenant, to be drawn and signed at the request of either party as soon as B. recovers the lands," &c.:—Held, that this instrument operated as a present demise. *Barry* v. *Nugent*, 3 Dougl. 179; 5 Term Rep. 165, n.

What constitutes an actual Demise.]—An instrument dated in March, 1798, whereby the landlord agreed to let, and also, upon demand, to execute to the tenant a lease of a farm; and the tenant agreed to take, and, upon demand, to execute a counterpart of a lease of the farm from the 5th of April, 1798, for fifteen years, under a certain yearly rent, which lease was to contain the usual covenants, and an agreement for re-entry in case of nonpayment of rent, and also the further covenants, &c.; and the agreement was to bind until the lease was executed, is a present demise, and therefore requires a lease stamp, the agreement for a future lease, with further covenants, being for the better security of the parties. *Doe* d. *Walker* v. *Groves*, 15 East, 244.

Agreement for a lease, with stipulations for the lessee to commence with laying out a considerable sum on the premises (the lease to contain certain specified covenants), "and in the meantime, until such lease shall be executed, to pay rent, and to hold the same premises subject to the covenants above mentioned," amounts to an actual demise. *Pinero* v. *Judson*, 6 Bing. 206; 3 M. & P. 497; 8 L. J. (o.s.) C. P. 19; 31 R. R. 388.

"G. F. does this day agree to let to J. S. three cottages for ten years; he further agrees to build a brewhouse and make a cellar, at the rent of 35*l.*: he agrees to pay the ground-rent, and has this day received 4*l.* from J. S., in earnest," is an actual demise, and not an agreement for a lease. *Staniforth* v. *Fox*, 7 Bing. 590; 5 M. & P. 589; 9 L. J. (o.s.) C. P. 175.

A memorandum having a lease stamp, by which A. agrees to let B. lands mentioned in an annexed abandoned lease from A. to C. upon the conditions, agreements, &c., contained in the same lease, and by which A. and B. bind themselves to execute a lease similar to such abandoned lease, is itself a valid lease. *Pearce* v. *Cheslyn*, 5 N. & M. 652; 4 A. & E. 225; 1 H. & W. 768; 5 L. J., K. B. 113.

"Sept. 21, 1829.—K. agrees to let, and P. to take a house in its unfinished state, for the term of sixty years, being the whole term that K. has the same leased to him, at the rent of 52*5l.*, payable quarterly, the first payment for the half-quarter at Christmas next: P. to insure the premises, and to have the benefit of an insurance lately paid: a lease and counterpart to be prepared at the expense of P., and to contain all the clauses, covenants and agreements K. entered into in the lease granted to him," is an actual demise, and not a mere agreement for a lease. *Doe* d. *Pearson* v. *Ries*, 8 Bing. 178; 1 M. & Scott, 259; 1 L. J., C. P. 73.

The defendant held premises under a lease from H. at a certain rent; and entered into an agreement with N. for the sale of all the household furniture, &c., on the premises, for a certain sum to be paid by instalments, covenanting, on payment of the whole of the purchase-money, to demise the premises to N. for twenty-five years; the lease to contain the like covenants on the part of N., as were contained in the lease under which the defendant held. The agreement also contained a covenant that N. should, in the meantime, and until such lease should be granted, pay the rent and perform all the covenants which would be to be performed by him in case the lease was actually granted; with a power of distress for nonpayment of the rent. N. was let into immediate possession under this agreement, and paid rent:—Held, that the agreement amounted to a present demise. *Hancock* v. *Caffyn*, 1 M. & Scott, 521; 8 Bing. 358; 1 L. J., C. P. 104.

A party seised in fee of premises, agreed, with eight other persons, to convey to them in trust for the inhabitants of a parish, to hold from the Lady-day then next ensuing, for the term of ninety-nine years, at a specified rent, payable half-yearly. The agreement then contained covenants by the lessees to pay the rent, taxes, &c., and to keep the premises in repair, and by the lessor for quiet enjoyment; and also a proviso for the execution of a lease containing the usual covenants, to be executed before a day specified;

and another, that the lessees, or their successors, should have the option of purchasing the fee-simple in the soil:—Held, that this instrument amounted to an actual demise, and was not a mere agreement for a lease. *Alderman* v. *Neate*, 4 M. & W. 704; 1 H. & H. 369; 8 L. J., Ex. 89; 3 Jur. 171.

The plaintiff, by letter, offered to take a farm of the defendant at a certain specified term and rent; the crops to be valued, and a lease to be prepared at the plaintiff's expense; the whole to be subject to a certificate of the plaintiff's solvency. The defendant, having received the certificate, by letter accepted the plaintiff as tenant, on the terms proposed: the valuation was deferred from time to time; but the plaintiff, on paying 100*l.* towards the amount, was let into possession:—Held, that the letters of the plaintiff and defendant (at all events, as explained by the above circumstances, and some admissions made by the plaintiff after a distress) constituted an actual demise, on which the defendant was authorised to distrain for rent in arrear, and not a mere agreement for a lease. *Chapman* v. *Bluck*, 4 Bing. (N.C.) 187; 5 Scott, 513; 1 Arn. 15; 7 L. J., C. P. 100; 2 Jur. 206.

A tenant being in possession under a demise for three years, ending Michaelmas, 1836, at a rent payable at Michaelmas, the landlord and tenant agreed as follows:—"Memorandum of agreement, made 13th December, 1834, P., the landlord, agrees to let the farm to B., the tenant, for fourteen years, determinable at the end of seven years, with twelve months' notice (not stating the commencement), at the yearly rent of 20*l.*, payable half-yearly; a lease to be drawn upon the usual terms by T., and B. agrees to take it upon the said terms":—Held, a present lease, commencing on December 13th, 1834. *Doe* d. *Phillips* v. *Benjamin*, 9 A. & E. 644; 1 P. & D. 440; 2 W. W. & H. 96; 8 L. J., Q. B. 117.

By an instrument under seal, and stamped with a lease stamp, W., in consideration of the rents, covenants and agreements reserved on the part of C., to be paid, performed and observed, covenanted, promised and agreed with C., that she, W., her heirs or assigns, should and would, at any time during the term thereinafter agreed to be demised, upon request made to her or them in writing under the hand of C., for that purpose, grant and execute to C.; and C. consented and agreed to accept and execute a counterpart of a demise or lease of premises therein described, for the term of twenty-one years from a day past, determinable as thereinafter mentioned at a certain rent, payable quarterly; and C. covenanted to lay out a sum in repairing, painting, &c., and it was agreed, that there should be contained in the lease and counterpart, by and on the part of C., a covenant for payment of rent, to repair, &c.; and also a covenant for quiet enjoyment, and a power to C. to determine the tenancy on the lease at the end of the third, seventh or fourteenth year of the term of twenty-one years, on giving notice:—Held, an actual demise, and not a mere agreement for a future lease. *Curling* v. *Mills*, 7 Scott (N.R.) 709; 6 Man. & G. 173; 12 L. J., C. P. 316.

On the 28th of October, 1843, the plaintiff, the defendant, and M. entered into an agreement, by which, after reciting that M. was tenant to the defendant of a house at a rent of 25*l.* a year, and had agreed to let it to the plaintiff at a rent of 20*l.* a year from 24th June, 1844, at which time the defendant agreed to exonerate M. from his tenancy on his paying all rent up to that day, and to accept the plaintiff as tenant from that period, at the rent of 20*l.* a year, M. agreed to let and the plaintiff to take the house from the date of the agreement of the 24th of June then next, at the rent of 20*l.* a year, and M. agreed to find all materials except lath, to put up a partition wall, the plaintiff finding lath and labour. And the plaintiff agreed to take the house of the defendant from the 24th of June, at the rent of 20*l.* a year, and to give or take six months' notice to quit, and the defendant agreed to exonerate M. from his tenancy on the 24th of June, on his paying up all rent due to that time. Immediately after the execution of this agreement M. let the plaintiff into possession. On the 4th of March, the defendant agreed to sell the house to the plaintiff, but this agreement was not carried into effect:—Held, first, that the instrument of 28th of October, 1843, amounted to a lease by the defendant to the plaintiff from 24th of June, 1844. *Tarte* v. *Darby*, 15 M. & W. 601; 15 L. J., Ex. 326.

Held, secondly, that it was not affected by the subsequent agreement for sale of the premises. *Ib.*

An agreement on a lease stamp by which A. agreed to let to B. certain premises from Michaelmas next, upon condition that A. should paint, &c., is an actual demise, and may be assigned. *Doe* d. *Green* v. *Fidler*, Peake, Ad. C. 33.

W. being tenant from year to year to J., they entered into an agreement dated 13th December, 1834, whereby J. agreed to let the premises to W. for the term of fourteen years, determinable upon notice at the yearly rent of 20*l.*, payable half-yearly; a lease to be drawn up on the usual terms; and W. agreed to take them on these terms. Held, that this constituted a lease. *Doe* d. *Phillips* v. *Benjamin*, 9 A. &. E. 644; 1 P. & D. 440; 8 L. J., Q. B. 117.

An agreement "between A. and B.," by which "A. agrees to pay B. 140*l.* a year in quarterly payments, for a house, garden, &c. (describing the situation), for a term of seven, fourteen or twenty-one years, at the option of the tenant, the rent to commence from 1st January," &c., is a lease, and not merely an agreement for one. *Wright* v. *Trevezant*, 3 Car. & P. 441.

An agreement by which A. agrees to "let" premises to B. "on lease" for a certain term, at a certain rent, "subject to the stipulations and covenants in the original lease under which he holds," and "to keep the said stipulations in every respect until the said lease shall be granted," which lease when required by B. is to be prepared by A.'s solicitor, but at B.'s expense, is a lease, and not an agreement for one. *Wilson* v. *Chisholm*, 4 Car. & P. 474.

See also cases ante, cols. 794 et seq.

Incorporeal Hereditament.]—A demise of an incorporeal hereditament can only be valid by deed; a demise by parol of a right of hunting and sporting, together with a messuage, is therefore void. *Bird* v. *Higginson*, 4 N. & M. 505; 2 A. & E. 696; 1 H. & W. 61. Affirmed, 6 A. & E. 824; 6 L. J., Ex. 282—Ex. Ch.

An instrument not under seal, by which land is demised, and which also attempts to demise incorporeal tenements, is not void by reason of such attempt. *Reg.* v. *Hockworthy*, 2 N. & P. 383; W. W. & D. 707; 7 A. & E. 492; 7 L. J., M. C. 24.

Statute of Frauds—Effect of.]—The 1st section of the Statute of Frauds, as construed by the 2nd,

is meant to vacate parol leases, conveying a greater interest in land than for three years, and whereon a rent is reserved. *Crosby* v. *Wadsworth*, 6 East, 602; 2 Smith 559; 8 R. R. 556.

Notwithstanding that section, a parol lease for more than three years will create a tenancy from year to year; the intention of the statute being satisfied by its not operating as a term. *Clayton* v. *Blakey*, 8 Term Rep. 3; 4 R. R. 575. S. P., *Doe* d. *Rigge* v. *Bell*, 5 Term Rep. 471; 2 R. R. 642.

If under a parol demise for more than three years, void by the Statute of Frauds, the lessee enters and becomes tenant from year to year, he is bound by an undertaking to repair contained in such void demise. *Richardson* v. *Gifford*, 3 N. & M. 325; 1 A. & E. 52; 3 L. J., K. B. 122. S. P., *Beale* v. *Sanders*, 3 Bing. (N.C.) 850; 5 Scott, 58; 3 Hodges, 147; 6 L. J., C. P. 283; 1 Jur. 1083.

A parol lease for a term not exceeding three years, warranted by the 2nd section of the Statute of Frauds, may be as special in its terms as a written one. *Bolton* (*Lord*) v. *Tomlin*, 1 N. & P. 247; 5 A. & E. 856; 2 H. & W. 369; 6 L. J., K. B. 45.

A verbal agreement to take ready-furnished lodgings for "two or three years" is a contract for an interest in land, and valid as a lease for not exceeding three years. *Edge* v. *Stafford*, 1 Tyr. 293; 1 C. & J. 391; 9 L. J. (O.S.) Ex. 101.

Action on an indenture for rent. Plea, that whilst the defendant was in the occupation of the premises, and before the rent became due, it was agreed that the plaintiff should make some alterations, and in consideration thereof the defendant should relinquish his interest under the indenture, and accept a fresh lease for seven years at an increased rent; and until such lease should be tendered to the defendant he should hold the premises as tenant from year to year, at the increased rent; that the plaintiff executed the alterations; that the defendant relinquished his interest under the indenture, and held the premises under the agreement; and that no new lease was executed; by means of which premises the defendant became tenant from year to year, and all his interest under the indenture was surrendered to the plaintiff by act and operation of law:—Held, first, that the plea could only be proved by an agreement in writing, since the stipulation as to the yearly tenancy was part of the agreement for a future lease, and such agreement was required by the Statute of Frauds to be in writing. *Forquet* v. *Moore*, 7 Ex. 870; 22 L. J., Ex. 35.

Held, secondly, that, under such an agreement, there would be no surrender of the existing lease by operation of law, until the new lease was granted. *Ib.*

8 & 9 Vict. c. 106, s. 3—Void unless by Deed.]—By 8 & 9 Vict. c. 106, s. 3, *a lease required by law to be in writing of any tenements or hereditaments, made after the 1st October*, 1845, *shall be void at law, unless made by deed.*

This statute is retrospective in its operation. *Upton* v. *Towend*, 17 C. B. 50.

But it does not apply to agreements for letting turnpike tolls under 3 Geo. 4, c. 126. *Shepherd* v. *Hodsman*, 18 Q. B. 316; 21 L. J., Q. B. 263.

By a writing, not under seal, signed by the plaintiff and the defendant, the plaintiff agreed to take of the defendant a farm at a yearly rental, "the tenancy to commence from the 29th day of September next, for a term of eight years, subject to a lease," to be drawn up by the defendant:—Held, that there was no contract by the defendant to give the plaintiff possession of the farm on the day named; for that possession was to be given only on the commencement of a tenancy under a lease for eight years, and this agreement was void as a lease, under 8 & 9 Vict. c. 106, s. 3. *Drury* v. *Macnamara*, 5 El. & Bl. 612; 25 L. J., Q. B. 5; 1 Jur. (N.S.) 1163; 4 W. R. 50.

By a written instrument not under seal, and dated the 28th of February, 1872, W. purported to demise a messuage to the defendant as tenant from year to year, for so long as he should keep the rent paid, and as W. should have "power to let the premises"; the rent reserved by the instrument was less than two-thirds of the annual value of the messuage. The defendant entered and paid rent quarterly:—Held, that the instrument was void as a lease, first, on the ground of uncertainty; and secondly, on the ground that, not being within the terms of s. 2 of the Statute of Frauds, it ought to have been under seal pursuant to 8 & 9 Vict. c. 106, ss. 2, 3. *Wood* v. *Beard*, 46 L. J., Q. B. 100; 2 Ex. D. 30; 35 L. T. 866.

Held, also, that the only estate vested in the defendant was a tenancy from year to year. *Ib.*

Hand and Hall entered into the following agreement not under seal: "Jan. 26. Hand agrees to let, and Hall agrees to take the large room, &c., from 14th February next until the following Midsummer twelve months, and with right at end of that term for the tenant, by a month's previous notice, to remain on for three years and a half more":—Held, that the agreement was divisible, and contained an actual demise for a term less than three years, with a superadded stipulation that Hall at his option should have a renewal of the tenancy, and that, as to the actual demise, it need not be under seal pursuant to 8 & 9 Vict. c. 106, s. 3. *Hand* v. *Hall*, 46 L. J., Ex. 603; 2 Ex. D. 355; 36 L. T. 765; 25 W. R. 734—C. A.

—— **But Valid as Agreements.**]—A. and B., after 8 & 9 Vict. c. 106 came into operation, executed a written instrument, by which A. agreed to let and B. to hire land for a term exceeding three years, at a rent payable monthly. B. entered; and it was afterwards orally agreed that the rent should be paid quarterly:—Held, that 8 & 9 Vict. c. 106, s. 3, though rendering the lease void, as not being by deed, still made it void only as a lease, and did not prevent it from indicating the terms on which B. held as tenant from year to year; and that consequently B.'s tenancy might be determined, during the term, by a half-year's notice, but at the end of the term, expired without notice. *Tress* v. *Savage*, 4 El. & Bl. 36; 2 C. L. R. 1315; 23 L. J., Q. B. 339; 18 Jur. 680; 2 W. R. 564.

The statute does not prevent an instrument which (as containing words of present demise, and not being under seal) is void as a lease from being enforced as an agreement in equity. *Parker* v. *Taswell*, 2 De G. & J. 559; 27 L. J., Ch. 812; 4 Jur. (N.S.) 1006; 6 W. R. 608.

An agreement creating a present demise, void as a lease, by the above statute, may still enure as an agreement. *Hayne* v. *Cummings*, 16 C. B. (N.S.) 421; 10 Jur. (N.S.) 773; 10 L. T. 341. S. P., *Tidey* v. *Mollett*, 16 C. B. (N.S.) 298; 33 L. J., C. P. 235; 10 Jur. (N.S.) 800; 10 L. T. 380; 12

W. R. 802. *Bond* v. *Rosling*, 1 B. & S. 371; 30 L. J., Q. B. 227; 8 Jur. (N.S.) 78; 4 L. T. 442; 9 W. R. 746.

The following agreement, made in 1861: "L. agrees to let, and R. agrees to take, the wood-mill, with the house and land adjoining, for the period of three years from Lady-day then next, at the rent of 120*l.* per annum. A lease for the same to be executed and signed as soon as possible, subject to the permission of the landlord of the mill. L. also agrees to let, and R. agrees to take, the mill, house, land, &c., from this date up to Lady-day then next, on the same terms, and at the same rate of rent; R. to have the sole use of the mill, house, and land, and all machinery and utensils therein contained," operates as an actual demise from its date up to Lady-day, and as an agreement for a lease from that time for a term of three years, and consequently is not void for not being under seal. *Rollason* v. *Leon*, 7 H. & N. 73; 31 L. J., Ex. 96; 7 Jur. (N.S.) 608.

—— **Assignment of Lease.**]—A lessee of premises from May till the 13th December, let them by parol to the defendant for the whole of the term, reserving a weekly rent. The parties intended to create the relation of landlord and tenant, and to pass the interest by lease. The defendant occupied and paid rent till June, and then gave a week's notice to quit, and, at the expiration thereof, left the premises. In an action to recover subsequent rent:—Held, that this might operate as a lease, though it passed all the lessor's interest, notwithstanding 8 & 9 Vict. c. 106, and, therefore, the lessee was entitled to recover. *Pollock* v. *Stacey*, 9 Q. B. 1033; 16 L. J., Q. B. 132; 11 Jur. 267.

—— **As to Stamping.**]—A lease in writing, not by deed, void under the 8 & 9 Vict. c. 106, s. 3, does not require a stamp. *Mott* v. *Turnage*, 1 F. & F. 6.

Ownership — Lands Clauses Act.]—An agreement to let land at a yearly rent, determinable by six months' notice to quit (no term being mentioned), provided that, in case A. and B. erected any buildings upon the land, they were to have the privilege of removing them at any time during their occupation, or otherwise they were to be allowed a beneficial interest in the same to the amount of the sum expended in the erection of the buildings, such beneficial interest to extend over a period of twenty years; that is to say, if A. and B. were required to give up possession of the piece of ground before the expiration of the term of twenty years, they were to be allowed one-twentieth part of the amount expended for each remaining year of the unexpired term of twenty years:—Held, that this agreement conferred on A. and B. such a beneficial interest in the land as constituted them owners within the interpretation clause of the Lands Clauses Act (8 & 9 Vict. c. 18), and that, therefore, the company was not entitled to enter on the land until it had satisfied A. and B.'s claim, as provided by s. 84. *Rogers* v. *Hull Dock Co.*, 4 N. R. 249; 11 L. T. 42; 12 W. R. 1101. Affirmed, 34 L. J., Ch. 165; 10 Jur. (N.S.) 1245; 11 L. T. 463; 13 W. R. 217.

Part of Land already Let.] — By parol, a dwelling-house and premises were demised for a year. The lessee "accepted the lease, and by virtue of the demise entered upon the demised land." Before and at the time of the demise, eight acres, included in it, had been demised to a third party, in whose possession they were, so that the lessee could not, and did not, enter upon them:—Held, that the demise was altogether void. *Neale* v. *Mackenzie*, 2 Gale, 174; 1 M. & W. 747; 6 L. J., Ex. 263—Ex. Ch.

What sufficient to create Relationship of Landlord and Tenant.]—The property of the soil and bed of the Thames, and of moorings fixed to the soil of the river, is vested in the conservators. W. used certain moorings on the river for the purpose of mooring his hulk, as a floating coal depôt, under an agreement with the conservators, to the following effect: "The conservators of the Thames grant to W. W. liberty and licence to fasten, and thenceforth keep fastened, his coal hulk to the moorings placed by the conservators in the river, until either party shall have given the other one calendar month's notice in writing. In consideration whereof W. W. shall pay the conservators, towards the expenses of placing and maintaining and repairing the moorings, the annual sum of 30*l.*" W. was assessed to the poor-rate as an occupier of part of the bed of the river:—Held, that the agreement did not constitute a demise, but only a licence to use the moorings, and that W. was, therefore, not an occupier, and not liable to be rated. *Watkins* v. *Milton-next-Gravesend Overseers*, 37 L. J., M. C. 73; L. R. 3 Q. B. 350; 18 L. T. 601; 16 W. R. 1059.

A., an owner of lace-machines, paid 12*s.* a week to B. for permission to place the machines in a room in B.'s factory, and for free ingress and egress to the room for himself and workmen for the purpose of working and inspecting the machines. B. supplied the necessary steam-power for working the machines, payment for which was included in the above sum:—Held, that there was no demise to A. of any part of the room, and no relation of landlord and tenant created between him and B. *Hancock* v. *Austin*, 14 C. B. (N.S.) 634; 32 L. J., C. P. 252; 8 L. T. 429; 11 W. R. 833.

By a deed between A. and B., holders of shares in a building society, and C. and D., trustees of the society, reciting the formation of the society, that A. and B. were entitled to a certain sum out of the funds in respect of their shares, and that for the security of all the payments to become due in respect of the shares, A. and B. had agreed to execute the assurance thereby made; A. and B. conveyed premises to C. and D. as such trustees, upon trust to permit A. and B. to receive the rents until default in payment of their contributions, with a power to C. and D. and the trustees for the time being of the society to appoint a person to receive the rents in case of default, and a power of sale in the like event. The deed also contained a clause whereby A. and B. agreed "to become tenants of the parties hereto of the second part, and to the trustees for the time being of the society of the premises demised henceforth during their will at the net yearly rent of 200*l.*, payable on the usual quarter days":—Held, that this deed did not operate as a demise, so as to sustain an avowry alleging a tenancy under the trustees at the yearly rent of 200*l.*, the general scope of the deed being altogether inconsistent with such a construction. *Walker* v. *Giles*, 6 C. B. 662; 18 L. J., C. P. 323.

A. let to B. a defined portion of a room in a factory, with steam-power for working lace-machines belonging to B., at a certain sum per

annum, payable quarterly; a deduction to be allowed in the event of hindrances in the supply of power beyond seven days in each quarter:—Held, a sufficient demise to entitle A. to distrain. *Selby* v. *Greaves*, 37 L. J., C. P. 251; L. R. 3 C. P. 594; 19 L. T. 186; 16 W. R. 1127.

—— **In case of Agreement for Lease.**]—*See* D. 1, ante.

Rule against Perpetuities.]—Although it is competent for a reversioner to execute a lease for lives for a definite ascertained term to commence as soon as an existing lease has expired, the interest to be taken must be capable of ascertainment within the period prescribed by the rule against perpetuities. The law relating to the rule against perpetuities as affecting agreements for future leases considered. *Redington* v. *Browne*, 32 L. R., Ir. 347.

Of Charity Land.]—*See* CHARITY.

Of Ecclesiastical Property.] — *See* ECCLESIASTICAL LAW.

2. CONSTRUCTION OF.

Omission of Word.]—When a material word appears to have been omitted in a lease by mistake, and other words cannot have their proper effect unless it is introduced, such lease must be construed as if that word was inserted, although the particular passage where it ought to stand conveys a sufficiently distinct meaning without it. *Wright* v. *Dicksons*, 1 Dow, 141, 147.

Meaning of Words in—Generally.]—It cannot be inferred as matter of law that words occurring in a lease are used by the parties in a peculiar sense in which they are understood in the district in which the property demised is situate. *Clayton* v. *Greyson*, 6 N. & M. 694; 5 A. & E. 302.

It is a question for the jury, in what sense the words were used in the particular case. *Ib.*

—— "**Term.**"]—The word "term" in a covenant in a lease, may signify either the time, or the estate granted. *Evans* v. *Vaughan*, 6 D. & R. 349; 4 B. & C. 261; 3 L. J. (O.S.) K. B. 217; 28 R. R. 250.

—— "**To be left to the superintendence of, &c.**"—**Condition Precedent.**]—A lease contained a covenant by a lessor to do certain work, and at the end of the covenant were these words, "and the whole of which is agreed to be left to the superintendence of the defendant and the plaintiff's son:—Held, that this was neither a condition precedent to nor concurrent with the covenant. *Jones* v. *Cannock*, 3 H. L. Cas. 700.

—— "**Heirs or Assigns**"—**Easement—Regrant by Lessee—Surrender—Merger.**]—In 1820 A., B. and C., who were tenants in common in fee, demised a strip of land intersecting their estate to T., for a term of 1,000 years for the purpose of making a canal. The lease contained a proviso that nothing therein contained should prevent the lessors, their heirs and assigns, from using all or any of the demised land, or from granting any way-leaves, or roads over or across the same in like manner as they could or might have done if the lease had not been granted, but so as not to injure the canal or the navigation thereof, or the towing-path, or any works for the convenience of the lessee. In 1838 the estate was partitioned between A., B. and C., by deed, the reversion of part of the canal being conveyed to B., and the lands abutting on it to A. and C. respectively. In 1839 B. conveyed his reversion in that part of the canal to the lessee. Upon a claim by A. to exercise over that part of the canal the rights reserved by the lease of 1820:—Held, that the right of way across the canal was reserved to the lessors and their assigns as owners of the reversion and not as owners of the adjoining lands, and consequently that the conveyance by B. in 1839, by causing the term to become merged in the reversion, extinguished the rights of A. and C. over that part of the canal included in that conveyance. *Dynevor* (*Lord*) v. *Tennant*, 57 L. J., Ch. 1078; 13 App. Cas. 279; 59 L. T. 5; 37 W. R. 193—H. L. (E.)

—— "**Her Assigns.**"]—Lease to A., her heirs and assigns, habendum to A. and her assigns, for and during the natural life of B.:—Held, in ejectment by A., the heir of B., that the words "and her assigns," in the habendum, must be rejected as repugnant to the premises. *Doe* d. *Timmins* v. *Steele*, 3 G. & D. 622; 4 Q. B. 663; 12 L. J., Q. B. 272; 7 Jur. 555.

—— "**As the same was late in the occupation of C.**"]—A shop was demised to C., the landlord retaining the right of occupying the flat roof. Shortly afterwards the landlord demised an adjoining house to another person, with the right of walking and sitting on the roof of the shop. C.'s lease having determined, the landlord demised the shop to the plaintiff by the description of "all that shop as the same was late in the occupation of C." The lease of the house having afterwards determined, the landlord relet it to the defendant, with the right to occupy the roof of the shop as a photographic studio:—Held, that the words "as the same was late in the occupation of C." ought to be considered as inserted only for the purpose of identifying the property, and not of limiting the operation of the deed; that the lease to the plaintiff, therefore, gave him a right to the occupation of the roof, and that the erection of a photographic studio by the defendant was an unlawful act. *Martyr* v. *Lawrence*, 2 De G. J. & S. 261; 4 N. R. 312; 10 L. T. 677; 12 W. R. 1043.

Words struck out.]—A printed instrument, purporting to be a form of a demise of a farm, originally contained in the habendum words creating a tenancy from year to year, but on producing the instrument in evidence, they were found to be struck through, and were proved to have been so struck through before the execution of the instrument by the party charged. The remaining words of demise were "for the term of one year fully to be complete and ended," and stood immediately preceding those which had been struck out. However, many subsequent stipulations remained in the lease, which seemed to be only applicable to a tenancy for longer than a year, or determinable by notice to quit:—Held, first, that the words struck through might be looked at to ascertain the real intention of the parties in so erasing them, and consequently that the tenancy was for one year only; and next, that the stipulations inapplicable to

such a tenancy must be considered as struck out, or as surplusage, unless the tenancy should continue for more than a year. *Strickland* v. *Maxwell*, 2 C. & M. 539; 4 Tyr. 346; 3 L. J., Ex. 161.

Covenants in.]—A proviso in a lease, empowering the lessor to resume any portion of the demised land which might be acquired for the purpose of building, planting, accommodation or otherwise will not enable the lessor to resume a portion of the land for the purpose of conveying it to a railway company discharged from the lease. *Johnson* v. *Edgware, Highgate and London Ry.*, 35 L. J., Ch. 322; 14 L. T. 45; 14 W. R. 416.

By lease of a salt mine made 16th November, 1852, pursuant to agreement of 25th August, 1851, the mine was demised for a term to commence on 25th June, 1851, and the lessees covenanted to get 2,000 tons of salt annually during the term, or pay for the deficiency at the end of each year; and by another covenant they undertook, with reasonable diligence, to sink shafts to the rock salt in order to work and get it. The deed contained a proviso that if the salt during the continuance of the term should fail by any inevitable accident, then on payment of rent due and performance of all covenants, the term was to cease. After the agreement was concluded, but before the deed was made, while the lessees were sinking a shaft, it was found that brine had collected in such quantities as to prevent the getting of rock salt at all:—Held, first, that although the influx of brine would have been an inevitable accident within the proviso for cesser if it had occurred after the demise, yet as it happened before the making of the deed, although after the time from which the term was to be computed, it had no such operation, and the term was a subsisting term; secondly, that notwithstanding it was impossible to work or get the rock salt, the lessees were not excused from sinking shafts according to their covenant. *Jervis* v. *Tomkinson*, 1 H. & N. 195; 26 L. J., Ex. 41; 4 W. R. 683.

L. was the holder of a lease of premises from S. for twenty-one years, determinable at the will of either party at the end of the first seven or fourteen years. The first seven years would expire at Christmas, 1863. L. had expended considerable sums on the premises, for which he was to receive 1,800*l.* from R., to whom he agreed to assign the lease. The agreement contained these stipulations:—"If R. is ejected by S., the 1,800*l.* to be repaid to R. If S. exercises the power of determining the lease at Christmas, 1863, and R. leaves the house, 1,100*l.* are to be returned to R. If at Christmas, 1863, the tenancy of R. is continued, the 1,800*l.* to be retained by L." R. entered into possession, and his aunt, Mrs. C., resided with him. In May, 1863, S. gave notice of an intention to determine the tenancy. At Christmas, 1863, Mrs. C. became lessee to S., under a new lease, at a largely increased rent. R. continued to live in the house after his aunt, Mrs. C., had become the lessee. R. claimed the return of the 1,100*l.* under the agreement:—Held, that the agreement must be construed as applying entirely to a legal termination of R.'s tenancy, which having taken place, he was entitled under the agreement to the return of the 1,100*l.* *Lucas* v. *Rideout*, L. R. 3 H. L. 153. *S. C.* in Ex. Ch. 14 L. T. 738, affirmed. *See also* post, M.

Lease and Memorandum—Read together.]—By a lease reciting that A., one of the lessors, was an original lessee for the term of his natural life, and that B., the other, was a person to whom A. had granted a lease for a term of years certain, seven of which would remain unexpired on the 29th September following the date of the lease, A. and B. demised to the lessee the premises from the 29th day of September, for and during the two several terms thereinbefore mentioned (the rent to be paid to both the lessors and their executors), if the lessee should so long live, and the term and estate of the original lessee should so long continue. Under the lease there was subscribed a memorandum, providing that the rent reserved should be paid during the first seven years to the intermediate lessee, and afterwards to the original lessee, during the term of thirty years, if his interest should so long continue; and that the new lessee, his executors, administrators, and assigns, should have liberty to quit a part of the premises at any time during the term, upon giving twelve months' notice:—Held, that the lease and memorandum must be taken together, and construed as one entire instrument; and that the intention of the parties, expressed by both, was to extend the habendum beyond the term of the life of the lessee, and give him a lease for thirty-seven years, determinable on the death of the lessor. *Weak* d. *Taylor* v. *Escott*, 9 Price, 595.

Lease for 2,000 years.]—A lease for 2,000 years is not to be construed as a lease, but merely as a term to attend the inheritance. *Denn* d. *Bargwell* v. *Barnard*, Cowp. 595.

When an "alienation."]—A lease of seventy-seven years is an alienation within the meaning of the clauses of an entail prohibiting "alienation" and making void "dispositions" of the lands entailed. *Elliott* v. *Pott*, 3 Bligh. 134.

Must be Uniform.]—A. being tenant to B. under a lease containing covenants, by which the former was bound to fetch seventy-five bushels of coals from Poole yearly, and deliver them at the mansion-house of the latter, and also to supply him with as much good wheat as he should want in his family at 5*s.* per bushel, it was agreed between them that the lease should be surrendered up, and a new one granted, omitting the above covenants. A new lease was accordingly executed, and at the same time an agreement was entered into, whereby A. agreed with B. that he would fetch and bring to the dwelling-house of B., his heirs and assigns, seventy-five bushels of coals yearly, for twelve years (the term of the new lease), and yearly supply of B., his heirs and assigns, with as much good wheat as he should want in his family, at 5*s.* per bushel. B. having parted with his reversion in the farm, and also quitted the mansion-house in which he resided at the time when the agreement was made:—Held, that he was not entitled to maintain an action against A. for refusing to deliver the wheat at the stipulated price; that the agreement being entire must receive one uniform construction; and as it was clearly local in respect to the delivery of the coals, it could not be deemed personal with respect to the wheat. *Coker* v. *Guy*, 2 Bos. & P. 565.

Held, also, that no parol evidence could be admitted to explain the agreement, there being no latent ambiguity. *Ib.*

When extent of Demise is disputed.]—A., the owner of certain freehold houses and land, with a yard adjoining thereto, demised, by parol, several of the houses. The tenants were in the habit of passing over the yard, and using a common pump and privy there. There was no evidence whether the yard formed part of the demise or not. In an action by one of the tenants against the landlord for excluding him from the yard, the judge left it to the jury to say whether the landlord at the time of the demise had reserved the yard :—Held, that this was a misdirection, the question being whether he had demised it, and not whether he had reserved it. *Hebbert* or *Herbert* v. *Thomas*, 1 C. M. & R. 861 ; 5 Tyr. 503 ; 1 Gale, 53.

A demise was in the following words :—"All that part of the lands of G. marked in the map Nos. 10 and 11, and called the Lough Farm, containing twenty-seven acres of green pasture and improvable ground and thirteen acres of bog, reserving and excepting the thirteen acres of bog":—Held, that the words of grant ended with "Lough Farm," the rest being merely words of description, and that, therefore, the exception was good, as being of a particular thing out of a general. *McCleary* v. *Cochrane*, Ir. R. 4 C. L. 145 ; 18 W. R. 362—Ex. Ch.

Agreement as to Supply of Chlorine Waste.]—In an agreement for a lease from the plaintiff to the defendant of the Higher Works, the plaintiff agreed to supply to the defendant the whole of the chlorine still waste as it came from his still, neither adding to nor taking anything from the same, at a given rate per hundredweight, and not to use, or injure or part with any of the still waste, except to the defendant, so long as he should hold the works :—Held, that the defendant was bound to take the whole of the waste which, during his occupancy, came from the plaintiff's still. *Bealey* v. *Stuart*, 7 H. & N. 753 ; 31 L. J., Ex. 281 ; 8 Jur. (N.S.) 389.

Execution and Delivery of Lease Question for Jury.]—In ejectment on the title, the defendant relied upon twenty years' adverse possession, to obviate which the plaintiff gave in evidence a lease, the last life in which died within the twenty years ; but, though both the lease and the counterpart were attested as "signed, sealed and delivered" by the lessor, neither of them was executed by the lessee, and both, being seventy years old, came out of the custody of the lessor :—Held, that though the plaintiff was entitled, under all the circumstances of the case, to have had a question as to the fact of the delivery submitted to the jury, he was not entitled to a direction in his favour, and that the verdict directed for the defendant should stand. *Miltown* (*Earl*) v. *Goodman*, Ir. R. 10 C. L. 27.

Evidence to explain Grant.]—In 1855, S., an owner in fee of two mills, leased one to P., who carried on there the business of a bleacher. The refuse from his works was discharged through a drain, partly open and partly covered, into a natural stream or watercourse, 300 or 400 yards distant, and upon which the other mill was situate. This discharge of the refuse took place about seven times a fortnight, and polluted the stream. In 1858, P. surrendered his lease, and S. granted a new lease to the defendant. In this lease the defendant was described as a "bleacher," and the demise was of the premises "late in the occupation of P." There was a clause that all buildings erected by the defendant for the purpose of bleaching should, at the end of the term, become the property of S. In 1858 the plaintiff purchased both mills. The defendant discharged the refuse from his works through the drain into the stream in the same manner that P. had formerly done. The plaintiff, who carried on in the other mill the business of a paper maker, brought an action against the defendant for polluting the stream : —Held, that the lease might be explained by the state of the premises at the time it was granted, and the mode in which they had been previously enjoyed ; and that, thus explained, there was an implied grant by S. to the defendant to use the stream for the purpose of his business of bleaching, and therefore the plaintiff, who was in the position of S., could maintain no action against the defendant. *Hall* v. *Lund*, 1 H. & C. 676 ; 32 L. J., Ex. 113 ; 9 Jur. (N.S.) 205 ; 7 L. T. 602 ; 11 W. R. 271.

A draft lease was prepared by a lessor, in pursuance of a written contract, which was not objected to by the lessee, who afterwards refused to complete :—Held, that the draft lease could not be used for the purpose of controlling or explaining the contract itself. *Heywood* v. *Cope*, 25 Beav. 140.

Admissibility of Parol Evidence.]—Where by a lease the plaintiff had the use of cows to be depastured on lands described as "summerleazes" and "after grass" respectively, from 2nd February to 17th November, evidence was tendered at the trial of a custom in the country that a lessor should, notwithstanding such a lease, put cattle of his own on the lands called "summerleazes" up to 12th May :—Held, that such evidence being in effect evidence of the meaning of the technical word "summerleazes" was admissible to shew what rights passed in the plaintiff under the lease. *Tudgay* v. *Sampson*, 30 L. T. 262.

Insertion of Proviso.]—The Goldsmiths' Company entered into an agreement with the plaintiff to grant to him a long lease of ground on which he was about to erect new buildings. The agreement contained a proviso that nothing therein should give the plaintiff any rights of light and air over certain adjoining ground and buildings. A form of lease was annexed to the agreement, and the lease was afterwards granted according to the form, and contained an express demise of lights ; but there was no proviso in the lease similar to the one in the agreement. The Goldsmiths' Company afterwards demised the adjoining ground to the defendant, who commenced building so as to intercept the plaintiff's light :—Held, that the lease must be read as if the proviso in the agreement was inserted in the lease. *Salaman* v. *Glover*, 44 L. J., Ch. 551 ; L. R. 20 Eq. 444 ; 32 L. T. 792 ; 23 W. R. 722.

3. Confirmation of.

Acceptance of Rent.—Although, generally, the acceptance of rent by a person who is entitled to set aside a lease will confirm it. *Doe* d. *Jolliffe* v. *Sybourn*, 2 Esp. 667.

Yet acceptance of rent by a tenant in tail, on coming into possession, is no confirmation of a

lease made by a tenant for life, which is absolutely void at his death. *James* d. *Aubrey* v. *Jenkins*, Bull. N. P. 96.

Nor can a lease which is void against a remainderman be set up by his acceptance of rent, and suffering the tenant to make improvements after his interest vests in possession. *Doe* d. *Simpson* v. *Butcher*, 1 Doug. 50. S. P., *Jenkins* d. *Yate* v. *Church*, Cowp. 482.

Acceptance by an adult beneficiary, after attaining his majority, of rent accruing under an invalid lease is not a confirmation of the lease or a bar to relief by having the lease set aside. *Robson* v. *Flight*, 4 De G. J. & S. 608; 34 L. J., Ch. 226; 11 Jur. (N.S.) 147; 11 L. T. 725; 13 W. R. 393.

By Heir.]—An heir in tail having received, for ten years, rent under a demise for ninety-nine years granted by his ancestor:—Held, a confirmation of the lease. *Doe* d. *Southouse* v. *Jenkins*, 5 Bing. 469; 3 M. & P. 59; 7 L. J. (O.S.) C. P. 182; 30 R. R. 700.

Allowing Tenant to make Improvements.]—Where a tenant under a void lease makes great improvements with the knowledge and approbation of the landlord, he is entitled in equity to a valid lease, semble. *Hardcastle* v. *Shafto*, 1 Anstr. 185.

Lease by Stranger—Acquiescence by Owner.]—To a bill which alleged (amongst other things) that the plaintiffs, believing themselves to be entitled under a devise to a dwelling house and shop, entered into an agreement for a lease of the premises, then in a dilapidated state, to a tenant, in pursuance of which the tenant expended money in pulling down and rebuilding the premises; that the defendant, who was, as it afterwards appeared, the actual owner of a moiety of the property, knew the true state of the title, and had made a claim to the whole property, which claim he repeated a few days before the improvements were commenced; that he knew also that the improvements were being made, and that the plaintiffs and their tenants were acting under a mistake, and nevertheless permitted the works to be carried on without any objection during their progress; and praying that the defendant might be decreed to confirm the lease, and in the meantime be restrained from evicting the tenant: a demurrer for want of equity was allowed:—Held, also, that in such a case the principle is the same whether the owner and the party making the expenditure by mistake are strangers or tenants in common of the property; that the owner, having once and recently given notice of his claim to the property, was not, in order to exclude any equity in respect of the expenditure on the ground of mistake by the party in possession or of acquiescence on his own part, bound again to assert it when the expenditure began, or while it was going on; that, in order to exclude such equity it was not necessary that the notice of his claim, given by the claimant to the party in possession, should disclose any particulars relating to his title, nor, if the claim, which he made exceeded what he was entitled to, was the party in possession justified in disregarding it, or supposing it to be unfounded. *Clare Hall Master* v. *Harding*, 6 Hare, 273; 17 L. J., Ch., 301; 12 Jur. 511.

On Death of Lessor, a Tenant for Life.]—A lease executed by a tenant for life, in which the reversioner, who was then under age, is named, but not executed by him, is void on the death of the tenant for life; and an execution by the reversioner only afterwards is no confirmation of it, so as to bind the lessee in an action of covenant. *Ludford* v. *Barber*, 1 Term Rep. 86; 1 R. R. 56. S. P., *Doe* d. *Martin* v. *Watts*, 7 Term Rep. 83; 2 Esp. 501; 4 R. R. 387.

A tenant for life leased premises for twenty-one years, and, before the expiration of that term, died; the trustees of the remainderman, then an infant, continued to receive the rent reserved, and he, on coming of age, sold the premises by auction; in the conditions of sale the premises were declared to be subject to the lease, and in the conveyance to the purchaser the lease was referred to as in the possession of the lessee; and in the covenant against incumbrances that lease was excepted; the purchaser mortgaged, and in the mortgage deeds the like notice was taken of the lease, and the mortgagees for some time received the rent reserved:—Held, that the lease expired with the interest of the tenant for life, and that the notice since taken of it did not operate as a new lease. *Doe* d. *Potter* v. *Archer*, 1 Bos. & P. 531. And see *Roe* d. *Jordan* v. *Ward*, 1 H. Bl. 97; 2 R. R. 728.

The defendant came into possession under a lease from a tenant for life, whom the lessor of the plaintiff succeeded as remainderman: a money rent was to be paid; and, by a further reservation, the tenant was to carry, or cause to be carried, three cart-loads of culm yearly to the landlord's dwelling-house. At the trial this lease was objected to as invalid, but it appeared that the lessor of the plaintiff, at the Michaelmas after the tenant for life died, told his servant to go and look for carts to bring the culm home. The servant went to the tenants, and among others to the defendant, who accordingly brought a load of culm to the dwelling-house, other persons who were tenants doing the same. On the following May-day the defendant sent two other cart-loads of culm to the house where it was received, other loads being sent in by the tenants at the same time. The jury found that the culm was carried by and received from the defendant in the way of rent under the reservation:—Held, that such finding was grounded on sufficient premises, and that, allowing the lease to be void, the receipt of culm was a recognition of the defendant as tenant from year to year. *Doe* d. *Tucker* v. *Morse*, 1 B. & Ad. 365.

By Executrix of Mortgagor.]—Where by lease a mortgagee demised, and the executrix of the mortgagor demised and confirmed, and a power of re-entry was reserved to them or either of them:—Held, that it operated as the demise of the mortgagee, and the confirmation of the mortgagor's representative. *Doe* d. *Barney* v. *Adams*, 2 C. & J. 232; 2 Tyr. 289; 1 L. J., Ex. 105.*

By Infant—On Coming of Age.]—Where a party takes a lease of an infant's lands, and the infant, on coming of age, mortgages the property to the lessee by deed referring to the lease, this is a confirmation of the lease. *Story* v. *Johnson*, 2 Y. & C. 586.

When Lease is originally void.]—A lease made by a perpetual curate of a curacy augmented by the governors of Queen Anne's Bounty, without the concurrence of the patron paramount, though confirmed by the ordinary

and immediate patron, is void at common law, and consequently is not set up by acceptance of rent by the successor to the curacy. *Doe* d. *Brammall* v. *Collinge*, 7 C. B. 939; 18 L. J., C. P. 305; 13 Jur. 791.

In 1786 a dean and chapter and P. granted a lease of premises for ninety-nine years, reserving a rent to the dean and chapter and another rent to P. This lease purported to be made in pursuance of leasing powers given by a private act of parliament, but was, in fact, not in accordance with them. The rents reserved by the lease had been from time to time regularly paid to and received by the successive deans and chapters, and to and by P. and his representatives. Quære, whether the lease was void or only voidable; but held, that if voidable, it had been set up by acceptance of rent by each successive dean and chapter, and if void, the payment and receipt of rent were evidence from which a demise from year to year by the dean and chapter would be presumed. *Doe* d. *Pennington* v. *Taniere*, 12 Q. B. 998; 18 L. J., Q. B. 49; 13 Jur. 119.

Action for—Parties.]—In a suit to establish a lease, all the tenants should be before the court. *Brangan* v. *Gorges*, 7 Ir. Eq. R. 283.

4. Renewal.

a. Covenants for.

i. *When Perpetual.*

Construction of.]—A lessor demised hereditaments to the lessee, his heirs and assigns, for the natural lives of the lessee and two other persons and the longest liver of them, with a covenant that the lessor, his heirs and assigns (upon the lessee, his heirs or assigns, "surrendering this present demise as hereinafter mentioned") should at any time thereafter at the request of the lessee, his heirs or assigns, "as often as one or two life or lives of and in the said hereditaments" should drop and be determined, renew and grant a further term "for any other life or two lives of any other person or persons to be nominated by the lessee, his heirs or assigns, in the stead of the person's life or lives so dropping or determining"; the lessee, his heirs or assigns, paying to the lessor, his heirs or assigns, "for every such renewal for every life or lives of such person or persons so to be renewed as aforesaid the sum of 40*s.* only, and at the same time surrendering this present demise to be cancelled":—Held, that upon the true construction of the covenant the right of renewal was neither perpetual, nor limited to one renewal for not more than two new lives, but was a right of renewal as often as any of the three original lives should drop, so that any such renewal might take place either on the dropping of any one of the said three lives, or after the dropping of any two of them, as the lessee might from time to time request. *Swinburne* v. *Milburn*, 54 L. J., Q. B. 6; 9 App. Cas. 844; 52 L. T. 222; 33 W. R. 325—H. L. (E.)

The habendum of a lease was in these terms:—"To have, &c., to T. S., his heirs, &c., for and during the natural life and lives of J. B., W. B. and E. B., or the longest liver of them, or whatever life or lives shall for ever or hereafter be nominated or appointed, added or inserted on the back of this indenture, or a label affixed thereunto, paying for each and every life so renewed a peppercorn, if demanded, yielding, &c." The lease did not contain any technical covenant for renewal. Semble, the habendum amounted to a covenant for perpetual renewal. *Sheppard* v. *Doolan*, 3 Dr. & War. 1; 5 Ir. Eq. R. 6. *And see* Fl. & K. 598; 4 Ir. Eq. R. 654.

A covenant, "that R., his heirs and assigns, would renew the lease, upon the fall of any of the original cestui que vies, and instead of such life, insert such other life as the lessee should nominate, and that he should do so as often as any of the lives now mentioned, or hereafter to be inserted, shall happen to die," is a covenant for a perpetual renewal. *Palmer* v. *Hamilton*, 2 Ridgw. P. C. 550.

T., by indenture dated in 1623, demised to W. lands, &c., in Ireland, together with the mines, timber, &c., to make sale, &c., thereof, without impeachment of waste, the lessee, his executors, &c., planting from time to time five hundred trees of oak and ash in the room, &c., during the lease to hold, &c., for a term of ninety-eight years, at a rent of 15*l.* sterling for the first three years, and 30*l.* sterling for the remainder of the term; and T. covenanted that "he, &c., upon request, would from time to time renew the said lease, and perfect such other further assurances as W. &c., should require," &c. The lease also contained a covenant of warranty of title, &c., and that in case of eviction, or that the premises should be wasted in war or rebellion, &c., that the rent should cease for the time. By an indenture dated in 1739, reciting the original lease, and the covenant for renewal, a further lease for ninety-eight years, recited to be in pursuance of the covenant, &c., was granted, containing a similar covenant. Upon a bill filed in 1827, claiming a further renewal:—Held, that the covenant was to be construed as a covenant for further assurance, and not for perpetual renewal. *Browne* v. *Tighe*, 8 Bli. (N.S.) 272; 2 Cl. & F. 396.

A., by lease, covenanted with J., his lessee, "that the said J., his executors, administrators and assigns, shall and may, from time to time, and at all times after the death or determination of any of the said lives, renew his lease by putting in any other life in room and place of the deceased, paying one peppercorn for such renewal, provided such renewal be made, or tendered to be made, within six months after the life drops":—Held, a covenant for a perpetual renewal. *Atkinson* v. *Pillsworth*, 1 Ridgw. 449; Vern. & Scriv. 157.

A lease was made for three lives and the survivor of them, and for the lives and life of such other person and persons as should be nominated by the lessee, his heirs and assigns, upon the death of any of the persons for whose lives the premises were granted, or upon the death of any such person or persons as should at any time thereafter be nominated for ever, according to the covenants and agreements for that purpose thereinafter contained. The lease did not contain an express covenant by the lessor to renew; but the lessee covenanted within six months after the decease of each of the cestui que vies therein, and of each person who should thereafter be nominated, to pay, in the nature of a fine for each person so dying, to the lessor and his heir a peppercorn if demanded; and powers of distress and entry, in case the fine should be in arrear, were reserved to the lessor and his heirs; and the lessor covenanted that the lessee and his heirs, paying the rent and fines, might quietly enjoy according to the true intent and meaning of the indenture:—Held, that this was

a lease for lives renewable for ever. *Chambers* v. *Gaussen*, 2 Jo. & Lat. 99 : 7 Ir. Eq. R. 575.

An agreement in a lease for lives, "that upon the renewal or inserting of any life or lives a certain sum shall be paid by the lessee, his heirs and assigns, to the lessor, his heirs and assigns," does not amount to a covenant for perpetual renewal. *Smith* v. *Nangle*, 7 Cl. & F. 405 ; West, 184 ; 4 Jur. 476. Affirming 1 Ir. Eq. R. 119. And see *S. C.* at law, 1 Jebb. & S. 199.

A lease made before the Statute of Frauds, and now lost, being proved to contain an agreement as to the amount of a fine to be paid "upon the renewing of any life or lives," and having been seven times since renewed—an issue was directed to try whether at or before the making of the lease there was an agreement for a lease of lives renewable for ever. And a second issue to try whether such lease contained any clause or covenant relating to a renewal, and independent of the stipulation as to the amount of fines. *S. C.*, 1 Ir. Eq. R. 119.

Quære. If tenant for life make a lease for lives, in pursuance of a subsisting covenant for perpetual renewal, and dies, has the lessee in such a lease a good defence at law, to an ejectment by remainderman, who has succeeded to the estate. *Id.* 133.

In 1792 A., seised in fee of the lands of K., demised to B., with liberty to raise and sell limestone, reserving to the lessor and his heirs, and to his tenants on adjoining lands, the right also of raising limestone, to hold for one life or thirty-one years, with covenant by A. to renew, subject to like rents and covenants :—Held, 1. That a devisee for life under the will of A. was bound to execute one renewal only, and having executed a second it did not bind the remainderman. 2. The second renewal did not operate as a surrender of the first, though expressly stated so to do. 3. B. had no right to delegate to more persons than one his right of raising and selling limestone. *Swan* v. *Colclough*, Hay. & J. 807.

A. granted a lease and covenanted that he would always, at any time when requested by the lessees, &c., demise the premises for the further term of thirty-one years, in which new lease were to be contained the same rents, covenants, articles, clauses, provisoes and agreements :—Held, that this amounted to a covenant for perpetual renewal. *Copper Mining Co.* v. *Beach*, 13 Beav. 478.

A testator covenanted for a perpetual renewal of a lease :—Held, that the proper form of lease to be granted by trustees was a demise for the new term, reciting the original covenant by the testator. *Ib.*

Although, primâ facie, a lessor shall not be taken to have intended to enter into a covenant for perpetual renewal, yet if there are in the lease expressions indicative of such an intention, the court will give effect thereto. *Hare* v. *Burges*, 4 Kay & J. 45 ; 27 L. J., Ch. 86 ; 3 Jur. (N.S.) 1294 ; 6 W. R. 144.

Lease for lives, with a covenant on the death of either of the cestui que vies to execute a renewed lease at the same rent, and subject to the same covenants, "including this present covenant" :—Held, a covenant for perpetual renewal, and lessee entitled to have inserted in the renewed lease a covenant for renewal totidem verbis with that contained in the original lease, but with the name of the new cestui que vie substituted for that of the deceased. *Ib.*

Distinction as to the form of the renewed lease in this respect, where the reversion has become vested in a trustee. *Ib.*

Quære, as to right to perpetual renewal from construction of lease. *Dowling* v. *Mill*, 1 Madd. 541.

—— **By Acts of Lessor.**]—A. demised to B., for the life of B., and also for the lives of C. and D., and covenanted that if B., his heirs, &c., should be minded at the decease of B., C. and D., or any of them, to surrender the demise, and take a new lease, and thereby add a new life to the then two in being in lieu of the life so dying, then A., his heirs, &c., upon payment for every life so to be added, in lieu of the life of every of them so dying, would grant a lease for the lives of the two persons named in the former lease, and of such other person as B., his heirs, &c., should appoint in lieu of the person named in the preceding lease, as the same should respectively die, under the same rent and covenants ; there had been successive renewals from the time of a former lease, granted by the ancestor of A., and in each a like covenant for renewal : —Held, that A. and his ancestors had, by their own acts, construed this to be a covenant for a perpetual renewal. *Cook* v. *Booth*, Cowp. 819.

A contract for perpetual renewal will be specifically executed if clearly appearing, but is not to be inferred from a general provision for similar covenants. The construction of such a covenant is the same in equity as at law, and is not to be affected by the acts of the parties. *Iggulden* v. *May*, 9 Ves. 325 ; 7 East, 237 ; 3 Smith, 269 ; 2 Bos. & P. (N.R.) 449 ; 8 R. R. 623. *And see* 9 R. R. 104, n.

ii. *Tending to a Perpetuity.*

Insertion of covenant for renewal of lease in renewed lease enforced, though tending to perpetuity. *Bridges* v. *Hitchcock*, 5 Bro. P. C. 6.

By a deed dated 1529, conveying lands to a municipal corporation for charitable purposes, the corporation covenanted that when a term of ninety-nine years in a farm, part of the hereditaments granted, should expire, if any of the heirs of the body of a person named in the grant, becoming of consanguinity and kindred of the grantor, should come, claim and make lawful request of the corporation to have a new grant and lease to him or her, to be made within one year next after it should fortune the same farm to be void and come into the hands of the corporation, that then and as often as any such chance should fall, the corporation, upon such request to them so made, should make or cause to be made a new lease and grant of the farm to such heir, so making request, for thirty-one years, and no more nor less, reserving to them and their successors twenty marks of annual rent during the term. The corporation from time to time granted renewed leases under this covenant, the last lease being granted in 1815. In 1723 a decree was made ordering the corporation to grant a fresh lease according to the covenant, and in 1732 a decree was made for carrying out the former decree, with a variation arising from subsequent circumstances, but on neither occasion was the question of remoteness raised, nor was the attorney-general a party to the proceedings, the suits not being hostile as against the corporation, who did not dispute the right to renewal :—Held, that the covenant did not create a right in the nature of an estate tail,

but was intended to confer a right on the persons who at the expiration of each lease should for the time being answer the description of heirs of the body of W., and that it was therefore void as tending to a perpetuity. *Hope* v. *Gloucester Corporation*, 7 De G. M. & G. 647; 25 L. J., Ch. 145; 2 Jur. (N.S.) 27; 4 W. R. 138. And see *S. C.*, 1 Jur. (N.S.) 320.

Held, also, that as the question of perpetuity was not raised in, nor was the attorney-general a party to, the old suits for granting fresh leases, the decrees in those suits did not establish the validity of the covenant as against the charity. *Ib.*

Although presumptions are made in support of long possession and ancient usage, no such presumption could be made as would establish such a right to renewal as was provided for by the covenant in question, semble. *Ib.*

iii. *On Whom Binding.*

Assignee of Reversion.]—A., seised in fee, by registered deed conveyed lands to a trustee, upon trust to sell and pay debts and incumbrances, and the residue to himself. Subsequently A., in 1782, for valuable consideration, by registered deed demised the lands to B. (who did not appear to have had notice of the trust deed) for lives renewable for ever, subject to a lease thereof then subsisting. The rent reserved was equal in amount to the rent payable under the sub-lease. In 1789 the lands were sold to N. under a decree in an administration suit instituted before 1782 by a judgment creditor of a former owner of them against A. and his trustee, who joined in conveying the lands to N. It was not shewn that A. had been served with subpœna in that suit before the making of the lease of 1782, when he purchased. The purchase-money was applied in payment of incumbrances created prior to 1782. The last life in the lease of 1782 died in 1835, and the sub-lease determined in 1839, and shortly afterwards a claim for a renewal of the lease of 1782 was for the first time made by the heir-at-law of B.:—Held, that N. having, without notice of the plaintiff's equity, acquired the prior legal estate from the trustee of A., and the entire equitable interest by the application of his purchase-money in payment of prior incumbrances, was not bound to renew the lease of 1782: and also that the laches of the parties deriving under the lease in claiming a renewal, or obtaining a recognition of the title was, under the circumstances, a bar to their suit. *Drew* v. *Norbury* (*Earl*), 3 Jo. & Lat. 267; 9 Ir. Eq. R. 171, 524.

Covenants for perpetual renewal of leases are considered as real agreements, and go with the land, and therefore will affect even the legal interest of those who take the estate, with notice of these leases and covenants. *Shelburne* (*Earl*) v. *Biddulph*, 6 Bro. P. C. 363.

A covenant for perpetual renewal, entered into by a person having a limited interest in lands, does not bind the estate, and therefore, if his assignee acquires the inheritance, it is not bound by the covenant. *Brereton* v. *Tuohey*, 8 Ir. Ch. R. 190.

In a suit for renewal, though the defendant be not proved to be the assignee of the reversion, so as to compel him to renew, yet a case may be made for a perpetual injunction to restrain him from executing his habere at law. *Hamilton* v. *Patten*, 1 Ir. Eq. R. 341.

Where lease, not warranted by power, is granted by tenant for life, containing covenant for perpetual renewal, the reversioner, by accepting for many years after he comes into possession the rent reserved upon the lease, does not confirm it so far as to make the covenant of renewal binding on him. *Higgins* v. *Rosse*, 3 Bligh, 113.

A. demises lands to B. and his heirs, for the lives of O., P. and Q., and the longest liver of them, and grants the reversion to X. In the original demise is a covenant by A., for himself, his heirs, executors and administrators, that if O., P. or Q. shall die, and B. shall within twelve months demand a renewal, and name another cestui que vie, A., or the person entitled to the reversion, would, on the payment of a fine and surrender of the old lease, grant to B., his heirs and assigns, a new lease, for the life of such nominee, and of such of them, O., P. and Q., as shall then be alive, "such new lease to contain all the covenant herein contained, including this covenant." O. died, and six months afterwards B. demanded a renewal from X., for the lives of P. and Q. and R., a new life named:—Held, that B. was entitled to have a renewal. *Hare* v. *Burges*, 3 Jur. (N.S.) 1294.

A. makes a lease for three years, and in consideration of the lessee's laying out 100*l.* in improvements covenants, at the end of the term, to grant a new lease at the same rent. Purchaser of the inheritance decreed to make good the covenant. *Richardson* v. *Sydenham*, 2 Vern. 447.

C., being about to marry, applied to A., his landlord, and requested him to change a cestui que vie in his lease, by inserting in the place of an old life the name of his intended wife, which A., by letter, promised to do; and upon the faith of such promise, the marriage was had, and the demised premises settled upon the wife. Upon a bill by the wife (C. being dead), it was held that she would have been entitled to a specific execution against A., and the estate of A. having been sold to O., who was deemed, under the circumstances, to have had notice of the agreement, he was decreed specifically to perform it. *Crofton* v. *Ormsby*, 2 Sch. & Lef. 583; 9 R. R. 107.

Mortgagee of Reversion.]—A. being seised of three denominations of land for three lives, renewable for ever, mortgaged her interest in the entire, to secure the repayment of 1,500*l.*, and afterwards in 1787 sold her interest in one denomination to J., and demised the two other denominations to B. to hold for three lives renewable for ever, at the rent of 140*l.* 9*s.* 3*d.* per annum, payable half-yearly on the 25th March and 29th September. In 1796 C., the mortgagee, filed a bill of foreclosure, to which J., but not B., was made a party; and having obtained a decree for a sale the lands were in 1803 purchased by a trustee for himself, and by whom they were soon after conveyed to him. From 1803 to 1827, the rent reserved by the lease of 1787 was paid from time to time to C., who gave receipts for the amount as falling due in May and November. In October, 1827, the rent being considerably in arrear, a notice was served on B. to quit at May following, and in Trinity Term, 1828, an ejectment on the title was brought by C. on a demise subsequent to the 1st May. In this action C. was ultimately defeated, a point saved at the trial with respect to the gale days having been ruled against him. In 1812 one cestui que vie died, and another in

1823. In October, 1828, B. tendered to C. an engrossed lease, together with the sum of 250*l.* 1*s.* 0*d.*, which, by an account stated, appeared to be the full amount of rent and fines then due, but offering to pay any further sum which might be found due, and demanded a renewal. The renewal was refused on the ground that B. was only tenant from year to year to C., the lease of 1787 being subsequent to the mortgage. But on a bill filed by B. for renewal:—Held, that that lease, though not originally binding on C., was nevertheless by his conduct established against him; and that B. was entitled to renewal of his interest, notwithstanding the arrears into which he had fallen, upon payment of all rent and fines. *Lysaght* v. *Callinan*, Hayes, 141.

Devisee of Reversion.]—In 1792 A., seised in fee of the lands of K., demised to B., with liberty to raise and sell limestone, reserving to the lessor and his heirs, and to his tenants on adjoining lands, the right also of raising limestone, to hold for one life or thirty-one years, with covenant by A. to renew, subject to like rents and covenants:—Held, 1. That a devisee for life under the will of A. was bound to execute one renewal only, and having executed a second it did not bind the remainderman. 2. The second renewal did not operate as a surrender of the first, though expressly stated so to do. 3. B. had no right to delegate to more persons than one his right of raising and selling limestone. *Swan* v. *Colclough*, Hay. & J. 807.

A copyholder agreed to demise a tenement within the manor for sixty-three years on a building lease, and, as the custom did not allow a lease to be made for more than twenty-one years, the copyholder agreed to execute a lease for twenty-one years with a covenant for himself, his heirs and assigns, to renew the lease for a further term of twenty-one years at the expiration of the first, and for a further term of twenty-one years at the expiration of the second term. The copyholder died before the lease was executed, having devised the premises to a trustee:—Held, on a bill by the lessee against the trustee for specific performance, that the trustee having no beneficial interest in the estate was not bound in the lease for twenty-one years to enter into any covenant for the renewal of the lease at the expiration of that term, and that he could only be required to covenant against his own acts. Whether, if the trustee had brought his bill for specific performance against the lessee, the lessee would have been compelled to perform the contract if the trustee had declined to covenant for renewal, quære. *Worley* v. *Frampton*, 5 Hare, 560; 16 L. J., Ch. 102; 10 Jur. 1092.

Heir-at-Law.]—An heir-at-law is not bound by his ancestor having executed an intermediate renewal in pursuance of a supposed covenant. *Browne* v. *Tighe*, Hayes, 158.

A. P. and C. P. being seised in fee, as coheiresses of the lands of C. and other lands, A. P., on her marriage with Sir H. C., by indenture of 1730, settled her moiety on Sir H. C. for life, with remainder to his first and other sons in tail male; and thereby Sir H. C. and A., his wife, were empowered to demise or join with the owner of the other moiety in demising the settled land for three lives, or any number of years determinable on three lives. In 1732 Sir H. C., A., his wife, and C.P. demised to H. B. and his heirs the lands of B., for three lives renewable for ever, and covenanted to warrant and defend the premises to H. B. and his heirs, freed from all former gifts, grants, uses, entails, and other charges, whatever, by them theretofore made. In 1757, on the marriage of H. C., the son of Sir H. C., a partition by writ was made between Sir H. C. and C. P., and the lands of B. were allotted to Sir H. C. subject to the lease to A. B., and were, with the consent of H.C., conveyed by C. P. to Sir H. C., subject to the lease. Afterwards Sir H. C. and his son suffered a recovery of the lands, and by deed of August, 1775, settled them to the use of Sir H. C. for life, remainder to H. C. for life, remainder to his first and other sons in tail male. Sir H. C. died, having by his will devised and bequeathed all his unsettled real and personal property to his son, H. C., whom he appointed as his executor. C. P. also died, leaving H. C. her heir-at-law, and as such he became entitled to considerable real estates belonging to C. P. All the lives in the lease of 1732 having died, H. C. refused to renew it, and brought an ejectment on the title for the recovery of the lands thereby demised. The plaintiff thereupon filed his bill, charging that H. C., having derived a considerable estate in right of, and as heir to C. P., was bound to make good her covenants in the lease of 1732, and praying for a renewal of the lease of 1732, or for compensation out of the devised estates of Sir H. C. and of C. P., and for an account of the estates he possessed as heir of C. P. The court decreed a renewal. *Beere* v. *Cavendish*, 5 Ir. Eq. R. 472.

Personal Representatives.]—A covenant for renewal is in itself a mere personal contract, and at law the only remedy which lies for the breach of it is a personal action; but a substantive independent covenant binds the covenantor and his representatives in respect of the assets transmitted. *Chandos* v. *Brownlow*, 2 Ridgw. P. C. 405.

Lessee of a term for years with a toties quoties covenant for renewal having died intestate, his administratrix, in 1806, subdemised the premises at an increased rent, with a covenant that she, her executors, administrators and assigns, would renew to the sub-lessee at the same rent, as often as she should herself procure a renewal from her head landlord. Upon the death of the administratrix, administration de bonis non was obtained by the defendant:—Held, 1st, upon the evidence in the case, that the sub-lease of 1806 was a due administration of the assets; 2ndly, that the sub-lessee was entitled as against the administrator de bonis non to a specific performance of the covenant for renewal. *Hacket* v. *M'Namara*, Ll. & G. t. Plunk. 233.

Specific performance of a covenant in a lease to take a renewed lease decreed against lessee's executors, who had entered and admitted assets. *Stephens* v. *Hotham*, 1 Kay & J. 571; 24 L. J., Ch. 665; 1 Jur. (N.S.) 842; 3 Eq. R. 571; 3 W. R. 340.

New Trustees.]—Trustees of a messuage and premises, partly freehold and partly leasehold, for a term, of which fourteen years were unexpired, but which lease was renewable by custom on paying a fine, granted a lease to W. of the whole for fourteen years, and covenanted to use their best endeavours to obtain a renewal of the lease, and thereupon to grant him a lease for a further term of seven years from the expiration

of his tenancy, at a like rent. The trustees' power was to lease at a rack-rent for any term not exceeding twenty-one years. Before the expiration of W.'s lease new trustees had been appointed, and the reversion in fee had become vested in other persons, who would not renew the lease on the old fine, the property having much increased in value :—Held, that the trustees had no power to enter into a covenant to grant a further term at a like rent on the renewal of the lease, and that the covenant did not bind the new trustees. *Salamon* v. *Sopwith*, 35 L. T. 826 ; —C. A.

Stranger.]—Voluntary agreement to renew indorsed on lease by one not a party to it not binding. *Dowling* v. *Mill*, 1 Madd. 541.

Charity.]—The governors of a charity, in consideration of a covenant to lay out 2,000*l.* in building, demised land for the term of forty-one and a half years, and the concurrent term of ninety-nine years, if three lives named in the lease should so long live ; and they covenanted that during the first-mentioned term, when one of the lives should die, they would put in another life for the fine of 5*l.* The lease being void by 13 Eliz. c. 10, as to the excess beyond twenty-one years or three lives :—Held, that the covenant for renewal was not binding on the governors of the charity. *Moore* v. *Clench*, 45 L. J., Ch. 80 ; 1 Ch. D. 447 ; 34 L. T. 13 ; 24 W. R. 169.

Inn of Court.]—A bill will not lie against the benchers of an inn of court, relative to their renewal of a grant of chambers. Plea allowed. *Cunningham* v. *Wegg*, 2 Bro. C. C. 241.

Lessee—Renewal of Sub-lease.]—A lessee of a house granted a sub-lease to L., in which he covenanted that if he should at any time obtain an extension of the term or a renewal of the lease he would grant to L. an extension or a renewal of his sub-lease for the same period. A renewal of the lease was taken in the name of a trustee for the wife of the lessee for her separate use :—Held, that the lessee was under no obligation to endeavour to procure the renewal to himself ; that the question was whether the trustee was in reality trustee for the lessee or for his wife ; that in the former case the parties to the record would be bound by the lessee's covenant, and L. would have been entitled to have the covenant performed against them, but that as the trustee was in point of fact trustee for the wife, L.'s case failed. *Lumley* v. *Timms*, 28 L. T. 608 ; 21 W. R. 494—L.JJ.

Presumption in favour of Right to.]—Every presumption is to be made to support a right of renewal where from leases for twenty-one years at a small rent and fine, certain of the tithes of a parish had been regularly granted by the respective bishops of Ely, who were impropriate rectors of the parish, to the vicars for the time being. *Att.-Gen.* v. *Ely* (*Bishop*), 4 Russ. 102.

iv. *Who entitled to Enforce.*

Bare Tenant for Life.]—The appellant in this case having claimed the renewal of a lease from the heirs of the covenantor, pursuant to his covenant, they refused, alleging that the covenantee was a bare tenant for life. This refusal is a breach of covenant, for which an action at law will lie against the representatives of the covenantor. *Macartney* v. *Blundell*, 2 Ridgw. P. C. 113.

Lessee who has not covenanted to accept a Renewal.]—Although a sub-lease of church lands and tithes, containing a toties quoties covenant on the part of the sub-lessor to renew, does not contain a mutual covenant on the part of the sub-lessee to accept a renewal, the latter is not thereby prevented from filing a bill in equity to obtain a renewal. *Morgan* v. *Gurley*, 1 Ir. Ch. R. 482.

Person acquiring Title after Action.]—A plaintiff may rely on a title acquired in point of form after he filed the bill, if it be not inconsistent with his original claim, and is capable of having relation back ; therefore, when the devisee of an insolvent debtor filed a bill for renewal, and, the objection being raised, afterwards procured himself to be appointed assignee, and amended the bill stating that fact :—Held, that he could sustain the bill. *Doyle* v. *Callow*, 12 Ir. Eq. R. 241.

Lease obtained by Fraud—Purchase for Value.]—Where A., the heir of lessee, having a right to perpetual renewal, had entered into an agreement with B. respecting the independent lease of land held under renewable lease by ancestor of A., which independent lease B. had obtained from landlord by fraud and circumvention :—Held, that heir of A. and purchasers for valuable consideration claiming under him were entitled in equity to benefit of agreement between B. and A., and that heir of landlord was entitled to benefit of agreement so far as B. took any interest. *Butler* v. *Mulvihill*, 1 Bligh, 137.

v. *When Fulfilled.*

Derogation from Grant.]—A lessee of land with covenant for renewal obtained a renewal of the lease. The new lease did not contain the whole of the land demised by the former lease. Prior to renewal the lessor had given the government a licence to execute certain work by which the land demised was injuriously affected :—Held, that the new lease was a fulfilment of the covenant for renewal, though the subject-matter was not identical, and that the right of the lessee to compensation was not affected by the licence given by the lessor. *Att.-Gen.* (*Straits Settlements*) v. *Wemyss*, 57 L. J., P. C. 62 ; 13 App. Cas. 192 ; 58 L. T. 358—P. C.

vi. *Specific Performance.*

Agreement affected by Fraud.]—Equity will not decree a renewal claimed on an agreement accompanied with fraud. *Davis* v. *Oliver*, 1 Ridgw. P. C. 1.

F. C., tenant for life with a power of leasing for thirty-one years, demises, in 1749, for three lives to his attorney. M. C., his son, tenant in tail, four years afterwards, in consideration of 20*l.*, executes an agreement, which was endorsed on the part of the lease in the attorney's hands, to confirm the demise, and renew for a further term of three lives ; eleven years after this F. C. dies, and the articles are then registered. The last of the three lives died in 1817, and the representative of the attorney files a bill for a

specific performance of the son's agreement:—Held, that the case was too suspicious to come within the principle of specific performance, and the length of time elapsed under circumstances which did not imply acquiescence. *Blakeney* v. *Baggott*, 1 Dow (N.S.) 405.

Vagueness and Uncertainty.]—Bill for specific performance of an agreement to renew a lease dismissed; the agreement being too vague and uncertain to be executed by the court. The insolvency of the intended lessee is a good ground of objection to a bill brought by him for the specific performance of a contract to renew a lease. *Price* v. *Assheton*, 1 Y. & Coll. 441.

Bill for specific performance of a parol agreement to renew, plaintiff having built a house. The only witness for the plaintiff proved an agreement different from that in the bill; two defendants by answer stated an agreement different from both. In strictness the bill ought to be dismissed; but specific performance was decreed according to the answers, with costs against the plaintiff. *Mortimer* v. *Orchard*, 2 Ves. J. 242.

Separate Covenants in Lease and previous Indenture—Variation—Alteration in Title.]—S., on the 5th January, 1746, being tenant in fee simple of lands in Tipperary, executed an indenture, which was, two days afterwards, registered under the Irish Registration Act. The memorial represented that S. had, by the indenture, demised, or agreed to demise, these lands to C., for three lives therein named, with "a clause of renewal after the expiration of said lives thereinbefore mentioned," provided that C., his heirs, &c., should, "within six months from the death of the last of said three lives, nominate such life or lives as he would have inserted," and pay all rent, and "the sum of 11*l.* 7*s.* 6*d.* for adding or renewing such life or lives for ever." The memorial was signed by C. alone, and he registered it. In February, 1750, S. executed a settlement in contemplation of marriage, by which he made himself tenant for life only in the estate comprised in the indenture of 1746. In March, 1750, he executed a lease to C., in which the indenture of 1746 was recited, and in consequence of some changes in the lands a change was made in the rent. The lease recited the indenture as a demise to C. for three lives, and the longest liver of them, with a covenant to "renew the same for ever, on payment of 11*l.* 7*s.* 6*d.* for renewing the same on the fall of every life, within six months next after the fall of each life." The habendum in the lease was for the same three lives; and S. covenanted that "upon the death or failure of the aforesaid life or lives, or any or either of them" (naming them), and upon C., his heirs, &c., paying "the sum of 11*l.* 7*s.* 6*d.* above the annual rent, within the space of six calendar months, and immediately after the death or failure of such life," and on nomination, &c., "S. and his heirs," &c., would add the life so nominated; "and so in like manner from time to time successively for ever thereafter on the failure of every other several life or lives in the said lease, or thereafter to be nominated." Renewals had, from time to time, been made by the successors of S. in the estate, sometimes after proceedings in chancery to compel the same, sometimes without such proceedings; but in 1845, G., the descendant of S., having absolutely refused to renew, a bill was filed against him by B., who had become possessed of C.'s lease. The bill prayed for a renewal according to the lease, which B. alleged to have been made in conformity with and under the obligation of the indenture of 1746. This indenture could not be produced, but the memorial was tendered and received in evidence. The defendant alleged that the lease was ineffectual to bind the inheritance, as it was made by a person who was, at the moment of executing it, only tenant for life, and he contended that there was no legal evidence of the indenture of 1746. He also relied on the difference between the terms of renewal contained in the indenture and those contained in the lease:—Held, that the plaintiff was entitled to the renewal as prayed; that the memorial was properly admitted as secondary evidence of the indenture; that that indenture was to be treated as an original lease, containing a covenant, under the obligation of which the lease of 1750 was executed; that the obligation entered into in 1746 being by the tenant in fee simple, his performance of it in 1750 was valid, although he was then only tenant for life; and that the acts of the successive tenants of the estate, though not evidence to prove the existence of the covenant, became, when the covenant had been otherwise proved, evidence of the construction which the parties interested had put upon it. *Sadlier* v. *Biggs*, 4 H. L. Cas. 435.

Upon one of the occasions of renewal, the tenant for life against whom a bill had been filed was an infant. The Court of Chancery in Ireland ordered his guardian to execute a lease in conformity with the covenant contained in the deed of January, 1746. Semble, that order was authorised by the Irish statute, 15 Anne, c. 3. *Ib.*

Laches.]—Where the lessor in a lease of church lands, with a toties quoties covenant for renewal, was, as the court held upon the construction of the lease, entitled to enforce the taking out of a renewal from the tenant, but had neglected for a period of twenty-five years to do so, and permitted the tenant to deal with the holding as an ordinary tenancy from year to year:—Held, that the lessor had so dealt with the property as reasonably to lead the tenant to believe that the covenant for renewal was at an end; and that therefore the covenant should not be enforced in a court of equity. *Pilson* v. *Spratt*, 25 L. R., Ir. 5.

Covenant for perpetual renewal. Specific performance refused under circumstances, of laches, and alteration of the property, so that it could not be enjoyed according to the stipulations. *London City* v. *Mitford*, 14 Ves. 42; 9 R. R. 234.

Promise by Letter—Past consideration.]—A promise, by letter, to renew a lease in consideration of money already laid out by the tenant, is nudum pactum, and no specific performance will be decreed; nor is it varied by money having been laid out afterwards. *Robertson* v. *St. John*, 2 Bro. C. C. 140.

Absence of Consideration—Mistake.]—Bill for a specific performance of a covenant for renewal dismissed, it being either a covenant for perpetual renewal, and if so, obtained without consideration from the lessor, or else inserted by mistake; but there being no proof of its having been

improperly obtained, a cross bill, to have it declared void, was dismissed with costs. *Redshaw* v. *Bedford Level Governors*, 1 Eden, 346.

Condition for.]—Where there is a lease with a covenant for renewal, the landlord cannot insist that the tenant shall pay collateral debts as a condition for granting a renewal. *Fitzgerald* v. *Carew*, 1 Ir. Eq. R. 346.

Unilateral Covenant—Notice by Lessee.]—A tenant of certain premises held them under a lease containing a covenant for renewal upon notice being given by the tenant six months before the expiration of the term. The tenant duly served this notice on the landlord, and the original term expired. The tenant refused to take out a renewal, but continued in possession :—Held, that upon service of the notice, the covenant to renew ceased to be merely unilateral, and could be enforced in an action for specific performance. The fact that the landlord did not commence the action for fifteen months after the expiration of the lease under the circumstances did not constitute laches. *Dawson* v. *Lepper*, 29 L. R., Ir. 211.

Informal Notice of Intention to renew.]—A lease of household property was granted in the year 1818 to the trustees of an insurance company for twenty-one years at a rent of 100*l.*, with a covenant that the lessor, his heirs or assigns, would from time to time, at any time before the expiration of the term, and also before the expiration of every succeeding term to be granted by every future or renewed lease whenever required by the lessees or the persons interested in the term, or any succeeding term, and upon payment of a fine or premium of 1,000*l.*, grant a renewed lease for twenty-one years, and in every such new lease there should be a similar covenant for renewal at or before the end of every twenty-one years, it being the intention of the parties that this lease should be renewable for ever at the option of the lessees, their executors, administrators, or assigns; and there was a covenant by the lessees that in case the option to renew was not exercised they would, before the expiration of the term, rebuild or reinstate the buildings and premises as a dwelling-house. There were two renewals of the lease, one in 1839 and one in 1860, which last lease expired on the 24th of June, 1881. The persons then entitled under the original lessor were G. S., who was tenant for life of a moiety of the property, and three trustees, of whom G. S. was one, of the entirety subject to the life interest. Under arrangements made by the insurance company this lease with other property was vested in five trustees upon trust to indemnify a certain class of stockholders and subject thereto for the company. One H. was secretary to these trustees and also to the company, and it was his duty to attend to the renewal of the lease. On the 23rd of June, 1881, G. S. gave notice to H. that the lease would expire on the following day. H. answered that the directors of the company "would of course renew the lease." Subsequently renewal was refused :—Held, in an action for specific performance, that it was not necessary for the lessees to pay the fine of 1,000*l.*, or execute a new lease, before the expiration of the term, but that it was necessary that notice of an intention to renew should be given before the end of the term; and that the informal notice by H. to G. S. was sufficient. Specific performance decreed, with payment of the premium and interest at 5*l.* per cent. from the end of the prior lease. *Nicholson* v. *Smith*, 52 L. J., Ch. 191; 22 Ch. D. 640; 47 L. T. 650; 31 W. R. 471.

Power of Leasing—Sanction of Court—"Best Rent."]—A covenant for renewal in a lease executed by a lessor under a power of granting leases in possession at the best rent is good, and may be enforced against the lessor, provided that, at the time for its performance, the new lease reserves the best rent that can then be obtained, and contains only stipulations then authorised by the power. But if at the time when performance of the covenant is claimed, the stipulated rent is not the best rent, the lessee is not entitled either to specific performance or damages, even though the original lease had been sanctioned by the court in the presence of all the beneficiaries. *Gas Light and Coke Co.* v. *Towse*, 56 L. J., Ch. 889; 35 Ch. D. 519; 56 L. T. 602.

A private act of 1828, relating to a testator's real estate, empowered his trustees to grant building leases in possession not exceeding seventy-five years at "the best yearly rent." In 1860, under an order in certain suits relating to the estate, the surviving trustee, in pursuance of the power and with the approval of the judge (some of the cestuis que trust being also before the court, and others being represented by trustees), demised certain copyhold land to a gas company (then in occupation under an agreement for the lease, which agreement had also been sanctioned by the court) for thirty years at the yearly rent of 30*l.*, the lessor covenanting to renew at the end of the term for a similar term at the like rent, if the lessees previously signified their desire for renewal by notice in writing delivered to the lessor, "his heirs or assigns, or left at his or their usual place or places of abode." The lessor had obtained from the lord of the manor of which the copyhold land was held a licence to grant leases covering fifty-one years from the date of the lease. Under the agreement for the lease and before the lease was executed, the company spent a considerable sum in erecting a large purifying-house on the land. Before the expiration of the lease the solicitors to a new gas company, the successors to the original lessees, gave notice in writing to the solicitors to the then trustees, the original lessor having died, of the lessees' desire for renewal, but the lessors declined to renew on the grounds (amongst others) that, as the fact was, the value of the property had very largely increased, that the original rent was therefore not now "the best yearly rent," and that the covenant for renewal was not authorised by the power. In an action by the company against the present trustees and their cestuis que trust claiming specific performance of the covenant or damages :—Held, (1) that the covenant was not ultra vires; but (2) that specific performance of it could not be enforced, as the original rent was not now the best rent; (3) that the act 12 & 13 Vict. c. 26, enabling the court to remedy defects in leases in certain cases, did not apply to the present case, there having been no "mistake or inadvertence" on the part of the lessor, nor "ignorance of title on the part of the lessees"; and (4) that on the doctrine of *Bain* v. *Fothergill* (L. R. 7 H. L. 158), the lessees could not recover damages for a

breach of covenant arising from infirmity of title. Quære, whether giving notice for renewal to the lessor's solicitors was a proper compliance with the terms of the lease as to notice. *Ib.*

Person out of Jurisdiction.]—Courts of equity in Ireland have no power to direct the Master to execute a renewal of a lease in the name of a person out of the jurisdiction. The 5 & 6 Will. 4, c. 17, omits, by an oversight, it would appear, to extend to Ireland the provisions of the 18th section of the 1 Will. 4, c. 65, which gives the court power to order renewals to be executed under these circumstances. *Priaulx* v. *Mackesey*, Sau. & Sc. 206. But see *id.* 208, n.

Against Charity.]—Bill to compel an hospital to renew a lease dismissed. *Somerville* v. *Chapman*, 1 Bro. C. C. 61.

Bill to enforce a claim of perpetual renewal upon usage, sanctioned by decrees, and upon expenditure, dismissed; as not supported by the custom of the country, or contract, not within the powers of the lessor, a charitable foundation; nor according to the true construction of the decrees. *Watson* v. *Hemsworth Hospital Master*, 14 Ves. 324.

A decree having been made for granting a lease of charity land to J. (who had been at great expense in recovering those lands) for ninety-nine years; if three lives lived so long, at the rent of one-third of the then improved value, and to be perpetually payable without fine; it was now decreed the lease should be renewed toties quoties without fine, but the rent not to be computed according to the value of the land at the time of the first decree, but as it should be when the lease should from time to time be renewed. *Att.-Gen.* v. *Smith*, 2 Vern. 746.

Decree against a corporation to grant a new lease according to a covenant for perpetual renewal, though the whole of the reserved rent has been for many years applied uniformly to one charitable purpose. *Gozna* v. *Grantham* (*Aldermen*), 3 Russ. 261.

Defendant to Suit.]—In a suit for the renewal of a lease, a person entitled to a portion of the interest sought to be renewed may be made a defendant. *Butler* v. *Portarlington* (*Lord*), 1 Con. & L. 1; 1 Dr. & War. 20; 4 Ir. Eq. R. 1.

b. Forfeiture of Right to.

Nonpayment of Rent.]—Upon a lease for lives, with covenant for perpetual renewal, more than one year's rent being due, judgment in ejectment was obtained, and an habere executed; but an arrangement was come to, whereby certain bills, at three months, drawn by the tenant, were received, by the direction of the Master, on the part of the landlord, who was a minor and ward of court, in payment of the rent, with a promise, that if the bills were not paid then the forfeiture was to be complete. The bills were not paid:—Held, that the arrangement so made was binding, and that if the bills had been paid when due the plaintiff would have been entitled to relief; but—Held, also, that in consequence of the bills not having been so paid the court had no power to decree redemption. *Mulloy* v. *Goff*, 1 Ir. Ch. R. 27.

Permissive waste of a mansion on the part of the tenant is not a sufficient ground for refusing a renewal. *Ib.*

A. being seised of lands under a lease for three lives, renewable for ever, demised for the same lives to B., with a covenant for perpetual renewal. No renewal fine was payable, and therefore the case was not within the Tenantry Act. The covenant was, to renew upon payment of all arrears of rent, within twelve months after the death of any cestui que vie nominated in the lease or future renewals; and the lease contained a proviso that the lives to be nominated by B. should be the same inserted in the renewals which A. himself should obtain, and a covenant by A. to keep his lease renewed, and give notice to B. within three months of each renewal, to the end that B. might then apply to A. for such renewal, at any time within three months after such notice; and that A. would, thereupon, upon payment of all arrears of rent, renew to her; provided that if B. did not pay all arrears within twelve months after the death of the nominee for the time being, the covenant should be void. Two of the cestui qui vies died in 1799 and 1811, and there was not a year's arrears of rent due after either of their deaths; nor did A. then obtain any renewal to himself. Very large arrears of rent were afterwards suffered to accrue. In 1828 A. obtained a renewal; there were then six years' rent due, but all arrears were paid, and a renewal demanded by B.'s representatives within twelve months after that:—Held, that the covenant to renew was not forfeited under those circumstances, and that the mere neglect to pay his rent, although gross, would not disentitle the tenant to relief in equity, and a renewal was accordingly decreed. *Fitzgerald* v. *O'Connell*, 6 Ir. Eq. R. 455; 1 Jo. & Lat. 134.

Semble, a case where nonpayment of rent is not per se such fraudulent conduct on the part of the tenant as will disentitle him to a renewal. *M'Donnell* v. *Burnett*, 4 Ir. Eq. R. 216.

Nonpayment of Fine.]—Where the assignor of a lessor of a lease for lives, renewable for ever on payment of a fine certain, gave notice to pay the renewal fines, and of breach of covenants by encroachment, &c., upon the latter of which a long correspondence took place, it appearing that the tenant was always willing to pay the fines, although no tender had been made:—Held, that the neglect to pay them for three years was not, under the circumstances, unreasonable; and that the tenant was entitled to a renewal, reserving the rights of the lessors as to the collateral matters. *Trant* v. *Dwyer*, 1 Dow (N.S.) 125; 2 Bligh (N.S.) 11.

Lease for lives of lands in Ireland, renewable for ever, is not absolutely forfeited by extinction of all the lives, and neglect to pay fines for renewal, even after notice from the lessor; under the particular circumstances of case renewal enforced. *Butler* v. *Mulvihill*, 1 Bligh, 137.

A., holding by lease for lives renewable for ever, demised to B. for a like tenure; and B. covenants to renew his lease and pay the fines. In 1810 a life dropped, which was the last surviving life of A.'s lease, and one of the lives of B.'s lease. In February, 1818, A. renewed his lease, and in July following he called on B. to renew his lease, and to pay a renewal fine and interest, and a septennial fine. B. refused to pay the septennial fine or interest, and took no further step until 1823:—Held, that the septennial fine was properly demandable, and that

B.'s right was barred. *Hunt* v. *Sayers*, Hayes, 590.

A. being entitled to certain premises under a bishop's lease by indenture of lease demised the said premises to C., to hold for the term of twenty years, with a toties quoties covenant for renewal. By the said lease it was provided, that if the said C., &c., did not pay or cause to be paid unto the said A., &c., within the space of three months after the said A. should obtain a renewal of his lease, and after notice thereof should have been given to the said C., the proportionable part of the renewal fine, and the costs and expenses attending the said renewal of such head lease, that then and thenceforth the said C., &c., should be for ever after barred from any right of renewal, and that the said A. might refuse to grant the same. On a bill filed by the personal representative of C., &c., for a renewal :—Held, that as the notice was one of facts peculiarly within the landlord's knowledge, the service of such a notice must be clearly proved, so as to satisfy the court of the intention of the landlord to insist on the forfeiture ; and that although there was a strong suspicion that the notice did reach the tenant, yet that a court of equity could not work out a forfeiture of a tenant's right of renewal on a mere suspicion. *Lawless* v. *Grogan*, 1 Dr. & Wal. 53.

Lease to A. for a term of years, at a yearly rent, and under and subject to the payment, at stipulated periods during the term, of certain sums of money in the nature of fines, with a covenant on the part of the lessor, at the end of the term, on due and punctual payment being made of the rent and gross sums or fines, at the times appointed for payment thereof, to grant a further or renewed lease. A. assigned to B. a part of the premises, for the same term and interest as A. himself took under the lease, subject to the payment of a proportional part of the rent and gross sums or fines (the amount of the proportion was not specified). C. afterwards purchased of the lessor the reversion of the premises expectant on the lease to A., and subsequently to acquiring the reversion, purchased A.'s interest in all the premises demised to A. by the lease, and not assigned by him to B. After this purchase by C., one of the gross sums or fines became due, but was not paid, and no proportion of it was demanded by C. from or was paid by B. :—Held, that the double character filled by A. relieved B. from the strict performance of the covenant, and that the nonpayment by B. of the proportion of the gross sum or fine was not, under the circumstances, a refusal to pay, or such a breach of the covenant as to deprive B. of his claim to a renewed lease of the property assigned to him, and a demurrer for want of equity was overruled. *Statham* v. *Liverpool Dock Co.*, 3 Y & J. 565.

Where A., holding under a lease for lives renewable for ever, containing a covenant that he should within three months after the fall of each life give notice thereof in writing to his landlord, and within six months pay the renewal fine of 40*l.* 12*s.* 6*d.* on the fall of each life, demised to B. at an increased rent for the same term and with a similar covenant to pay the same renewal fine :—Held, that it was not sufficient for A. in order to work a forfeiture of B.'s interest, to shew, that in a conversation about the renewal after the falling of the lives, B. objected to pay the renewal fines until A. should first procure a renewal from his head landlord, but there should have been a distinct demand made upon B., calling upon him to pay the fines. Semble, also, that where there are joint tenants, a demand made upon one only will not be sufficient to work a forfeiture of the interest. *John* v. *Armstrong*, Ll. & G. t. Plunk. 392.

The mere non-payment itself of the fine for renewal of lease does not constitute fraud, unless the party has reason to know that the event on which he was bound to pay has taken place. *Ib.*

In a suit for a renewal, it appeared that in July, 1821, the landlord, upon the death of one of the cestui que vies, the other two being still in esse, served the tenant with a copy of a printed notice, not addressed to him in particular, but to all his tenants generally, calling on them, before the 10th of August, to shew their right to a renewal, and to pay their rents and renewal fines, and to have their renewals completed, otherwise that he would decline to renew. The tenant thereupon entered into a communication with the solicitor of the landlord, as to the renewal of his lease, and in January, 1822, a draft of renewal was served by his solicitor upon the solicitor of the landlord, for his approval. The case made by the bill was, that the solicitor for the landlord stated that he had not then obtained a renewal to himself, and that the renewals would be executed as soon as he obtained such renewal ; that the solicitor of the landlord did not take any steps to have the renewals executed, but kept the drafts in his possession ; and that since that time no further application had been made by or on behalf of the landlord to the tenant, to take out the renewal ; but that matters remained in that state until 1830, when the tenant tendered the fine. The case, as it appeared on the evidence for the plaintiff, and as relied upon by him at the bar, was, that the landlord's solicitor claimed the right of preparing the renewals, and undertook to prepare them, but did not ; and that the solicitor for the tenant, at various times between 1822 and 1830, made repeated applications to the solicitor of the landlord for the renewal, but unsuccessfully. It was proved that the landlord had obtained a renewal of his lease before he served the notice of July on the tenant, and that his land agent made frequent verbal applications to the tenant in the years 1821 and 1822, to take out his renewal, which the tenant declined to do, on the ground that he was not bound so to do. The bill was dismissed with costs. *Cullen* v. *Leonard*, 5 Ir. Eq. R. 134.

The substantive duty of the tenant is the payment of the fine ; and to this extent the furnishing of the draft of the renewal is available to him, that if he furnishes it bonâ fide, to enable him to fulfil the essential obligation of paying the fine, a delay in returning it will prevent the time running against him, so long as that delay occurs by the default of the landlord, but it will not exempt the tenant for any length of time from looking after his renewal. *Ib.*

Breach of Covenant.]—A. granted a lease for twenty-one years to B., with a proviso determining the lease, and giving A. a right of re-entry, on non-performance of any of the covenants in the lease, and A. covenanted that, at the end of the term, if it should not be sooner determined by B.'s acts or defaults, he would grant to B. a lease for a further term of fourteen years. B. paid all his rent, and continued in possession

after the term had expired. A. then brought an ejectment against him for breaches of covenant during the term. B. filed a bill for a specific performance of the covenant to renew, and for an injunction to restrain the action. A., in his answer, set up the breaches of covenant, and denied having had notice of them till after the end of the term. Motion for the injunction refused. *Thompson* v. *Guyon*, 5 Sim. 65.

Under a covenant to renew a lease, there being no clause of re-entry, the lessor cannot refuse to renew upon the ground of breach of covenant unless there has been a gross breach. Semble, the breach must not only be gross but wilful. *Hare* v. *Burges*, 5 W. R. 585.

T., tenant under a lease for nineteen years, perpetually renewable on twelve months' notice before the expiration of each term, instituted a suit to compel L., the landlord, to renew from 1842 to 1861. In defence L. pleaded that the lease had been forfeited for breach of covenants. The suit, however, was allowed to stand still, and the parties then began to negotiate about a draft of a renewal, L. proposing alterations and threatening, if they were not accepted, he would insist on his original defence of forfeiture. Pending these negotiations, and the delay not being caused by T., the time arrived for T. giving notice of renewal of another term, from 1861 to 1880, which T. did not give:—Held, that while the lis pendens as to the existence of the former lease existed, T. was excused from making demand for a further renewal, it being inequitable in L. to insist on compliance with a covenant of which he denied the existence. *Hunter* v. *Hopetoun* (*Earl*), 13 L. T. 130.

A lease to two tenants contained a proviso for re-entry in case the tenants, or either of them, should become bankrupt, or assign the premises without the landlord's consent, or should not observe and perform all the covenants and agreements on their part to be observed and performed; also, joint and several covenants by the lessees to keep the interior of the premises in repair, and a covenant by the lessor that he would, at the expiration of the term, in case the covenants and agreements on the tenants' part should have been duly observed and performed, upon notice, grant to the tenants, their executors or administrators, a new lease for a further term. One of the tenants assigned his interest to the other without the consent of the landlord, and afterwards became bankrupt, and the landlord from that time accepted the rent from the other tenant alone. At the expiration of the lease the remaining tenant—the premises being slightly out of repair—gave notice to the landlord that he required a new lease to be granted to himself alone:—Held, first, that the keeping the premises in repair was a condition precedent which must be strictly performed before the renewal could be called for. *Finch* v. *Underwood*, 45 L. J., Ch. 522; 2 Ch. D. 310; 34 L. T. 779; 24 W. R. 657.

Held, secondly, that although the landlord had waived the forfeiture by acceptance of rent after the assignment, he could not be compelled to grant a renewal to one only of the lessees so long as the other was living. *Ib.*

The lease of a house contained a covenant by the lessee to pay the rent and keep the premises in repair, and to paint the outside and inside at certain fixed periods; and the lessor covenanted that the lessee should be entitled, on giving six months' notice before the end of the term, to have a further lease for twenty-one years "upon paying the rent and performing and observing the covenants" in his lease. The lessee applied for a renewal of his lease, but the lessor refused to grant such renewal, on the ground that the covenants had not been fulfilled either at the date of the six months' notice or at its expiration:—Held, that the performance of the covenants was a condition precedent to the lessee's privilege of having a renewed lease, and the requisite painting and repairs not having been completed, either when the six months' notice was given or when it expired, the lessee was not entitled to a renewal of his lease. *Bastin* v. *Bidwell*, 18 Ch. D. 238; 44 L. T. 742.

In a lease of house property for twenty-one years, the lessee covenanted to pay the rent, keep in repair, and insure, and the landlord covenanted that he would, at the expiration of the term (provided all arrears of rent should have been paid, and all the covenants should have been performed and kept), at the request in writing of the lessee, grant a new lease for the further term of twenty-one years, at the same rent and subject to the provisoes and agreements in the lease contained (including the covenant for renewal), and so from time to time upon the expiration of every subsequent term of twenty-one years, provided such request in writing should be given as aforesaid. The lessee expended large sums of money in building houses on the premises, and at the expiration of the first twenty-one years a new lease was granted in the same terms for twenty-one years. In both leases there were clauses for re-entry on breach of the covenants. Before the expiration of the second term, the lessee gave notice in writing that he would require a new lease. At that time one of the houses was much out of repair, and the lessee allowed it to remain out of repair, on the ground that from communications with the lessor it was doubtful whether a new lease would be granted, in consequence of an alleged forfeiture:—Held, first, that the condition precedent to a renewal was twofold—request in writing and compliance with the covenants; and that the double condition was not confined to the first renewal, but applied toties quoties. *Job* v. *Banister*, 26 L. J., Ch. 125; 3 Jur. (N.S.) 93; 5 W. R. 177—C. A. Affirming 2 Kay & J. 374.

Held, secondly, that the court would not interfere by injunction to prevent the lessor recovering possession in ejectment, the lessee not having within reasonable time proceeded to repair. *Ib.*

Held, thirdly, that there is no sound distinction between the principles as to relieving against forfeiture in cases of a covenant for perpetual renewal and ordinary cases. *Ib.*

By a lease executed in 1747 a member of the Incorporated Society demised to the society a piece of ground, and covenanted to renew the lease for ever. The lease contained a covenant, on the part of the society, to build and maintain upon the demised premises a house fit for the "reception and education of twenty boys and twenty girls, to be nominated by the society, according to the true intent and meaning of their charter": and a proviso for re-entry, in case the society should not continue to do so. Up to the year 1819 the society kept up a female Protestant boarding-school on the premises, but after that only a day-school, to which Roman Catholics were admitted. In 1830 they demised the school-room and land to a person who erected a new

house, fit for a day-school merely, and used the rest of the premises for farming purposes :—Held, that as the charter of the society gave them power to make by-laws, those acts were not breaches of the covenant for renewal and formed no ground for refusing a specific performance of it, although the charter was expressed to be granted for the instruction "of the children of the Popish natives in the principles of the Protestant religion." *Incorporated Society* v. *Rose*, 3 Ir. Eq. R. 257.

Laches.]—A. and B. covenanted in a lease for sixty-one years, "that at any time within one year after the expiration of twenty years of the term of sixty-one years, upon the request of the lessee, and his paying 6*l.* to the lessors, they would execute another lease of the premises unto the lessee for and during the further term of twenty years, to commence from and after the expiration of the term of sixty-one years ; and so in like manner, at the end and expiration of every twenty years, during the term of sixty-one years, for the like consideration, and upon the like request, would execute another lease for the further term of twenty years, to commence at and from the expiration of the term then last before granted." Under this covenant the lessee cannot claim a further term of twenty years at the expiration of the last term of twenty years in the lease, if he has omitted to claim a further term at the end of the first and second twenty years in the lease. *Rubery* v. *Jervoise*, 1 Term Rep. 229 ; 1 R. R. 191.

A lease for sixty-one years of house property contained a covenant that the lessee might renew on certain terms at the end of each and every term of fourteen years on giving ten days' notice of such his desire. The lessee, or those claiming under him, continued in possession after the two first terms of fourteen years each had expired, and then before the expiration of the third fourteen years decided to renew :—Held, that the lessee was not precluded, by his not giving notice earlier, from claiming his right to have a renewed lease in the terms of the covenant. *Bogg* v. *Midland Ry.*, 36 L. J., Ch. 440 ; 16 L. T. 113.

The houses were required by a railway company, who contended that the court had not jurisdiction to entertain the question of the future rights if it existed, or be compelled to make compensation on that basis :—Held, however, that the court had such jurisdiction. *Ib.*

T., a tenant under a lease for nineteen years, perpetually renewable on twelve months' previous notice before the expiration of each term, instituted a suit to compel L., the landlord, to renew from 1842 to 1861. In defence, L. pleaded that the lease had been forfeited for breach of covenants. The suit, however, was allowed to stand still, and the parties then began to negotiate about a draft of a renewal, L. proposing alterations, and threatening, if they were not accepted, he would insist on his original defence of forfeiture. Pending these negotiations, and the delay not being caused by T., the time arrived for T. giving notice of renewal of another term from 1861 to 1880, which T. did not give :—Held, that while the lis pendens as to the existence of the former lease existed, T. was excused from making demand for a further renewal, and had not lost his right of renewal, it being inequitable in L. to insist on compliance with a covenant of which he denied the existence. *Hunter* v. *Hopetoun* (*Earl*), 13 L. T. 130.

Lands were conveyed to a trustee, in trust, to grant a lease of the mines under the same to certain persons for forty-two years, and at the request of the lessees, made at any time thereafter, to grant a further lease of the same mines for twenty-one years, to commence at the expiration of the first term, the first lease to contain a covenant for renewal for the second term. The lease of forty-two years was made accordingly. Shortly before the expiration of the first term, the lessees applied for the renewal, which was refused ; no proceedings were taken to enforce the performance of the covenant or trust, for upwards of two years after the refusal :—Held, that so far as the title to renewal depended on the covenant, the delay or acquiescence would be a defence in equity. *Walker* v. *Jeffreys*, 1 Hare, 341 ; 11 L. J., Ch. 209 ; 6 Jur. 336.

Semble, that the lessees had an equitable interest in the trust, which would not be divested by the delay alone ; but that the lessees, in support of their title to a decree for performance of the trust, must shew that they had, by performing the covenants on their part, paid the price for which, on the instruments, the lessors had stipulated. *Ib.*

Covenant for perpetual renewal. Specific performance refused under circumstances, laches, and alteration of the property, so that it could not be enjoyed according to the stipulations. *London City* v. *Mitford*, 14 Ves. 42 ; 9 R. R. 234.

Right of renewal forfeited by the laches of the tenant. *Baynham* v. *Guy's Hospital*, 3 Ves. 295 ; 3 R. R. 96.

Lessor covenanted to renew the lease at the request of the lessee within the term ; lessee did not request, but executors do within the term ; lessor is compellable to renew. *Hyde* v. *Skinner*, 2 P. W. 196.

Lease for twenty-one years at 1*l.* rent, with covenant to tenants to renew from twenty-one years to twenty-one years, to make up ninety-nine years ; at the expiration of the first term, there being an arrear of rent due, and no application for renewal, lessor brought an ejectment and obtained judgment and possession : on bill filed for a renewal (accounting for the delay), and on payment of arrear and interest, it was decreed. *Rawstorne* v. *Bentley*, 4 Bro. C. C. 415.

The assignee of a lease for lives, which contained a covenant for renewal upon the dropping of any life, provided application were made within six months, having omitted, upon the death of one of the cestui que vie, to apply for a renewal within the six months, filed his bill praying relief, upon the ground that he did not within the six months know that the person was dead, or that the deceased person was one of the cestui que vies named in the lease. The bill was dismissed with costs, because the plaintiff might have known the facts if he had used reasonable diligence and acted with ordinary prudence. *Harries* v. *Bryant*, 4 Russ. 89 ; 28 R. R. 15.

Covenant in lease for perpetual renewal upon notice within one year next after the death of any or either of the life or lives ; informal notice, about five years after dropping of first life, with the allegation of accident and ignorance of rights, and a regular application after the termination of the second and third lives, both within one year ; lessee held not entitled to a renewed lease determinable on either three or two lives with similar covenant, but bill retained for a year, with liberty to bring action at law. *Maxwell* v.

Ward, 1 M'Clel. 458 ; 13 Price, 674 ; 28 R. R. 725.

Ignorance of party's own rights or instruments in his possession or power, in no way occasioned by opposite party, cannot excuse a non-performance of anything incumbent on party to perform. *Ib.*

Equity will relieve against an objection taken, that notice of an intention to renew was not given, according to the letter of the condition of the covenant, in writing. *S. C.*, 11 Price, 16.

In a lease for a term of years, determinable on the deaths of three persons, it was covenanted that, on the death of either of the lives, the lessee should, within twelve months, renew, and pay a fine of nine guineas ; and each party bound himself unto the other in a penalty of eighteen guineas, to renew, and to grant and take the new lease respectively. Two of the lives died before the lessee made his application to renew, when he offered to pay the fines and a penalty, but the owner of the land refused to renew :—Held, that no accident will entitle a party to renew, unless it could not have been avoided by reasonable diligence ; that the penalty did not give an option to the lessee, and that a direction given by a former owner in his will to renew, only left the trustees to do what the testator himself would have done ; that if the lessee omit to renew on the death of the first life, he is not entitled to renew on the death of the second life ; and that communications which have passed between the lessor or solicitors, and other lessees, regarding their renewals, cannot be read in evidence. *Reid* v. *Blagrave*, 9 L. J. (o.s.) Ch. 245.

Lessor for lives under covenant to renew on expiration of one, is not bound, if no application, till two drop. *Bayly* v. *Leominster Corporation*, 1 Ves. J. 476 ; 3 Bro. C. C. 529.

Leases for years depending upon lives are substantially the same as leases for lives, and renewals have always been decreed in equity where all the lives had been gone for many years, and no legal estate had existed in the tenant. *Freeman* v. *Boyle*, 2 Ridgw. P. C. 69 ; Vern. & Scriv. 414.

Construction of a covenant for a renewal where notice necessary. *Eaton* v. *Lyon*, 3 Ves. 690.

—— **Irish Leases.**]—In Irish leases, if tenant suffers the three lives to drop, without renewing, or without good excuse for such omission, the right is gone, and lease becomes forfeited. *Bateman* v. *Murray*, 5 Bro. P. C. 20 ; 1 Ridgw. P. C. 187. See also *Kane* v. *Hamilton*, 1 Ridgw. P. C. 180. Reversing Wall. Lyn. 172 ; and cases in Wall. Lyn. 190, n.

In cases of leases for lives renewable for ever, it seems to be an established principle with the courts of equity in Ireland to relieve the tenant, and grant him a renewal upon terms, without regard to negative clauses in the original lease, if compensation can be made to the landlord, and the conduct of the tenant has been fair ; and also to relieve against lapse of time after all the lives have dropped ; provided there be no gross neglect, dereliction or fraud on the part of the tenant, in which case the courts will absolutely refuse their aid. *Magrath* v. *Muskerry*, 1 Ridgw. P. C. 469.

Lease in Ireland renewable by A. to B., B. leases to C. at increased rent, with covenant to renew for ever to C. on same terms. B. covenants to renew with A. C. pays fines, and renews with B. B. never renews with A. D., A.'s representative, in 1793, accepts some money from C. towards fines due from B., and makes demand of whole fines from C., which C. neglects to comply with. A formal demand is made from C. by D. in 1799, who delays nine months, and then makes an illusory tender, which is not accepted :—Held, C.'s right of renewal is gone. *Barrett* v. *Burke*, 5 Dow, 1.

Formal demand is not necessary, but when made, time is considered from that period. But prior demands are to be taken into account in considering what is a reasonable time after formal demand. Precise sum need not be stated in demand. *Id.* 17.

Landlord may file a bill to perpetuate evidence of a demand made under the Tenantry Act on his tenant to renew. *Keating* v. *Sparrow*, 1 Ball & B. 372.

After a demand made, and neglect to renew when all the lives are gone, it is dereliction ; when but one or two, negligence ; and wilful default, when a refusal or neglect to renew in a reasonable time. To neglect renewing for three years after demand is made, is wilful default. *Ib.*

The plaintiffs held under a lease for three lives, with a covenant for perpetual renewal ; two of the cestui que vies (one of whom was the father, and the other the uncle, of one of the plaintiffs) having died, the landlord, on the 28th of January, 1832, served a notice on plaintiffs, calling upon them to pay the renewal fines and interest, and to furnish a renewal for execution. On the 17th of February, a draft renewal was furnished to the landlord's agent ; a blank having been left for the amount of the renewal fines, as the periods of the deaths of the cestui que vies were not then ascertained. On the 28th of the same month it was returned by the agent with some alterations, who asserted that one of the lives had dropped in 1804, and the other in 1818. The plaintiffs, on the 28th of September, ascertained, by a search in the parish registry books, that one of the lives had dropped in 1805, and the other in 1818, and on the 20th of October tendered the amount of the renewal fines, which the landlord refused. The plaintiffs, in the circumstances, were decreed entitled to a renewal upon payment of the costs of the suit, although it was proved that some time previous to the service of the notice of the 28th of January, 1832, they had been required to take out a renewal. *Baldwin* v. *Bridges*, Ll. & G. t. Plunk. 408.

A., seised in fee, by registered deed conveyed lands to a trustee, upon trust, to sell and pay debts and incumbrances, and the residue to himself. Subsequently A., in 1782, for valuable consideration, by registered deed demised the lands to B. (who did not appear to have had notice of the trust deed) for lives renewable for ever, subject to a lease thereof then subsisting. The rent reserved was equal in amount to the rent payable under the sub-lease. In 1789 the lands were sold to N., under a decree in an administration suit instituted before 1782 by a judgment creditor of a former owner of them against A. and his trustee, who joined in conveying the lands to N. It was not shewn that A. had been served with subpœna in that suit before the making of the lease of 1782, when he purchased. The purchase-money was applied in payment of incumbrances created prior to 1782. The last life in the lease of 1782 died in 1835, and the sub-lease determined in 1839, and shortly

afterwards a claim for a renewal of the lease of 1782 was for the first time made by the heir-at-law of B. :—Held, that the laches of the parties deriving under the lease in claiming a renewal, or obtaining a recognition of their title, was, under the circumstances, a bar to their suit. *Drew* v. *Norbury* (*Earl*), 3 Jo. & Lat. 267 ; 9 Ir. Eq. R. 171, 524.

The fact of a lease being in settlement does not alter the landlord's right to the benefit of a forfeiture of the right to renewal by the tenant's laches. *Townley* v. *Bond*, 2 Con. & L. 393 ; 4 Dr. & War. 240.

If, after a forfeiture has been incurred, the landlord declare himself willing to renew, upon the condition of the tenants using expedition, this waiver does not set the matter open again ab initio, and the tenant must use the utmost diligence in taking advantage of it, otherwise his right will be barred. *Ib.*

Where a forfeiture is already incurred, and the matter has been put into the hands of the landlord's law agent, communications on legal matters by his land agent will not bind him. *Ib.*

A renewal decreed, notwithstanding a delay of four months after notice to renew served under the Tenantry Act, when the notice insisted on a term to which the landlord was not entitled, and the landlord delayed after promising to answer inquiries respecting the title made by the tenant, but with costs to be paid by the plaintiff. *Moore* v. *Sayers*, Beat. 530.

Where, on the dropping of one of the lives in a lease for three lives, with covenant for perpetual renewal, repeated applications are made to tenant to renew, particularly in 1798 and 1796, and he made no offer to renew till 1804 or 1805, when some conversation took place respecting the renewal, upon the tenant's relinquishing suit in equity against his landlord, but which conversation ended in nothing, and the landlord refused to renew :—Held, that right to renew was forfeited. *Mountmorris* (*Earl*) v. *White*, 2 Dow (N.S.) 459.

Where there was a lease for three lives with covenant for perpetual renewal, and one life had dropped in 1791, and another in 1838, and there had been a neglect to renew until August, 1843, when a petition was presented, under the statute 1 Will. 4, c. 65, to obtain a renewal from the minor representative of the lessor ; the petition was dismissed. *Sheehy* v. *Bradshaw*, 6 Ir. Eq. R. 397 ; Dr. 307.

If lease for lives renewable for ever expires without renewal, and landlord brings ejectment, tenant ought not to dispute his title, but give consent for judgment, and file bill for renewal. *Wallace* v. *Patten*, 1 Ir. Eq. R. 338.

Lessor being himself a tenant, under a lease for lives renewable for ever, makes a sub-demise, and covenants that every life added by his own landlord shall be also added to the sub-demise. On obtaining a new life in his own lease, he ought to give notice to his tenant, that he is ready to renew. *Ib.*

—— **Penalty.**] — Where a lease has been granted upon lives renewable for ever, with a nomine pœnæ in case of the lessee's neglect to renew, equity will not decree the lessor to renew, except upon the terms of paying the penalty. *Donegaile* v. *Chartres*, 1 Ridgw. P. C. 122.

—— **By Sub-lessee.**]—Equity will not decree the specific performance of a covenant by the mesne landlord with his lessee for the renewal of the lease after the lessee has wilfully neglected or refused to renew, and the nonpayment after demand of the fine which the mesne landlord has paid to the superior landlord, amounts to such neglect or refusal. *Chesterman* v. *Mann*, 9 Hare, 206.

An under-lessee, who is not himself bound to take a renewal of his lease, but who is entitled to the benefit of a covenant by his lessor for the renewal of his under-lease upon payment of his proportion of the fines and expenses of a renewal by the superior landlord, ought, if he complains of the amount of such proportion required from him by the mesne landlord, to apply without delay to a court of equity to assess the sum which he ought to pay, submitting himself to the jurisdiction of that court to compel him to pay a reasonable sum ; and if, instead of making such application and after notice from his mesne landlord that the fine must be paid in a certain time or his right will be excluded, he should delay the payment, the objection that the sum demanded from him was unreasonable will not excuse his laches. *Ib.*

The time from which the lessee will be deemed to have neglected or refused to renew is not to be computed from the latest time at which the mesne landlord might have procured a renewal, but from the time at which he applies to the under-lessee to contribute to the fine and expense of the renewal which he is about to obtain or has obtained. *Ib.*

Where there is a lease of church lands and tithes by an ecclesiastical corporation, and a sub-lease of part thereof by the first lessee, with a toties quoties covenant for renewal on the terms of the sub-lessee paying his proportion of such fines, costs and charges as the first lessee should have to pay in obtaining a renewal of his interest, and there is not a mutual covenant on the part of the sub-lessee to accept a renewal, delay on the part of the sub-lessee in taking out a renewal and paying such proportion when required by notice so to do by the first lessee, at a time when he has been called upon by the ecclesiastical corporation to renew and pay the necessary fine, is a circumstance which will be taken into consideration by the court of equity on a bill filed by the sub-lessee for renewal. Semble, in such a case, if the sub-lease be put in settlement, notice by the sub-lessor to the tenant for life under the settlement will be sufficient without giving notice also to the trustees of the settlement. What will be sufficient laches to work a forfeiture of the right to a renewal of such a sub-lease considered. *Morgan* v. *Gurley*, 1 Ir. Ch. R. 482.

Neglect to name New Life.]—Specific performance of a covenant to grant on the death of the survivor of three cestui que vies a new lease for one life, to be named within twelve calendar months after the death of the first of the said three lives, decreed ; though the new life not named within the time prescribed by the covenant. The lessee being surprised by the misinformation of the lessor's agent, and therefore could not name the life at the proper time, and there being no difficulty in ascertaining the compensation. The lessor affected by letters written to lessee by his land agent and receiver of his rents, who had the key of his record chamber, that being sufficient to constitute him

agent for the purpose, and to protect the tenants in their fair transactions with such agent. *Firman* v. *Ormonde* (*Lord*), Beat. 347.

Renewal of a lease refused, the lessee omitting to nominate lives within the time limited by the covenant, and the injury sustained by the lessor not admitting of compensation. *M'Alpine* v. *Swift*, 1 Ball & B. 285.

Where a lessor covenants for the perpetual renewal of a lease upon the lessee's naming a new life, and paying a fine within a certain time after the death of any of the cestui que vies, a court of equity will, upon slight circumstances, relieve the lessee against a forfeiture, for not literally complying with the terms of the covenant. *Ross* (*Earl*) v. *Worsop*, 1 Bro. P. C. 281.

Concealing Death of Cestui que vie.]—Where a lessee wilfully conceals the death of any of the cestui que vies, and acts under such concealment for his own advantage, the lessor is not obliged to renew, but may take advantage of the forfeiture, and enter upon and hold the estate. *Pendred* v. *Griffith*, 1 Bro. P. C. 314.

Covenantor procuring Renewal on his own Life.]—If a lease for ninety-nine years, determinable on three lives, is conveyed in trust for A. for life, and A. covenants to use his utmost endeavours as often as any of the persons on whose lives the premises are held shall die, to renew the same, by purchasing of the lord of the fee a new life in the room of such as shall fail, it is no breach of the covenant if, upon one of the lives failing, he procures a renewal upon his own life. *Scudamore* v. *Stratton*, 1 Bos. & P. 455.

Relief against under the Conveyancing Acts.]—*See* post, J. 2, *i.*, iii.

c. Fines payable on.

Amount of.]—A sum falling short of three years' annual value of the premises is not an unreasonable fine for the renewal of a lease by the duchy of Cornwall; and the rack rent paid by actual occupiers is a fair criterion of the annual value. *Simpson* v. *Clayton*, 4 Bing. (N.C.) 758; 6 Scott, 469; 1 Arn. 299; 8 L. J., C. P. 59; 2 Jur. 892.

Arrears of—Who entitled to.]—In the case of a renewable lease the sum calculated as renewal and septennial fines and interest is really compensation for the breach of the covenant to pay a fine on the fall of each life. Therefore, where the lessor's interest in a renewable lease was sold after the lease had been allowed to remain unrenewed until more than one life had dropped, and a large number of fines had accrued due:—Held, that the owner of the reversion, though the proper person to receive the fines, receives them only as trustee for the persons who were entitled on the fall of each life. Held, also, that the execution of a fee farm grant subsequent to the publishing of the rental, but before the sale, affords no ground to the purchaser to claim the money paid as renewal and septennial fines and interest. *Brinkley's Estate*, *In re*, 16 W. R. 356.

—— **On Sale of Lease.**]—When the lessee's interest under a bishop's lease is sold in the Landed Estates Court, and the customary renewal fine is stated in the printed rental as an annual outgoing, if any such fines are in arrear at the time of the sale, the purchaser is entitled to have those arrears paid out of the funds in court. *Swiney's Estate*, *In re*, 16 W. R. 357.

By whom Payable—Trustee or Beneficiary.]—Trustees of a will held a renewable lease upon trust for successive life tenants, with remainders over and the residuary personal estate upon trusts to pay all the costs, charges, and expenses of executing the trusts of the will:—Held, that the fine and expenses of the renewal of the lease should be borne by the beneficiaries ratably, according to their enjoyment of the lease. *Baring*, *In re*, *Jeune* v. *Baring*, 62 L. J., Ch. 50; [1893] 1 Ch. 61; 3 R. 37; 67 L. T. 702; 41 W. R. 87.

—— **Persons from Time to Time entitled under Will.**]—Where the first trust of leasehold property, held for lives and years, is to pay the fines on renewals out of the rents and profits, and the next trust is for the benefit of those who, in strict settlement, take freehold and copyhold property under the same will, the expenses of renewal are incidental to the leasehold property, and fall upon those who from time to time are entitled to the possession of it under the will. *Shaftesbury* (*Earl*) v. *Marlborough* (*Duke*), 2 Myl. & K. 111.

A devise of renewable leasehold estates for lives and for years, upon trust from time to time to renew the leases and out of the rents, issues and profits to pay the fines, fees and other expenses of renewal, and subject thereto upon trusts corresponding with the trusts of freehold property devised by the same will to the testator's eldest son for life, with remainders to his issues in tail, with remainder to his second son for life, with remainders over in strict settlement:—Held, as to the leaseholds for life, that under this devise the persons successively entitled to the leasehold estates for lives under the will are bound to sustain the expenses of all renewals occurring during the period of their respective enjoyment; as to the leaseholds for years, that the fines on renewals should be provided by an annual reservation out of the rents and profits of an aliquot part of the accruing fine. *Shaftesbury* (*Earl*) v. *Marlborough* (*Duke*), 3 L. J., Ch. 30.

—— **Where Renewal becomes Impossible.**]—A husband bequeathed his share in renewable leaseholds (which he expressed himself to be entitled to under a lease, but in fact held under a trust, whereby the entirety was vested in trustees, with powers for renewal) upon trusts to renew the lease from time to time out of the income, and to divide the surplus during his wife's life as therein mentioned, with a direction that after her death the same should fall into his residuary estate; and he empowered his executors at any time to sell the leaseholds and invest the proceeds in consols. Renewal having become impossible:—Held, that the will shewed not a mere discretionary power for the trustees to renew, but a paramount intention that the property should be enjoyed in succession, and that therefore the remainder of the term must be sold, and the renewal fund treated as capital, and not paid to the tenants for life. *Maddy* v. *Hale*, 45 L. J., Ch. 791; 3 Ch. D. 327; 35 L. T. 134; 24 W. R. 1005—C. A.

Contribution from Sub-lessee.] — Renewal decreed against a tenant under a bishop's lease, without having any contribution from his sub-lessee, he having covenanted that as often as the bishop would renew he would renew without fine with his sub-lessee. The tenant and his lessor are necessary parties, the sub-lessee deriving his title from their covenants. *Revell* v. *Hussey*, 2 Ball & B. 288 ; 12 R. R. 87.

A. B., being entitled to a bishop's lease, grants a sub-lease to C. D., with a covenant "that in case he, &c., should at any time thereafter renew or take a longer term in the premises demised than he did therein, then that he, the said A. B., &c., would within twelve months after such renewal, and in like manner upon every renewal, or further term of years, &c., renew to the said C. D.," &c. The representative of A. B., who had renewed with the bishop at a heavy fine, refused to grant a renewal to the representative of C. D. without his contributing towards the payment of the fine so paid by him to the bishop :—Held, on a bill filed by C. D.'s representative to compel a renewal, that the representive of A. B. was not entitled to any contribution, but was bound by the covenant in the original lease to renew with the representative of C. D. whenever he obtained a renewal from the bishop. *Thomas* v. *Burne*, 1 Dr. & Wal. 657.

A bishop's lease was granted after the expiration of the former one at a less fine, because the lessee was son to the old tenant, who died without assets to pay the fine. Another person was his administrator, but the son had made himself executor de son tort. The new lease was held a graft, and the lessee bound to renew to sub-lessee without contribution. *M'Nulty* v. *Hamill*, Beat. 544.

A sub-lessee of a bishop's lease demised to the plaintiff, covenanting to renew, and to use his best endeavours to obtain a renewal from his immediate lessor. He afterwards purchased his immediate lessor's estate. The bishop refused to renew, except at a greatly increased fine, which he paid :—Held, that he was bound to renew to the plaintiff without any contribution, in consequence of the increase of the bishop's fine. *Lawder* v. *Blackford*, Beat. 522.

A., holding under a corporation (of which he was a member), and in the habit of obtaining renewals on favourable terms, demised to B., at a certain rent, with a covenant to renew at the same rent as often as the corporation should renew to him. The corporation at length raised the rent payable by A. A. was bound, notwithstanding, to renew to B. on the former terms. *Evans* v. *Walshe*, 2 Sch. & Lef. 519. *See* 12 R. R. 88, n.

Amount of.]—It is usual and perfectly reasonable that in derivative leases the tenant should contribute to the renewal fines in proportion to the quantity and quality of the land comprised in his lease. *Frankfort* v. *Thorpe*, 2 Ball & B. 379.

D., a lessee of lands under a bishop's lease for twenty-one years, demised part to S. for twenty years, and covenanted to renew as often as he obtained a renewal from the bishop, the sub-lessee paying an acreable proportion of the fines and expenses in one month after notice of the amount, and on failure to pay, D. to be at liberty to distrain ; and D. covenanted not to omit the part sub-let from the renewal of the head lease. D. assigned his interest to C. :—Held, that C. might compel S. to accept a renewal and pay his proportion of renewal fines and expenses ; and that the agreement that S. should so contribute was not inequitable or unreasonable. *Curry* v. *Stanley*, Hay & J. 487.

A. being possessed of premises held under B. by lease, renewable from time to time on payment of certain fines and fees, demised them for a term to C., who covenanted "that he would from time to time, and at all times during the term, pay to A. or B. such part of the fines and fees which, on every renewal by A. of the lease under which he held the premises demised, should be paid by him in respect of the premises demised to C." A. afterwards renewed his lease under B. for a term of five years, exceeding the term demised to C. :—Held, that C. was not liable on this covenant to pay the whole of the fines and fees incurred by A. on the renewal of his lease to the above extent, but only a part thereof, commensurate with the interest which C. had acquired in the premises. *Charlton* v. *Driver*, 5 Moore, 59 ; 2 Br. & B. 345.

The contributions of sub-tenants to renewal fines, under leases with toties quoties covenants, are to be calculated according to the proportion which the annual value of the lands comprised in each lease bears to the annual value of the entire lands comprised in the original lease at the time of the renewal. Reference cannot be had to contemporaneous leases to ascertain how such contributions have been regulated on the estate. Interest is chargeable on such contributions against the sub-tenants from the time when they ought to have paid them, though the tenant had not then obtained a renewal. *Molony* v. *Scollard*, 12 Ir. Eq. R. 93.

The contributions to renewable fines of the tenant of a college lease, and his sub-tenant, with a toties quoties covenant for renewal, are in proportion to the annual value of their respective interests. *Orr* v. *Littlewood*, 11 Ir. Ch. R. 502.

In calculating the value, the rent payable by each is to be deducted. *Ib.*

If there were buildings on the land at the date of the under-lease, they are to be taken into account in ascertaining the value. *Ib.*

The assignees of a church lease, which was subject to an under-lease that had subsisted for more than thirty years, and of which twenty-four years were unexpired, covenant, on renewal by them of such under-lease, that they will, within two months after the lease under which they then held shall have been renewed, execute to the under-lessee a lease for such further term as would make up the full term of his original under-lease, the under-lessee from time to time surrendering his then subsisting lease, and paying upon every such renewal such a proportion of the fine as should have been imposed in respect of any new buildings erected by him. The next renewal, if taken at the proper time, would have enabled the holder of the church lease to make up the full term to the under-lessee :—Held, that the latter was only bound to pay a proportionate part of the fine which would have been imposed on such one renewal if taken at the proper time. *Clutton* v. *Fleming*, 8 Sim. 105 ; 5 L. J., Ch. 373.

—— **Interest on.**]—A previous renewal by the tenant of a see to his sub-tenant recited the payment of interest on the renewal fines, and contained a toties quoties covenant for renewal,

and a covenant by the tenant to pay what fine or fines the lessor should pay to the see:—Held, that the sub-tenant was bound to pay interest on the renewal fines on obtaining the perpetuity, under the 6 & 7 Will. 4, c. 99, s. 1. *Brabazon* v. *Lucan* (*Lord*), 12 Ir. Eq. R. 432.

In order to entitle a tenant of an ecclesiastical lease to a renewal under any of the statutes 3 & 4 Will. 4, c. 37, 4 & 5 Will. 4. c. 90, or 6 & 7 Will. 4, c. 99, he must have or be entitled to a full renewal lease. Semble, therefore interest on renewal fines is payable by sub-tenants on obtaining a perpetuity under the 6 & 7 Will. 4, c. 99, s. 1. *Ib.*

Semble, interest is customarily payable on renewal fines by sub-tenants of ecclesiastical leases with toties quoties covenants for renewals. *Ib.*

d. Renewed Leases.

Covenants in.]—A covenant for renewal is a covenant to grant an estate, and implies the insertion of such covenants as are incidental to the legal estate, having regard to the tenure; and a covenant for a lease contains a contract that it shall be accompanied by the ordinary covenants. The party receiving is bound to give that which those from whom he derives were bound to, and did give, by the original contract. *Vance* v. *Ranfurley* (*Earl*), 1 Ir. Ch. R. 322.

—— **Ultra Vires.**]—Bill for the execution of a covenant contained in a renewed lease granted by trustees dismissed, the covenant being ultra vires of the trustees. *Bellringer* v. *Blagrave*, 1 De G. & Sm. 63; 11 Jur. 407.

—— **For Renewal.**]—A. being seised of K. estate for life, remainder to B., his son, for life, remainder to C., his grandson, in fee. A., B., and C. joined in a demise of a part of K., and certain mills thereon, with the rights, &c., grist toll, &c., usually paid by the tenants of K., at the rate of one-sixteenth of the corn ground, as toll for grinding, reserving all royalties to A., his heirs and assigns, with liberty to A., B. and C., and their heirs and assigns, according to their interests, to enter to take the royalties at the pleasure of A., his heirs and assigns, to hold for three lives, with covenant for perpetual renewal. By the reddendum, the rent was reserved as to part to A., B. and C., according to their respective interests, and as to the residue to A., his heirs and assigns, with a covenant to pay A., B. and C. according to their interests, their heirs and assigns. There were covenants by the lessees and by A. as to the tenants grinding at the mills, a covenant for perpetual renewal by A. for himself, his heirs and assigns, and covenants by A., B. and C. for title, &c. The lands devised were, without the profits from the mills, inadequate to meet the reserved rent. A. and B. being dead, and a bill being filed against C. for a renewal:—Held, that C. was not bound to enter into the covenants as to mill duties contained in the original lease, on the part of A., his heirs and assigns; but that he was bound to enter into all he had entered into in the original lease by name. *Ib.*

Semble, that if the demise by A., B. and C. had not been as well for all future lives to be added to the lease, as for the original lives, C. would not have been bound to renew by the covenant for perpetual renewal on the part of A., his heirs and assigns. *Ib.*

Covenant in a lease to renew under the same covenants is exclusive of the covenant of renewal. *Tritton* v. *Foote*, 2 Bro. C. C. 636. *And see* 2 Cox, 171.

A covenant for perpetual renewal does not entitle the lessee to a similar covenant from assigns of the land in subsequent leases. The subsequent leases ought to contain a recital of the original covenant. *Copper Mines Co.* v. *Beach*, 1 L. J. (O.S.) Ch. 84.

Court leans against construction of covenants for renewal with like covenants, that covenant for renewal shall be perpetual, unless clearly intended. *Moore* v. *Foley*, 6 Ves. 232; 5 R. R. 270. S. P., *Baynham* v. *Guy's Hospital*, 3 Ves. 295; 3 R. R. 96.

Form of lease to be granted by trustees, under a covenant by testator for perpetual renewal. *Hodges* v. *Blagrave*, 18 Beav. 404.

Under such a covenant, trustees are not bound to enter into a covenant to renew, but the original covenant, together with the decision of the court, of the lessee's right to a perpetual renewal, should be recited in the lease granted by the trustees, and the trustees should purport to demise in obedience thereto. *Ib.*

Covenant in lease for perpetual renewal upon notice within one year, next after the death of any or either of the life or lives: informal notice, about five years after dropping of first life, with the allegation of accident and ignorance of rights, and a regular application after the determination of the second and third lives, both within one year; lessee held not entitled to a renewed lease determinable on either three or two lives with similar covenant, but bill retained for a year, with liberty to bring action at law. *Maxwell* v. *Ward*, M'Clel. 458; 13 Price, 674; 28 R. R. 725.

A. demises lands to B. and his heirs, for the lives of O., P. and Q., and the longest liver of them, and grants the reversion to X. In the original demise is a covenant by A., for himself, his heirs, executors, and administrators, that if O., P. or Q. shall die, and B. shall within twelve months demand a renewal, and name another cestui que vie, A., or the person entitled to the reversion, would, on the payment of a fine and surrender of the old lease, grant to B., his heirs and assigns, a new lease for the life of such nominee, and of such of them, O., P. and Q., as shall then be alive, "such new lease to contain all the covenants herein contained, including this covenant." O. died, and six months afterwards B. demanded a renewal from X., for the lives of P. and Q. and R., a new life named:—Held, first, that B. was entitled to have a renewal. *Hare* v. *Burges*, 3 Jur. (N.S.) 1294.

Held, secondly, that in the renewal lease X. must covenant to grant a fresh renewal, on similar terms, on the death of either of them, P., Q. and R., in the same words mutatis mutandis, as the covenant in the original demise. *Ib.*

In order to have a right to perpetual renewal, it is sufficient if the intention is made reasonably clear. *Ib.*

The court, in deciding upon the nature of the covenants to be entered into by a conveying party, will look to his interest in the premises. *Ib.*

Where a lease had been granted with a

covenant for renewal, and also the deputation of a keepership, with a memorandum to renew concurrently with the lease, and upon the renewal, a few days before the expiration of the term, the renewed deputation had been by mistake made for the residue of the old, instead of the new term :— Held, that the mistake ought to be rectified, though there was a covenant in the lease not to assign, yet, as that covenant would not at law have prevented an under-letting, the same relief was given to an under-tenant as the original lessees would have been entitled to. *Jalabert* v. *Chandos* (*Duke*), 1 Eden, 372.

The lessee of see lands, held under a lease with a toties quoties covenant for renewal, demised part thereof as building ground for a similar term ; and the sub-tenant covenanted not to carry on certain trades upon, or to throw dirt into the avenue in front of the demised premises, during the term ; and that in case he, his executors, administrators, or assigns did so, he and they would pay an increased rent as a penalty :—Held, upon a petition by the sub-tenant against his landlord for a conveyance of a perpetual estate in the lands pursuant to the 6 & 7 Will. 4, c. 99, that the conveyance of the fee should contain covenants on behalf of the sub-tenant, his heirs, and assigns, similar to those in that behalf contained in the toties quoties lease to the sub-tenant, although neither the conveyance of the fee, nor the lease to the sub-tenant contained such covenants. *Dockrill* v. *Dolan*, 3 Ir. Eq. R. 552 ; 1 Longf. & T. 282.

Description of Premises.]—A lease for lives renewable for ever was made of the lands of D., except the bogs and turf-mosses. The tenant reclaimed portions of the bog, and converted them into arable land, and afterwards filed a bill for renewal :—Held, that the description of the demised premises in the renewal ought not to be in the same terms as in the original lease, but ought to be so altered that such portions of the lands as have been reclaimed from the bog should not pass thereby to the tenant. *Boyle* v. *Olpherts*, 4 Ir. Eq. R. 241 ; 1 Longf. & T. 320.

Duration.]—Where an agreement to renew a lease contains no stipulation as to the term of its duration, it is implied that the new lease shall be of the same duration as the old. *Price* v. *Assheton*, 1 Y. & Coll. 82.

Liability of Lessee's Executors.] — Specific performance of a covenant in a lease to take a renewed lease decreed in chancery against lessee's executors, who had entered and admitted assets. *Stephens* v. *Hotham*, 1 Kay & J. 571 ; 24 L. J., Ch. 665 ; 3 Eq. R. 571 ; 1 Jur. (N.S.) 842 ; 3 W. R. 340.

But the court will take care that the renewed lease, if not beneficial, is so framed as that no personal liability shall be incurred by the executors. *Ib.*

e. Evidence and Costs.

Evidence to Prove.]— In order to prove a renewal of a lease for lives the defendant called a witness, who stated that a conversation took place about fifteen years before, between himself and the former owner of the property, through whom the plaintiff made title, in which such former owner had said that the premises had been new-leased or new-lived, but without mentioning either terms, or lives, or rent, or any of the stipulation of the supposed lease :—Held, too loose to be available as evidence for the purpose for which it was offered. *Doe* d. *Lord* v. *Crago*, 6 C. B. 90 ; 17 L. J., C. P. 263.

Costs — Party making suit necessary.] — Where a person bound by a covenant to renew a lease if required, " at the costs and charges in all things " of the lessee, subsequently devised the land in strict settlement, and died pending the arrangements for a renewal, leaving the first person entitled to an estate of inheritance under his will an infant, so that it was necessary to institute a suit in chancery to obtain a renewal of the lessee :—Held, that the costs of the suit must be paid out of the estate of the covenantor, because it had been rendered necessary by his own act, done subsequently to entering into the covenant. *Wortham* v. *Dacre* (*Lord*), 2 Kay & J. 437 ; 4 W. R. 451.

A tenant having, by his conduct, made his title to a renewal doubtful, and thereby rendering a suit for it necessary, was, on obtaining a renewal, decreed to pay all the costs. *Barrett* v. *Pearson*, 2 Ball & B. 189.

Where Defence fails.]—A lessor having, in his answer to a bill for renewal of the lease, alleged breach of covenant by the lessees as a defence to the bill, and having failed in proving it, was ordered to pay the costs occasioned by that defence. *Vance* v. *Ranfurley* (*Earl*), 1 Ir. Ch. R. 321.

Costs cannot be given to a defendant who sets up a defence that fails ; but from the conduct of the tenant in this case, and the bill containing an unproved imputation against the landlord, the specific performance of the covenant to renew was decreed without costs. *Fitzgerald* v. *O'Connell*, 6 Ir. Eq. R. 455 ; 1 Jo. & Lat. 134.

Laches.]—In a suit for renewal, if it appears that the tenant has been guilty of any laches, he must, in general, pay the landlord's costs ; but if the tenant was guilty of no laches, and the landlord refused a renewal on insufficient grounds he will be decreed to pay the tenant's costs. *Fitzgerald* v. *Carew*, 1 Ir. Eq. R. 346.

Improvements by Lessee—Breach of Covenant.] —A lease was granted of copyhold houses and lands in London for twenty-one years, subject to a small rent, and to the usual covenants to repair, insure, &c., with the usual proviso for re-entry on breach of any of the covenants ; and also a covenant by the lessor, provided the rent should have been paid and the covenants kept, at the request in writing of the lessee, to procure from the lord of the manor a licence to demise the premises for the further term of twenty-one years, and so from time to time, provided such request should be given as aforesaid ; and, in obtaining such licence, to grant a new lease with the same covenants, including the covenant for renewal. Subsequently, the lease was renewed on the expiration of the term, by a new lease for twenty-one years, containing similar covenants. The lessee expended money on the premises, and the value of the property was much increased. The covenants in the renewed lease, to repair and to insure, were broken, and at the end of the renewed term, the landlord, on account of the breach of the covenants, refused again to renew, and brought an action of ejectment :— Held, that a court of equity would not compel

the landlord to renew, nor restrain him from ejecting the lessee; but that as the case was one of great hardship on the lessee, and the question had not before arisen in the case of a lease with a covenant for a perpetual renewal, the court dismissed the bill without costs. *Job* v. *Banister*, 2 Kay & J. 374.

A landlord who does not litigiously oppose a covenant for renewal, shall be entitled to his costs. *Doneraile* v. *Chartres*, 1 Ridgw. P. C. 137.

5. Leases for Life.

Validity of.]—A lease for lives to begin from the day of the date thereof, with seisin delivered afterwards, is good, and shall not be said to convey a freehold to commence in futuro. *Freeman* d. *Vernon* v. *West*, 2 Wils. 165.

By an indenture, premises were demised to M. E., and her heirs, for and during the natural lives of M. E.'s son, J. E., her daughter, M. E., and A. E.'s grand-daughter, and the life of the survivor of them. A. E. had a daughter, but he had not a grand-daughter at the time of making the indenture, nor previously thereto, though subsequently he had several grand-daughters:—Held, that the lease was good for the lives of J. E. and M. E. only. *Doe* d. *Pemberton* v. *Edwards*, 1 M. & W. 533; 5 L. J., Ex. 258.

A demise by A. to B. for the term of his natural life may enure as a demise either for the life of A. or of B., according to circumstances. *Doe* d. *Pritchard* v. *Dodd*, 2 N. & M. 838; 5 B. & Ad. 689.

Semble, that if the habendum is to B., his executors, administrators, and assigns, a presumption is created in favour of a demise for the life of A. *Ib.*

Such presumption is confirmed by a covenant by A. with B. for quiet enjoyment during the life of A. *Ib.*

Such a covenant per se would amount to a demise. *Ib.*

In 1813, R. O., being seised in fee of premises, mortgaged them for a term of 500 years to H., who died in 1814, having bequeathed the premises to his widow and executrix, who entered into possession and receipt of the rents. In 1837, R. O. died intestate, and J. O., his heir-at-law, paid off the mortgage, and received possession of the premises from the executrix, but no assignment was executed by her until 1843. In 1840, J. O. demised the premises after his death to his son W. O., during the lives of himself, his wife and child, and the survivor of them, at the yearly rent of 10*l.* The yearly value of the premises was 27*l.* In 1843 J. O. mortgaged the premises to L. for securing payment of 600*l.*, and the executrix of H., by the direction of J. O., assigned the residue of the term of 500 years to a trustee for L. as a further security, and in the meantime to attend the inheritance. Neither the mortgage nor the assignment made any mention of the lease for lives. In ejectment by the heir-at-law of the lessee against the heir-at-law of R. O.:—Held, first, that the lease for lives was not a void conveyance, under 26 Eliz. c. 4, s. 2. *Owen* v. *Owen*, 3 H. & C. 88; 33 L. J., Ex. 237; 10 Jur. (N.S.) 884; 11 L. T. 137.

Held, secondly, that L. was entitled to the protection of the term of 500 years against the claim of the heir-at-law of the lessee for lives. *Ib.*

By writing not under seal, reciting that D. had purchased for the residue of a term four messuages, in one of which the plaintiff resided, it was agreed that he should continue to reside in that messuage during the residue of D.'s interest, if the plaintiff should so long live, at the yearly rent of 1*s.*, and D. further agreed to assign all his interest in the premises purchased by D. to the plaintiff on payment of 140*l.* within a stated period:—Held, that this was a lease. *Lovelock* v. *Franklyn*, 8 Q. B. 371; 16 L. J., Q. B. 182; 11 Jur. 1035.

By Deed.]—A lease for life must be by deed. *Browne* v. *Warner*, 14 Ves. 156; 9 R. R. 259.

Leasing Power—Construction of Clause.]—The interest in a lease for lives renewable for ever of certain lands having vested in the five daughters of G., one of them, H., in 1773 married F., and by the settlement then executed F. was made tenant for life, with a power to lease for any term not exceeding three lives or 31 years. By the same settlement a term of 500 years was vested in trustees on certain trusts. In 1800 a lease of the lands for three lives was made to O'C. by the persons representing the interests of the four sisters of H.; but the interest of H. was represented only in that lease by F. F. died in 1821. The interest of O'C. in the lease of 1800 having become vested in O'B., the latter in 1825 made a lease of the lands to S. for three lives, and the longest of them, "provided the interest of the said O'B. should so long continue, and not otherwise." In 1828 O'B. purchased the trust term created in 1773. The interest in the lease of 1800 had determined:—Held, first, that the lease of 1800 was not in excess of the leasing power; and, secondly, that no equity arose in S. to have the term granted to him kept alive as to one-fifth of the lands, in consequence of the purchase of the trust term by O'B. *In re O'Brien's Estate*, Ir. R. 3 Eq. 77.

Apportionment of Rent.]—A lease of lands in which the lessor was seised in fee, and of other lands of which he was seised for life (with power of leasing), at one entire rent, and the lease not well executed according to the power, is good after the death of lessor for the lands in fee, though not for the other lands; for the rent may be apportioned. *Doe* d. *Vaughan* v. *Meyler*, 2 M. & S. 276; 15 R. R. 244.

Legal Estate.]—Lands held under a lease for lives, having been devised to Mary for life, and, after her death, to Thomas absolutely, they joined in surrendering the lease, and procured a new one for lives to themselves and their heirs as joint tenants; Thomas devised the lands, but Mary survived him and devised them:—Held, that the legal estate granted by the new lease was vested in the devisee of Mary, in trust for the heir of Thomas and also of his devisee. *Hill* v. *Hill*, Ir. R. 8 Eq. 140. Affirmed, *Ib.* 622—Ch. Ap.

Question for Jury whether for Lives or from Year to Year.]—The assignee of a lease for lives continued in possession for several months after its expiration, and paid a half-yearly gale of the reserved rent which subsequently accrued due; but there being a controversy as to the terms upon which he was permitted to remain in possession:—Held, that it ought to have been left to the jury to find what was the precise character

of the assignee's possession after the expiration of the lease—whether as tenant from year to year upon the terms of the expired lease, or subject to negotiations for the creation of a new tenancy at an increased rent. *Caulfield* v. *Farr*, Ir. R. 7 C. L. 469.

Covenant that Lease but not that Lives subsisting.]—C. assigned by deed a lease for the lives of W., J. and H., to hold for the lives of W., J. and H., and the survivors and survivor of them, and covenanted that the lease "was a good, valid, and subsisting lease in the law for the lives of W., J. and H., and the survivors and survivor of them, and was not forfeited, surrendered, or become void or voidable." J. had died before the making of the deed :—Held, that there was no breach of the covenant, as C. only undertook that the lease was subsisting, and not that three lives were in existence at the date of the covenant. *Coates* v. *Collins*, 41 L. J., Q. B. 90 ; L. R. 7 Q. B. 114 ; 26 L. T. 134 ; 20 W. R. 187—Ex. Ch.

Estoppel of Tenant.]—In an action for rent, where the title to the land is not in question, the tenant is estopped from saying the lease is not a good one ; as that being a lease for lives it could not be granted without livery of seisin, or by lease and release, or bargain and sale ; and that being a lease of a freehold it could not commence in futuro ; for let the lease be what it will, the covenant is good ; and, if otherwise, the tenant might enjoy the land, and yet the landlord have no remedy for his rent. *Monroe* v. *Kerry* (*Lord*), 1 Bro. P. C. 67.

Duration of.]—A lease was granted in pursuance of an agreement between A. and B., by which "A. agreed to let her house to B. during her life, supposing it to be occupied by B. or a tenant agreeable to A." ; and "a clause was to be added in the lease," to give A.'s son an option to possess the house when of age :—Held, that such lease only enured for the joint lives of A. and B. *Doe* d. *Bromfield* v. *Smith*, 6 East, 530 ; 2 Smith, 570 ; 2 T. R. 436.

Stamping.]—An agreement that A. is to have a tenement for life does not require a lease stamp, the document not being under seal, and therefore not operating to pass an estate for life. *Stone* v. *Rogers*, 2 M. & W. 443 ; M. & H. 146 ; 6 L. J., Ex. 145 ; 1 Jur. 455.

Termination of.]—Where the interest of a tenant is determined by the death of a tenant for life. under whom he holds, the possession ceases with the interest, and he cannot maintain trespass unless he does some act indicating an intention to continue in possession. *Brown* v. *Notley*, 3 Ex. 219.

Effect of.]—By a memorandum A. agreed to let premises to B. for two years at a certain rent ; and that B. should have the right of purchasing the premises at the end of or at any time during the term for a given sum ; "it being understood that A. was possessed of the premises for his own life, and the life of M., and of the survivor of them" :—Held, that by this agreement A. bound himself to make title to the premises, for the lives of himself and M. and the life of the survivor. *Worthington* v. *Warrington*, 5 C. B. 635 ; 17 L. J., C. P. 117.

Sub-lease—Surrender and Renewal of Lease—Recovery of Possession by Owner in Fee—Interesse Termini.]—C., the owner in fee and predecessor in title of the plaintiffs, in 1805 granted a freehold lease of lands for three lives. The lessees in 1807 sub-demised part of the land for a term determinable on the dropping of the last of the three lives, which occurred in 1874. The lessees in 1832 surrendered their lease, and on the next day took a new lease for lives, the last of which dropped in 1891. This lease was by common law demise, and bore an indorsement of livery of seisin. The defendant, claiming through the sub-lessees, had been, since 1874, when the sub-lease expired, in actual possession of the lands comprised therein without title. In an action to recover possession :—Held, that the lease of 1832, being a valid lease by virtue of 4 Geo. 2, c. 28, s. 6, operated to pass an estate to the lessees ; and therefore the plaintiffs' reversionary estate did not become an estate in possession within the meaning of the Real Property Limitation Act, 1874, until 1891, when the last life in the lease dropped ; and, therefore, that the plaintiffs' right to recover was not barred under that act. The expression "interesse termini" is never used with regard to a freehold lease, to which it has no application. *Ecclesiastical Commissioners* v. *Rowe* (5 App. Cas. 736) distinguished. *Ecclesiastical Commissioners* v. *Treemer*, 62 L. J., Ch. 119 ; [1893] 1 Ch. 166 ; 3 R. 136 ; 68 L. T. 11 ; 41 W. R. 166.

Effect of Surrender.]—Quasi tenant in tail of a freehold lease for lives may, by surrendering the old lease, and taking a new one to himself, bar the remainder over. *Gray* v. *Mannock*, 2 Eden, 339.

6. Non-execution by Lessor.

Action on Covenant—Liability of Tenant.]—Action on an indenture for a term of ten years, by the plaintiffs to the defendant, for not yielding up the premises occupied by him during the term in good repair. Plea (setting out the indenture, by which the plaintiffs, as the master and governors of an hospital, demised, under their common seal, to the defendant, who covenanted with such master and governors), that the indenture was not at any time during the term signed by the plaintiffs, nor did they sign any lease in writing :—Held, that the defendant was liable on his covenant, whether the plaintiffs had executed the indenture or not. *Cooch* v. *Goodman*, 2 G. & D. 159 ; 2 Q. B. 580 ; 11 L. J., Q. B. 225 ; 6 Jur. 779.

Held, secondly, that the plaintiffs could not sue in their individual characters on a covenant made with them in their corporate capacity. *Ib.*

Declaration on a deed made between the plaintiff and the defendant, whereby the plaintiff demised to the defendant a messuage, with the appurtenances, for seven years, and the defendant covenanted with the plaintiff, that he would yearly and every year, during the term, keep the premises in repair, and give them up in repair, at the end of the term ; by virtue of which demise the defendant entered upon and enjoyed the premises. The breach laid was for not keeping the premises in repair during the term. The defendant pleaded that his part of the deed was executed by him after the alleged day of the execution thereof, and that the plaintiff's part

was never executed by him, or by any agent of his thereunto lawfully authorised, nor was there ever any demise of the premises to the defendant, nor was there ever any lease of any part of the premises put in writing and signed, or made, signed, sealed or delivered by the plaintiff, or by any agent of his thereunto lawfully authorised by writing or otherwise; and that although before the making of the deed the plaintiff demised the premises for one year, and so on from year to year, by virtue of which demise the defendant entered and occupied the premises for a term, to wit, for nine years, which term ended before the commencement of the suit, the defendant never did occupy the premises under any demise from the plaintiff, other than that last mentioned, or for any term granted by the deed, and that there never was any consideration for the execution by the defendant, on his part, of the deed, and that his covenant therein was void:—Held, in substance, a good answer to the action. *Pitman* v. *Woodbury*, 3 Ex. 4.

Action upon an indenture between commissioners of an inland navigation, under the authority of several acts of parliament, on the one part, and the defendant on the other part, whereby the commissioners demised the tolls of the navigation to the defendant for one year, at a rent payable monthly, together with some other payments, and the defendant covenanted with the commissioners, parties to the indenture, and also with the whole body of the commissioners in a separate covenant, for payment of the rent. The declaration alleged an entry by virtue of the demise, and an occupying and receiving the tolls during the entire year. Breach, nonpayment of the rent. Plea, that the commissioners never executed the lease, and that the entry and occupation were at the will of the commissioners only, and not under the demise. Replication, that the defendant entered, and received and enjoyed the tolls by the permission of the commissioners, under the terms of the indenture:—Held, that, as the lessors had not executed the lease, the lessee had never received the consideration for which he had stipulated, namely, a permanent estate during the demise, and under its terms; and, therefore, that he was not liable to be sued upon his covenant in that instrument. *Swatman* v. *Ambler*, 8 Ex. 72: 22 L. J., Ex. 81. See *Morgan* v. *Pike*, 14 C. B. 473; 2 C. L. R. 696; 23 L. J., C. P. 64; 2 W. R. 193.

To an action on a covenant in a lease for years by the lessor, a plea that the lessee was tenant for a term of years if he should so long live, and that the lease was never executed by the reversioner is a bad plea. *How* v. *Greek*, 3 H. & C. 391; 34 L. J., Ex. 4; 10 Jur. (N.S.) 1187; 11 L. T. 315; 13 W. R. 80.

—— **Liability of Assignee.**]—To an action on a covenant against the assignee of a lease, of which the declaration averred that the party under whom the assignee claimed executed the counterpart:—Held, that a plea that the indenture was not executed by the plaintiff, or by any agent of the plaintiff thereunto lawfully authorised, in writing was no answer. *Areline* v. *Whisson*, 4 Man. & G. 80; 12 L. J., C. P. 58.

7. Counterparts.

Inconsistency with Lease.]—The rule as to lease overruling counterpart applies only where there is inconsistency between those two documents compared with each other, and not where the lease is inconsistent with itself. *Burchell* v. *Clark*, 46 L. J., C. P. 115; 2 C. P. D. 88; 35 L. T. 690; 25 W. R. 334—C. A.

When the term mentioned in the reddendum in a lease differed from that stated in the habendum, and the counterpart throughout stated the term as in the reddendum, the habendum was corrected so as to agree with the reddendum. *Ib.*

Effect of—Evidence.]—In an action for rent on a demise, the plaintiff produced a deed properly stamped as a counterpart lease, and proved the same to have been executed by the defendant:—Held, that although there was no evidence of any lease having been executed by the plaintiff, the presumption was that there was such; and the deed produced was therefore rightly admissible as a counterpart. *Hughes* v. *Clark*, 10 C. B. 905; 15 Jur. 430.

In an action for rent upon an indenture of lease, the defendant pleaded non demisit. The counterpart is sufficient evidence of the demise. *Houghton* v. *Kœnig*, 18 C. B. 235; 25 L. J., C. P. 218.

Where a lease purports to be made under a power contained in a will, the lessee is estopped, by his execution of the counterpart, from denying the execution of the will. *Bringloe* v. *Goodson*, 8 Scott, 71; 5 Bing. (N.C.) 738; 1 Arn. 322; 8 L. J., C. P. 116.

Lands at A. were conveyed to a charity in 1763. In 1783 the charity, being then incorporated as the Magdalen Hospital, granted a lease for ninety-nine years to G. of all their lands at A. not included in the site of the hospital. The lease reserved no beneficial rent to the lessors, and contained no onerous covenants binding on the lessee. In 1876 the governors of the hospital brought an action against the defendants, who were in possession of premises alleged to be comprised in the lease, to have the lease declared void under 13 Eliz. c. 10, and for possession. The lease having been declared voidable on demurrer, the defendants denied that they were in possession under the lease, and asserted a freehold title in themselves in fee. Since 1858 they or their predecessors had dealt with the property as if seised in fee. At the trial of the action it was proved that, assuming the hospital to be owners in 1783 of the lands conveyed to them in 1763, the premises in question were comprised in the lease:—Held, that a counterpart of the lease in the possession of the plaintiffs was admissible as evidence against the defendants, although there was no other evidence of the identity of the property comprised in the lease with that conveyed in 1763, and although there was no evidence that G. entered under the lease, or that the defendants claimed under him; for that, first, where persons are found to be owners of property, there is a presumption, in the absence of anything to the contrary, that they have remained owners of the same property; and, secondly, that the defendants being in possession, it must be presumed that G. entered, and that the defendants were in possession by devolution from him, so as to ascribe to them a rightful rather than a wrongful possession. *Magdalen Hospital* v. *Knotts*, 37 L. T. 428; 26 W. R. 141. Affirmed in C. A. infra.

Held, also, that the fact that the defendants had dealt with the property as owners in fee did

not rebut the presumption that they held under the lease. *Ib.*

In 1763 lands were conveyed upon trust for a charitable corporation, and in 1783 the corporation granted a lease of part of such lands to G. for ninety-nine years at a peppercorn rent. In 1877 the corporation commenced an action against K., who was in possession of the demised lands, on the ground that the lease being voidable under 13 Eliz. c. 10, they had the option to determine it at any time during its continuance, and that the Statute of Limitations did not commence to run against them until they exercised such option:—Held, that in the absence of evidence to the contrary, the counterpart lease was primâ facie evidence of the title in fee of the corporation, and that the defendant being admittedly in possession of land included in the lease, the presumption, in the absence of proof to the contrary, was that he was in possession under some title derived through G. *Magdalen Hospital* v. *Knotts*, 47 L. J., Ch. 726; 8 Ch. D. 709; 38 L. T. 624; 26 W. R. 646—C. A. In H. L. (*see* infra) this point did not arise.

Cost of.]—In a written agreement for a lease it was stipulated that if the tenant should be desirous to take a lease of the premises, "he the said (landlord) will, at the request and costs of the said (tenant), grant and execute to him a lease thereof":—Held, that, upon this agreement, the tenant was not bound to pay for the counterpart of the lease, although the lease was to contain covenants to be performed by the tenant; and that, if the landlord required a counterpart, he must be at the expense of it himself. *Jennings* v. *Major*, 8 Car. & P. 61.

Right of Lessor to Witness Execution of.]—In the absence of any stipulation to that effect, the lessor is not entitled to insist upon witnessing by himself or his agent the execution of the counterpart of the lease by the lessee; and in a suit by the lessee to enforce specific performance of the agreement for a lease, the lessor ordered to pay the costs of the suit occasioned by his refusal to execute the lease, unless the execution of the counterpart was attested by his agent. *Borradaile* v. *Smart*, 5 W. R. 270.

8. Title of Lessor.

Presumption of Possession.]—The granting of a lease is an act of ownership which is primâ facie evidence of a title in fee of the grantor; and the law will presume that persons in possession of land comprised in the lease are in possession rightfully, and are, therefore, in the absence of other proof by them, privy to the term. *Magdalen Hospital* v. *Knotts*, 47 L. J., Ch. 726; 8 Ch. D. 709; 38 L. T. 624; 26 W. R. 640—C. A. *S. C.* in H. L.; 48 L. J., Ch. 579; 4 App. Cas. 324; 40 L. T. 466; 27 W. R. 602.

How far Lessor guarantees as to Title.]—Under a parol demise, the law implies an agreement for quiet enjoyment, but not of good title. *Bandy* v. *Cartwright*, 8 Ex. 913; 22 L. J., Ex. 285.

A tenant from year to year, who has been evicted by the reversioner after the determination of the interest of the landlord, cannot maintain an action upon an implied covenant for quiet enjoyment against his landlord. *Penfold* v. *Abbott*, 32 L. J., Q. B., 67; 9 Jur. (N.S.) 517; 7 L. T. 384; 11 W. R. 169. See also *Adams* v. *Gibney*, 4 M. & P. 491; 6 Bing. 656; 8 L. J. (O.S.) C. P. 242; 31 R. R. 514.

A tenant from year to year, equally with a tenant having a larger interest, is bound to make proper inquiries into his landlord's title, and he is affected with the consequences of not doing so. *Wilson* v. *Hart*, 35 L. J., Ch. 569; L. R. 1 Ch. 463; 12 Jur. (N.S.) 460; 14 L. T. 499; 14 W. R. 748.

See also cases, post, cols. 1136 et seq.

In Case of Agreement for Lease.]—*See* ante, cols. 787 et seq.

Tenant's Power to Dispute.]—*See* post, N. 1.

9. Option to Purchase Premises.

To Purchase Fee Simple—Nature of Interest conferred on Lessee—Real and Personal Representatives.]—A lease of land contained a covenant by the lessor with the lessee, his executors, administrators and assigns, that if the lessee, his executors, administrators or assigns, should at any time thereafter be desirous of purchasing the fee simple of the demised land, and should give notice in writing to the lessor, his heirs and assigns, then the lessor, his heirs or assigns, would accept 1,200*l.* for the purchase of the fee simple, and on receipt thereof would convey the fee simple to the lessee, his heirs or assigns, or as he or they should direct. The lessee died intestate, and nearly twenty years after his death his heir, who was also administrator of his personal estate, called on the devisee of the lessor to convey the fee simple to him in accordance with the covenant, and a conveyance was executed accordingly. The heir afterwards contracted to sell part of the property thus conveyed to him:—Held, that the option to purchase was attached to the lease and passed with it; that it consequently passed as part of the lessee's personal estate to the administrator, and that the administrator could not make a good title to the purchaser, unless the next of kin of the lessee would concur in the sale. *Adams and Kensington Vestry, In re*, 54 L. J., Ch. 87; 27 Ch. D. 394; 51 L. T. 382; 32 W. R. 883—C. A.

Payment a Condition Precedent to Purchase.]—A lease for years contained a covenant on the part of the lessor, that if the lessee should be desirous at the expiration of the term of purchasing the premises, and should give to the lessor six calendar months' notice in writing of such desire, and should pay to him 2,000*l.*, the lessor would sell and convey the premises to the lessee; the expense of the preparation and verification of the abstract to be borne by the lessee, he expressly accepting the title. The lessee gave notice, but did not pay the money:—Held, that the payment of the money was a condition precedent to the right of purchase, and that the money not having been paid, no binding contract arose. *Weston* v. *Collins*, 34 L. J., Ch. 353; 11 Jur. (N.S.) 190; 12 L. T. 4; 13 W. R. 510—L.C.

A lessee, who had the option of purchasing the freehold at any time within seven years, by giving three months' notice, and paying a certain sum at the expiration of such notice, gave the required notice three months before the seven years elapsed, but did not pay the money on or before the day the notice expired:—Held, that the lessee

was not entitled to a decree for specific performance, the time of payment being one of the two conditions of the contract. *Ranelagh* (*Lord*) v. *Melton*, 2 Drew. & Sm. 278 ; 34 L. J., Ch. 227 ; 10 Jur. (N.S.) 1141 ; 11 L. T. 409 ; 13 W. R. 150.

Option independent of Duration of Term.]—By a clause at the end of a lease, the lessees on notice given on or before a fixed date had the option of purchasing the fee simple of the premises comprised in the lease, together with certain machinery thereon. The term was under the lease determined absolutely by an event which happened, viz. by a fire which partly destroyed the premises demised, and which occurred before the exercise of the option :—Held, that the option to purchase was independent of the duration of the term. *Edwards* v. *West*, 47 L. J., Ch. 463 ; 7 Ch. D. 858 ; 38 L. T. 481 ; 26 W. R. 507.

Notice to Infant Heir.]—A lease for twenty-one years contained a proviso, that if the lessees should be desirous of purchasing the fee, and should give to the lessor, his heirs or assigns, notice of such desire, they should be entitled to become the purchasers of the premises at the price named, and the lessor, his appointees, heirs or assigns, would, on payment of the purchase-money, do all acts for conveying the premises to the use of the purchasers. The lessor died, having devised all his real estates to trustees, who disclaimed, and leaving an infant heir. The lessees having served on the infant and his guardian notice of their election to purchase :—Held, that such notice was effectually served, and constituted a valid and binding contract, which the court would not refuse to carry out on the ground that the infant could not give a discharge for the purchase-money. *Woods* v. *Hyde*, 31 L. J., Ch. 295 ; 6 L. T. 317 ; 10 W. R. 339.

Breach of Covenant to Insure.]—An owner of a plot of ground agreed to grant a lease of it to A. as soon as the latter had erected a villa thereon. But it was stipulated, that if A. should not perform the agreement on his part, the agreement for a lease was to be void, and that the owner might re-enter. A. was to insure in a particular way, and he was to have the option of purchasing the fee within two years. A. erected the villa, but insured in a wrong office and in a wrong name :—Held, that the contract for a lease was independent of the option to purchase, and that, notwithstanding the forfeiture of the first, the latter still subsisted, and a specific performance of the contract for sale was decreed. *Green* v. *Low*, 22 Beav. 625 ; 2 Jur. (N.S.) 848 ; 4 W. R. 669.

10. Setting Aside.

Fraud.] — A lease impeached for alleged fraud and under-value :—Held, under the circumstances, valid. *Donegal* (*Marquis*) v. *Greg*, 13 Ir. Eq. R. 12.

Concealment and misrepresentation relied on in such a case must be proved fraudulent, and the contract shewn to be based upon it ; and the very fraud alleged in the bill proved. *Ib.*

Equity will not decree a renewal of a lease claimed on an agreement accompanied with fraud. *Davies* v. *Oliver*, 1 Ridgw. P. C. 1.

Agreement for lease founded on fraudulent statement, will be rescinded, and an account directed. *Long* v. *Fletcher*, 2 Eq. Abr. 5.

Bill to set lease aside as having been obtained by surprise and fraud, dismissed under the circumstances. *Smyth* v. *Smyth*, 2 Madd. 75.

A. filed his bill in the Court of Chancery in Ireland, to be relieved against a long lease granted by his ancestors, on the foot of fraud ; but not giving sufficient evidence of the fraud, his bill was dismissed with costs. Some years after, A. filed a new bill for the same purpose, charging fresh proofs of the fraud, which were not discovered pending the former suit. Upon hearing this second cause, the lease was set aside ; and, on an appeal, this decree was affirmed, but varied by consent. *Cotter* v. *Barrymore* (*Earl*), 4 Bro. P. C. 203.

A. having granted a lease of certain mines to P. as a trustee for the West Cork Mining Company, and having in his lifetime received certain sums in part payment of the consideration money of the lease, P., who was his executor, filed his bill against V., the managing director of the company, for an account of the sum due on foot of the purchase-money and for payment thereof. V. filed a cross bill on behalf of the company, and thereby, after setting forth various facts and matters as evidencing fraudulent conduct against the shareholders on the part of A. and his executor P., impeached the lease as fraudulent, and the consideration thereof as exorbitant and extravagant :—Held, under the circumstances, that the plaintiff in the original cause was entitled to the relief as prayed for by his bill, and that the cross bill should be dismissed without costs. *Pike* v. *Vigers*, 2 Dr. & Wal. 1. Affirmed, sub nom. *Vigers* v. *Pike*, 8 Cl. & F. 562.

Validity of leases is triable at law ; therefore, bill to set lease aside demurrable. Sed quære. *Hutchinson* v. *Gamble*, 2 Bro. P. C. 518.

Fraudulent Representation—As to Purposes for which Premises were to be used—Immorality.]—An owner of premises, who grants a lease of them for a term, under which the lessee enters, cannot avoid the lease on the ground that it was obtained by the fraudulent misrepresentations of the lessee as to matters collateral to the lease, e.g. that he was a respectable person, and intended to use the premises for a respectable business ; whereas he was not a respectable man, and intended at the time and did afterwards use the premises for an immoral and an illegal purpose. *Feret* v. *Hill*, 15 C. B. 207 ; 2 C. L. R. 1366 ; 23 L. J., C. P. 186 ; 18 Jur. 1014 ; 2 W. R. 493. *See also* post, col. 924.

—— **As to Age of Infant.**]—Where a lease is set aside at the instance of the lessor on the ground that the lessee is an infant and obtained the lease on his representation that he was of full age, the lessor cannot recover damages for use and occupation. *Lempriere* v. *Lange*, 27 W. R. 879.

Unfounded but Justifiable Assertion.]—Lease deliberately executed cannot be set aside on account of an unfounded, though justifiable, assertion of the lessor, pending the treaty, there being no wilful misrepresentation, nor on the grounds of mistake from an omission of a general warranty in the lease, such not constituting part of the agreement. *Legge* v. *Croker*, 1 Ball & B. 506 ; 12 R. R. 49.

Surprise.]—Agreement decreed to be delivered up on the ground not of fraud, but surprise,

neither party understanding the effect of it, viz., a lease, with covenant for perpetual renewal at a fixed rent, of premises held under church lease, renewable upon fines continually increasing. *Willan* v. *Willan*, 16 Ves. 72.

A surveyor is a competent adviser in the matter of a building lease, and a lessee who has had the assistance and advice of a competent surveyor cannot complain of surprise. *Haberdashers' Co.* v. *Isaac*, 3 Jur. (N.S.) 611.

In consideration of Marriage.]—Tenant in tail made a lease to A., in consideration of his procuring a marriage between the lessor and a lady of fortune:—Held, that this consideration was fraudulent, and the lease accordingly set aside. Decree of the Court of Chancery dismissing the bill for relief against the lease, reversed. *Scribblehill* v. *Brett*, 4 Bro. P. C. 144.

Inadequacy of Consideration.]—A lease granted under circumstances of imposition and inadequate consideration and distress of lessor, set aside as between lessor and lessee, but lessee having made it a provision for wife and family by marriage settlement, court below left to proceed as to their relief. *Knatchbull* v. *Kissane*, 5 Dow, 389.

Premises worth 20*l.* or 22*l.* let for 15*l.* 8*s.* The difference is not so gross as to vitiate the bargain on the ground of inadequacy of consideration, it not appearing that the lessor had been deceived by the lessee respecting the value. *Luby* v. *O'Donnell*, 2 Sch. & Lef. 471.

In 1804 A., tenant for life under a settlement, with a power to grant leases for twenty-one years, concurred with B., the next tenant for life, in an agreement to grant to the steward and solicitor of A. a lease of part of the lands, &c., in settlement for twenty-one years at a rent paid upon a valuation, which omitted to estimate certain rights of common annexed to the lands, on the alleged ground that those rights were disputed by the copyholders of the manor. In 1809, B. having become tenant for life on the death of A., executed a lease according to the agreement. In 1810, under an act for inclosure of waste lands, a very large allotment was made in respect of the lands leased. B. died in 1816, when the reversion of the lands subject to the lease vested in C., who accepted the rent reserved until 1821, when he filed a bill to set aside the lease:—Held, in the court below, that the transaction was unimpeachable on the ground of fraud:—Held, on appeal, that the relief was barred by acts of confirmation and acquiescence, but quære whether, considering the facts and the relation of the parties, the lease might not have been avoided on the ground of fraud or mistake if it had been questioned soon after the transaction. *Selsey (Lord)* v. *Rhoades*, 1 Bligh (N.S.) 1; 30 R. R. 1.

—— **Lease of Charity Land.**]—Lease of charity lands set aside on the grounds of inadequacy of rent, length of the term, and the insertion of a proviso that the tenant might remove buildings at the end of the tenancy. The fact of a party joining in a lease as a consenting party:—Held, to be notice to the lessees of the nature of the interest which he claims. *Att.-Gen.* v. *Hall*, 1 W. R. 117.

Where Lessor has no Title.]—A lease having been granted by deed in terms from which the law implies a covenant for title, and the lessor proving to have no title to part of the demised premises:—Held, that the lessee might refuse to take possession of such part of the demised premises, and elect to keep the remainder, and might in an action for rent due under the lease claim damages for breach of the implied covenant by way of counter-claim. *Feret* v. *Hill*, supra.

Action for rent due on a lease. The declaration stated that one Lawless being entitled to a certain estate mortgaged the premises to O'Brien, and that afterwards Lawless and O'Brien demised to the defendant, who entered upon the premises demised and became thus possessed of the term; that O'Brien's interest vested in the plaintiff, and that a half-year's rent was due to the plaintiff on the demise. A plea alleged that, before the demise, O'Brien falsely and fraudulently represented that Lawless was entitled to the lands in the lease mentioned, as devisee under the will of his father, and that his will had been duly proved, and that by such false and fraudulent representations the defendant was induced to accept the lease and enter into the covenants therein contained, and averred that Lawless was not so entitled as owner, and the defendant himself, as O'Brien well knew, was entitled to the lands as heir-at-law. On demurrer, the plea was held bad, for not stating that the defendant repudiated the lease and derived no benefit under it. *Meldon* v. *Lawless*, Ir. R. 5 C. L. 547, n. S. P., *Anderson* v. *Costello*, Ir. R. 5 C. L. 544.

The lessor of certain lands knew that as to part of them he had no title to grant the lease. The lessee did not know, and had no means of knowing, that such was the case, and the lessor did not disclose the want of title of him:—Held, that it was not necessary in equity, in order that the lessee might be relieved of the lease, that there should have been any affirmative fraud, and that the concealment by the lessor of a fact affecting the title to a material part of the demised premises was a sufficient ground for treating the lease as set aside. *Mostyn* v. *West Mostyn Coal and Iron Co.*, 45 L. J., C. P. 401; 1 C. P. D. 145; 34 L. T. 325; 24 W. R. 401.

Lease by Owner before Seisin.]—Fraud by making lease after feoffment, and before livery and seisin. *Treby* v. *Gibone*, Cary, 82.

Lease by Intoxicated Person.]—Lease obtained by fraud and circumvention from person in a state of intoxication is void in equity. *Butler* v. *Mulvihill*, 1 Bligh, 137.

By Person of Weak Intellect.]—Leases for lives obtained by agents of a deceased person of weak intellect upon inadequate considerations set aside as fraudulent. *Gartside* v. *Isherwood*, 1 Bro. C. C. 558.

By Principal to Agent.]—An agent may take a lease from his principal, but he must always be prepared to prove that full information has been imparted to his principal, and that the contract has been entered into with perfect good faith. *Molony* v. *Kernan*, 2 Dr. & War. 31.

By Agent to Stranger.]—A party who takes an assignment of a lease from the agent of the lessor, with notice of the assignor's character as agent, has the same liability of sustaining the lease cast upon him that the agent has, and if the lease cannot be upheld by the agent, neither can it be supported by the purchaser from the agent. *Ib.*

A tenant having, by collusion with the steward of the landlord, obtained a renewal of a lease for lives, as though one only had dropped, and two were exchanged, when in fact two lives had fallen; decreed to pay the value of the two lives, and he shall not have the option of delivering up the new, and abiding by his former lease. *Abingdon* (*Earl*) v. *Butler*, 2 Cox, 260; 3 Bro. C. C. 112; 1 Ves. Jun. 206.

A., who was agent over a property held by four sisters as tenants in common, and had a power of attorney from three of them to make leases, having, when about to leave the country under very suspicious circumstances, executed, as by a power of attorney from the four sisters, a lease of part of the property to B., his under-agent, and there was some evidence of under-value in the rent reserved, and covenants were omitted, which B. had suggested as proper in other leases of the same lands to other tenants, the lease was, at the suit of the four sisters, decreed to be set aside. *Rossiter* v. *Walsh*, 2 Con. & L. 562: 4 Dr. & War. 485.

By Client to Solicitor.]—Upon a bill by a tenant in remainder under a marriage settlement, a lease at an under-value, obtained by a solicitor from a tenant for life, being his client, and in embarrassed circumstances:—Held, invalid and rescinded on terms of paying for substantial improvements and the usual terms in equity. *Ward* v. *Hartpole*, 3 Bligh, 470.

By Tenant for Life to Trustee.]—A trustee appointed by will for the management of estates (with a salary of 100*l.* per annum), during the continuance of a tenancy for life, took a lease at a very low rent, in consideration of faithful services, from the tenant for life; it was also exceeding the power of leasing given to the tenant for life:—Held, that this lease was fraudulent and voidable in the hands of a purchaser for value, who had constructive notice of the nature of the lease, in favour of those claiming the estates after the tenant for life. *Ker* v. *Dungannon* (*Lord*), 1 Dr. & War. 509; 1 Con. & L. 335; 4 Ir. Eq. R. 343.

By Mortgagor to Mortgagee.]—A lease, set aside under the circumstances, being made by mortgagor to mortgagee, the latter taking advantage of the distress of the former, and using his mortgage as an instrument to obtain an undue advantage; and the lessor executing the lease on the faith of an agreement, that he was to be allowed a certain maintenance out of the property for himself and family, which lessee did not perform, and which it would not have been in his power to have secured on account of right of creditors. Whether the mere relation of mortgagor and mortgagee be sufficient to avoid a lease fairly made by the former to the latter, quære. *Gubbins* v. *Creed*, 2 Sch. & Lef. 214; 9 R. R. 71.

A contract between mortgagor and mortgagee for a lease to be granted by the former in consideration of forbearance is usurious. *Id.* 218.

Fee farm grant or lease of mortgaged premises from mortgagor to mortgagee, at a fixed annual rent, is among that description of transactions at which courts of equity look with great jealousy. *Hicks* v. *Cooke*, 4 Dow, 24; 16 R. R. 1.

By Debtor to Creditor.]—On the same principle that purchasers of reversionary interests and post obit bonds are required to prove that they gave the full value, and did not practise on distress, a lessee making a contemporaneous loan to his lessor ought, when called on, to shew that he gave the fair and just rent, and that he did not use his loan as a means to obtain a more profitable bargain than he might have had in the ordinary course of contract. *Moore* v. *M'Kay*, Beat. 291.

A lease not set aside because it was contemporaneous with an advance of money to the lessor. In order to induce the court to interfere, there must, in addition to that fact, be some evidence, or legal presumption, of the advance being used as a means of restraint or undue influence, to obtain an unjust profit, or that it was intended as a device or shift to evade the statute, or that the rent reserved was inadequate. *Id.* 282.

A lease at a fair rent, lessee paying two years' rent in advance, secured by lessor's bond and insurance on his life, not impeachable either as fraudulent on a power to lease without fine, or as being accompanied with a loan of money. *O'Brien* v. *Grierson*, 2 Ball & B. 323.

A bill will not lie at the suit of a remainderman to set aside a lease by tenant for life, on the ground of its being accompanied with a loan of money; there being no privity between them, and the remedy being at law. *Corbet* v. *Segrave*, 2 Ball & B. 98.

A lease granted to a creditor on a further loan of money, at a stipulated rent, to be retained in discharge of the debt, is a security in the nature of a mortgage, and if the rent be at a fair value, which by the debtor's acquiescence for nineteen years will be presumed, cannot be set aside. By the acquiescence, the debtor is precluded from proving the rent to be at an under-value. But a lease afterwards granted on further loan at the old rent, set aside, being on the face of it a fraud, the creditor to account for the full value of lands from the date of the mortgage. *Morony* v. *O'Dea*, 1 Ball & B. 109.

An agreement that a mortgagee shall enter into the possession of lands of the mortgagor at a fair rent in discharge of the debt will be supported in equity, not being against public policy, or working a private injury, and is an exception to the rule, that a mortgagee in possession must account for the full value of lands. *Ib.*

A lease at a stipulated rent, the landlord at the same time obtaining from the tenant a sum of money, two years' rent, in which the tenant is secured by another lease of the same date for two years, at a nominal rent; the interest to be retained out of the first gale payable under the other lease. This is not a lease in consideration of a loan, as the relation of a debtor and creditor did not exist; and the tenant could not recover the money by action; it is but an advance of rent by way of fine or foregift. Where a loan of money is made in consideration of a lease, and an available security is given for it, the dealing is usurious. But where rent is advanced by way of fine or foregift it is not so. *Wilton* v. *Browne*, 1 Ball & B. 125.

A lease containing a clause, empowering the tenant to retain the rents, till a sum of money advanced to the landlord at the time of granting the lease was repaid, but for which no separate security was given, nor was the advance to pay interest:—Held, not impeachable on the grounds of being a lease connected with a loan. *Prior* v. *Dumphy*, 1 Ball & B. 27.

Rent may be reduced beyond legal interest, by way of fine; yet the transaction not impeachable if not attended by fraud. *Lukey* v. *O'Donnell*, 2 Sch. & Lef. 466.

In order to constitute a loan, it is essential that the money, with interest, is at all events secured to the lender. *Ib.*

A. seised of the reversion in fee of premises which were let to E. for a term of years, at 15*l.* 8*s.* yearly rent, agrees bonâ fide to sell to B. the rent reserved by that lease for the residue of the term for a sum, the principal and interest of which was to be reimbursed to B. in that time by the perception of the rent, supposing it punctually paid; and at the same time A., being induced by the accommodation offered him by B. in purchasing the rent, makes a lease for lives renewable for ever to B. of the same premises, and at the same rent which E. paid, but not to commence or be payable until the expiration of E.'s lease; at which time the premises would be worth 20*l.* or 22*l.* per annum. This not impeachable as a lease coupled with a loan, the first transaction being a fair purchase of the rent, and the second, though induced by the first, yet not distinguishable from a lease made upon payment of a fine. *Ib.*

A lease granted at the same time with a loan of money by lessee to lessor, set aside, although the proposal for connecting the loan with the lease moved from the lessor. But an underlessee bonâ fide, and not concerned in the transaction of the loan, not disturbed. *Molloy* v. *Irwin*, 1 Sch. & Lef. 310.

A beneficial lease granted at the same time with a loan of money by lessee to lessor held fraudulent and void, as affording to the lender a profit on the money lent beyond legal interest. *Brown* v. *O'Dea*, 1 Sch. & Lef. 115.

A beneficial lease obtained under the influence of loans of money, made or expected to be made by the lessee to the lessor, is a fraudulent invasion of the Statutes of Usury, and an undue advantage taken of the lessor, and therefore void. *Drew* v. *Power*, 1 Sch. & Lef. 182.

A lease for 999 years, made by mortgagor to mortgagee, set aside; the policy of the law upon which the Statutes of Usury are founded not permitting such a transaction between persons standing in the relation of the mortgagor and mortgagee, and this, semble, although the lease was made at a fair value. *Webb* v. *Rorke*, 2 Sch. & Lef. 661; 9 R. R. 122.

Who may Avoid.]—Lease obtained by fraud may be avoided by patentee of the land. *Devon* (*Earl*) v. *Haule* or *Hanley*, Cary, 32.

Clause Permitting Waste—Effect of.]—Where the power is unlimited, a clause permitting waste does not invalidate the lease. *Muskerry* v. *Chinnery*, Ll. & G. t. Sugd. 185. But see *S. C.*, t. Plunk. 182.

11. Under-leases.

Effect of Assignment of Lease on.]—When a lessee grants an under-lease, reserving a rent which is incident to the reversion on the under-lease, the rent, the reversion, and the benefit of the covenants will not pass by a subsequent mere assignment of the term, nor unless expressly assigned. *Franklin* v. *Howes*, 24 L. T. 348; 19 W. R. 581.

Upon an assignment of a lease to a purchaser, the absence of the counterpart of an under-lease of a portion of the property comprised in the lease, is notice to the purchaser of the title of a person holding such counterpart by way of equitable mortgage, and if the purchaser does not inquire, or obtain possession of such counterpart, he will be guilty of gross negligence, and will, therefore, be postponed to the equitable mortgagee. *Ib.*

Grant of—Acceptance, how rebutted.]—When a parol contract is made for the grant of an under-lease subject to a question of title, possession taken with the knowledge and consent of the grantor is not of itself a waiver of an objection to title by the grantee, but it is only evidence of the acceptance of the title, which may be rebutted by other circumstances. *Hyde* v. *Warden*, 47 L. J., Ex. 121; 3 Ex. D. 72; 37 L. T. 567; 26 W. R. 201—C. A.

Constructive Notice of Provisions of Original Lease.]—Upon an agreement to grant an under-lease the grantee has constructive notice of the provisions of the original lease only when he has had a fair opportunity of ascertaining what they were. *Ib.*

The defendant having agreed to take an assignment of an under-lease from the plaintiff, found on examining the lease that it contained a covenant by the plaintiff not to under-let without the consent of the lessor, the lessor agreeing not to withhold his consent from any assignment to a respectable and responsible person:—Held, that the fact that the lessor's consent had not been obtained at the time of the agreement to take an assignment was not enough to enable the defendant to resist a claim for specific performance. *Ib.*

A party who enters into an agreement for an under-lease, without inquiring into the covenants of the original lease, has constructive notice of all usual covenants in the original lease. *Flight* v. *Barton*, 3 Myl. & K. 282.

But where a party entered into an agreement under a lease for an under-lease, and informed the lessee of the nature of the business which he meant to carry on in the premises, and the lessee did not apprise him that there was a covenant in the original lease prohibiting such business, the silence of the lessee was equivalent to a representation that there was no such prohibitory covenant. *Ib.*

It is the duty of a person contracting for an under-lease to inform himself of the covenants contained in the original lease, and if he enters and takes possession of the property he will be bound by those covenants. *Cosser* v. *Collinge*, 3 Myl. & K. 283; 1 L. J., Ch. 130.

Where a lessee covenants in an under-lease to observe the covenants of the original lease, it is the same as if those covenants had been inserted at length in the under-lease. *Piggott* v. *Stratton*, 1 De G. F. & J. 33; 29 L. J., Ch. 1; 6 Jur. (N.S.) 129; 1 L. T. 111; 8 W. R. 13.

By a contract in 1861, A. agreed to grant an under-lease to B. of premises, for the residue of the term held by A., except the last ten days, such under-lease to contain similar clauses and covenants to those contained in the original lease. In pursuance of this contract an under-lease was prepared by the lessor's solicitor for twenty-three years less ten days, and the lease was executed by the lessee, who neither inspected the original lease nor employed any professional

adviser. In 1877 it was discovered that the original lease had only sixteen years to run, and the under-lease had, by mistake, been made for seven years longer than the lessor had power to grant. The lessee claimed compensation :—Held, that the lessee was to blame in not inspecting the original lease and ascertaining for himself the precise term, and that caveat emptor applied. *Besley* v. *Besley*, 9 Ch. D. 103 ; 38 L. T. 844 ; 27 W. R. 184.

Mistake as to Lessor's Title—Compensation.]—L., a leaseholder, believing that her term had thirty years to run, agreed in writing with C. to grant him a lease for twenty-one years, nothing being said about compensation for misdescription. C. did not investigate the title, but took an under-lease for twenty-one years. In the following year he discovered that L.'s term had only about fourteen years to run, and he claimed compensation. L. offered to grant a fresh lease for the residue of the term less three days, but declined to give compensation. C. thereupon brought his action for rectification of the lease and compensation :—Held, that as the compensation was claimed in respect of a defect of title which C. might have discovered before he took his lease, and there was no contract as to compensation, he was not entitled to compensation after taking it. *Besley* v. *Besley* (9 Ch. D. 103) approved, and held not to be overruled by *Palmer* v. *Johnson* (13 Q. B. D. 351), which turned on an express agreement for compensation. *Clayton* v. *Leech*, 41 Ch. D. 103 ; 61 L. T. 69 ; 37 W. R. 663—C. A.

When determined.]—In 1852, M. having a crown lease of premises, let them to the plaintiff for three years from the 24th June by an agreement, wherein it was stipulated that he should do nothing contrary to the covenants and provisions in the lease from the crown. After the three years had passed, the plaintiff continued to occupy the premises as tenant from year to year, paying an annual rent from every 24th June. In September, 1869, M. assigned his interest in the crown lease to C., and subsequently gave notice to the plaintiff to pay his rent to C., from Michaelmas, 1869. This the plaintiff accordingly did, not receiving any notice to quit. In June, 1870, he was informed by the solicitors of C., that, as the interest of the latter under M.'s assignment expired in October, C. could not after that time treat the plaintiff as his tenant. The crown lease to M. expired on the 10th October, 1870, and in 1866 C. agreed with the crown for a new lease of the premises at the expiration of the old one. Both these facts were known to the plaintiff. A new lease was granted to C. by the crown when the former lease lapsed, and he having sub-let the premises to the defendants, they evicted the plaintiff in 1870 :—Held, that the plaintiff's tenancy terminated when the crown lease to M. ran out, and that the defendants were entitled to possession of the premises. *Weller* v. *Spiers*, 26 L. T. 866 ; 20 W. R. 772.

Right to inspect Lessee's Title.]—On the grant of a sub-lease by a lessee, the intending sub-lessee has a right to inspect the lessee's lease. *Gosling* v. *Woolf*, [1893] 1 Q. B. 39 ; 5 R. 81 ; 68 L. T. 89 ; 41 W. R. 106.

Waste.]—The court will restrain waste in an under-lessee at the suit of the ground landlord. *Furrant* v. *Lovel*, 3 Atk. 723.

12. RECTIFICATION.

Mistake—Must be Common to both Parties.]—To justify the court in reforming an executed deed, it must appear that there has been a mistake common to both the contracting parties, and that the agreement has been carried into effect by the deed in a manner contrary to the intention of both. *Murray* v. *Parker*, 19 Beav. 305.

—— **As to Quantity of Land Demised.**]—A lease which contained a larger quantity of land than was intended to be demised, was decreed to be rectified as to the overplus. *Mortimer* v. *Shortall*, 2 Dr. & War. 363 ; 1 Con. & L. 417.

—— **As to Parcels.**]—Where there has been a mistake in the parcels contained in an executed lease, although it may be a mistake by the plaintiff only, the court will order the annulment or, at the option of the defendant, the rectification of the lease. *Paget* v. *Marshall*, 51 L. T. 251.

—— **As to Land-Tax.**]—By an agreement in writing, A. agreed to take an under-lease from B., at a rent of 340*l.*, A. "paying all taxes, land-tax, and insurance." A lease was granted, reserving the rent of 340*l.* stated to include the land-tax. It had, however, been redeemed by the superior landlord. The lessee having refused to pay the amount of the land-tax redeemed, the lease was ordered to be reformed by making him liable for the land-tax though redeemed :—Held, also, that parol evidence was admissible to explain the meaning of the parties by "land-tax." *Murray* v. *Parker*, supra.

—— **As to Rent—Mistake by One Side only.**]—A. signed an agreement to take from B. a lease of a house, at the rent of 230*l.*, and on the terms of a lease on which the agreement was written, which erroneously stated the rental to be 130*l.* A lease was afterwards executed, in which the rent was erroneously stated to be 130*l.* The error on the part of the lessor was proved, and the court considered that the lessee must have perceived the discrepancy between the amount of rent previously stated by B. and specified in the agreement, and that reserved by the lease :—Held, that B. was not entitled to have the lease reformed, but that the proper relief was to give the lessee the option of taking the reformed lease or of rejecting it, paying, in the latter case, a rental for the past occupation, and a mortgage on the lease created by such lessee. *Garrard* v. *Frankel*, 30 Beav. 445 ; 31 L. J., Ch. 604 ; 8 Jur. (N.S.) 985.

After negotiations for a lease of certain premises had been for some time pending, R., who was acting in the matter on behalf of G., the intending lessor, wrote a letter to M., the intending lessee, offering a lease at a rent of 33*l.* 10*s.* yearly, which was immediately accepted in writing by M., and a lease at that rent was afterwards prepared and executed by G. and M. G. afterwards brought an action in the county court to have the agreement and lease rectified by inserting 53*l.* 10*s.* as the yearly rent, or in the alternative that the agreement and lease might be cancelled :—Held, that the sum of 33*l.* 10*s.* had been inserted by mistake in R.'s offer, and in the subsequently prepared lease, and that the offer had been accepted and the lease taken by M. with knowledge of the mistake ; and therefore the court, while holding that it was not a case for

reformation of the contract, directed the lease and the agreement to be delivered up to be cancelled. *Gun* v. *M'Carthy*, 13 L. R. Ir. 304.

—— **As to Machinery—Lease by Infant prepared by Master.**]—Where a lease beneficial to an infant was prepared by the master, and deliberately entered into and executed by the lessees (one of whom was a guardian of the infant), a bill by the lessees, praying that the lease might be rectified, by excluding machinery and other things from it which it was alleged did not belong to the infant at the date of the lease, was dismissed with costs. *Seaton* v. *Staniland*, 4 Giff. 61 ; 9 Jur. (N.S.) 69 ; 7 L. T. 347.

—— **As to Lessor's Name.**]—Leases of corporation wherein their names are mistaken by themselves holpen in chancery. *Anon.*, Cary, 31.

13. Cancellation and Delivery up of.

Cancellation.]—Cancelling a lease by the mutual consent of both parties does not destroy the estate vested in the lessee, and the lessor may therefore maintain an action on the demise for the recovery of the rent. *Ward (Lord)* v. *Lumley*, 5 H. & N. 87 ; 29 L. J., Ex. 322 ; 1 L. T. 376 ; 8 W. R. 184.

A declaration on a demise, for rent, stated that the plaintiff by deed demised to the defendant certain premises. Plea, that the plaintiff did not by deed demise the premises. Since the rent became due the deed was cancelled by the mutual consent of both parties :—Held, that the cancelled deed was evidence in proof of the issue. *S. C.*, 5 H. & N. 656 ; 29 L. J., Ex. 322 ; 2 L. T. 158 ; 8 W. R. 184.

Delivering up.]—A. being lessee of premises under a lease for twenty-one years, determinable at the end of seven or fourteen years, gave notice to quit at the end of seven years, but did not yield up possession pursuant to such notice. Disputes having arisen, A. gave C., who was entitled to the residue of the term, an undertaking that, in consideration of his granting a new lease to B., he would "deliver up to C. the said lease" :—Held, that the delivery of the lease to C. with the seal cut off, was a breach of the undertaking, although the seal was also delivered at the same time. *Richardson* v. *Barnes*, 4 Ex. 128 ; 18 L. J., Ex. 468.

Trover does not lie by a lessor against a lessee to obtain possession of the indenture of lease, upon the expiration of the term by forfeiture, or otherwise. *Ball* v. *Ball*, 3 Scott (N.R.) 577 ; 3 Man. & G. 242.

A lessor who has determined the term by re-entry for breach of covenant has no title to the lease as against the lessee. *Elworthy* v. *Sandford*, 3 H. & C. 330 ; 34 L. J., Ex. 42 ; 10 L. T. 654 ; 12 W. R. 1008.

—— **Presumption that Lease has been Lost.**]—An expired lease may be presumed to have been destroyed, where reasonable diligence has been unsuccessfully used to secure its production. *Doe* d. *Manton* v. *Austin*, 2 M. & Scott, 107 ; 9 Bing. 41 ; 1 L. J., C. P. 152.

The production of the counterpart of an old lease, coupled with evidence of the payment of rent to the lessee by his under-tenants for a number of years, is sufficient evidence of the lessee's interest under such lease. *Ib.*

Mistake as to Rent.]—See *Gun* v. *M'Carthy*, col. 869.

14. Stamps on Leases.—*See* Revenue.

15. By Way of Estoppel.

The doctrine of estoppel between landlord and tenant is founded upon the principle that a lessee, having accepted a lease, may not plead to the action of his lessor nil habuit in tenementis. *Langford* v. *Selmes*, 3 Kay & J. 220 ; 3 Jur. (N.S.) 859.

But a lessee may plead to such an action, that the lessor had an interest at the date of the lease, but that such interest had determined before the alleged cause of action arose. *Ib.*

Therefore, if a termor affects to grant a lease for a term exceeding his own term in duration, and to reserve an annual rent, that would operate as an assignment of his term, and there would be no estoppel between him and the person to whom he made such assignment ; and accordingly, it would be doubtful whether the assignor would have any remedies for recovering the rent. *Ib.*

If any estate or interest passes from a lessor, or his real title is shewn upon the face of the lease, there can be no estoppel. *Cuthbertson* v. *Irving*, 6 H. & N. 135 ; 29 L. J., Ex. 485 ; 6 Jur. (N.S.) 1211 ; 3 L. T. 335 ; 8 W. R. 704—Ex. Ch.

If a lessor has no title, and the lessee is evicted by title paramount, he may plead that as a defence to an action by the lessor. *Ib.*

But so long as a lessee continues in possession under the lease, he cannot set up any defence founded upon the fact that the lessor nil habuit in tenementis ; and upon the execution of the lease there is, in contemplation of law, created in the lessor a reversion in fee simple by estoppel, which passes by descent to his heir, and by purchase to his assignee or devisee, who may sue on the covenants in the lease. *Ib.*

An assignee of the reversion may establish his title against the lessee by way of estoppel. *Ib.*

D. granted to A. a lease of premises for twenty-one years from the 29th September, 1854, "subject, nevertheless, to an indenture of lease, bearing date the 19th October, 1847, and made between D. of the first part, J. D. and B. D. of the second part, and K. of the third part, whereby the premises were demised to K. for a term of twenty-one years, determinable and subject to the covenants and agreements therein mentioned." A. having paid rent under his lease :—Held, in an ejectment for breaches of covenant, that A. was estopped from setting up the prior lease. *Duke* v. *Ashby*, 7 H. & N. 600 ; 31 L. J., Ex. 168 ; 8 Jur. (N.S.) 236 ; 10 W. R. 273.

Where a person, having possession of land under a good title, became tenant, and paid rent to a stranger :—Held, that he was not estopped after his tenancy had determined, and before he had given up possession, from setting up his own prior title in an ejectment by his lessor. *Accidental Death Insurance Co.* v. *Mackenzie*, 5 L. T. 20 ; 9 W. R. 783.

The rule by which a tenant is estopped from denying the title of the landlord, who let him into possession, is applicable in an action of trespass as well as in ejectment. *Delaney* v. *Fox*, 2 C. B. (N.S.) 768 ; 26 L. J., C. P. 248.

Payment by a tenant of rent to a person other than the person who let him into possession, under a threat of expulsion, does not amount to a constructive eviction so as to affect the estoppel. *Ib.*

A declaration by the devisee of the reversion against the lessee, alleged that the reversion of and in the demised premises belonged to the lessor and his heirs. A plea, that the reversion of and in the premises did not belong to the lessor and his heirs is a good plea, as traversing a material allegation in the declaration. *Weld* v. *Baxter*, 11 Ex. 816; 25 L. J., Ex. 214. Affirmed, 1 H. & N. 568; 26 L. J., Ex. 112; 3 Jur. (N.S.) 91; 5 W. R. 113—Ex. Ch.

A replication by way of estoppel, that the lease was an indenture executed by the lessee, and that he entered and enjoyed the premises by virtue of the indenture; that it did not appear by the indenture that the lessor was not seised in fee, or that he had any estate or interest other than a fee simple, nor did the indenture contain anything to shew that the reversion did not belong to the lessor and his heirs, is bad, since the lessor might have had a term of years, or an estate for life, or pur autre vie. *Ib.*

By a deed made in 1840, S., in contemplation of his marriage, conveyed real estates to trustees to his own use until the marriage; and after the marriage, to the trustees, their executors, administrators and assigns, for a term of 500 years, without impeachment of waste, upon certain trusts, and immediately after the expiration, or sooner determination thereof, and in the meantime subject thereto, to the use of S. for life, without impeachment of waste, with remainder to other uses. It was also provided by the deed, that it should be lawful for S. during his life, from time to time, by deed either referring to or not referring to the power, to demise the estates for any term not exceeding twenty-one years, so that there should be reserved the best or most improved yearly rent, to be incident to the immediate reversion of the hereditaments so demised, that could be obtained for the same, and so that the lessee was not by any clause therein to be contained made dispunishable for waste, or exempted from punishment for committing waste. The marriage took place, and S. afterwards, by deed, leased the premises to the defendant for twelve years. By the lease, which did not refer to the deed of settlement, the rent was reserved to S., his heirs and assigns; and it contained a covenant by the lessee to repair a blacksmith's shop, and all the glass and leadwork of the windows of the messuages, and all doors, the lessee being allowed sufficient bricks and timber for the repairs, and to yield up the premises so repaired at the end of the term to S., his heirs or assigns; there was also a covenant by S. that he would repair, except those repairs covenanted to be made by the defendant. S. died before the expiration of the term:—Held, that the lease was not in pursuance of the power, and void as between the trustees and the lessee: but that such a lease is good by way of estoppel between the parties to it, and, consequently, S. might have maintained an action upon it against the lessee for a breach of covenant by the lessee. *Yellowly* v. *Gower*, 11 Ex. 274; 24 L. J., Ex. 289.

As against Receiver.]—In replevin a defendant made cognisance as bailiff of W. for rent in arrear from the plaintiff, under a demise from W.; on the production of the lease under which the plaintiff held, W. was described as a receiver appointed by the Court of Chancery, and the rent was made payable to him or any future receiver:—Held, that W. was entitled to distrain for rent in arrear, and that the plaintiff was estopped by his own deed from pleading non tenuit. *Dancer* v. *Hastings*, 12 Moore, 34; 4 Bing. 2; 5 L. J., C. P. 3; 29 R. R. 740.

An attornment by a tenant to a receiver appointed by the Court of Chancery to collect the rents, and payment of rent to such receiver, create a tenancy by estoppel between the tenant and the receiver, but do not enure to enable the person who is found ultimately to have the legal title to treat the tenant as his tenant, and to distrain for rent. *Evans* v. *Mathias*, 7 El. & Bl. 590; 26 L. J., Q. B. 309; 3 Jur. (N.S.) 793.

And see cases, post, N. 1.

16. Other Matters relating to.

Entry of Lessee.]—Entry is not necessary to the vesting of a term of years in the lessee; but for the purpose of maintaining an action of trespass the lessee must enter, since that action is founded on actual possession. *Harrison* v. *Blackburn*, 17 C. B. (N.S.) 678; 34 L. J., C. P. 109; 10 Jur. (N.S.) 1131; 11 L. T. 454; 13 W. R. 135.

A., in 1819, demised lands to B. for 100 years, and subject thereto, he, in 1820, demised for 200 years to C., who entered. In 1822 D. recovered judgment against A., and issued an elegit, under which the lands were delivered in execution:—Held, that C. was entitled to the possession as against D., and might maintain trespass against him, it not appearing that B. had entered under the demise to him. *Chatfield* v. *Parker*, 2 M. & Ry. 540; 8 B. & C. 543; 7 L. J. (O.S.) K. B. 13.

Premiums on Interest in Land—Lien.]—A lease is a sale pro tanto, and a premium reserved on a lease is in the nature of purchase-money, for which, if unpaid, there is a lien on the land; and consequently, unpaid premium is an interest in land within 9 Geo. 2, c. 36, s. 3. *Shepheard* v. *Beetham*, 46 L. J., Ch. 763; 6 Ch. D. 597; 36 L. T. 909; 25 W. R. 764.

Incorporation of Prior Lease.]—The said lease of 1843 referred to a prior lease of the same mines granted by the testator in 1829, and purported to grant such or the like liberties, powers, authorities, and privileges thereby granted, and all other liberties, &c., necessary for working the mines, except as in the said lease of 1829 was excepted. The lease of 1829 excepted certain minerals from the demise, and contained covenants by the lessees not to remove the pillars of the mines without the consent of the testator, his heirs or assigns:—Held, that the lease of 1843 incorporated the provisions in the lease of 1829 against the removal of the pillars. *Mostyn* v. *Lancaster*, 51 L. J., Ch. 696; 46 L. T. 648; 31 W. R. 3.

Proof of Terms of Holding.]—Where a tenant was to hold land according to certain rules in writing, under which a former tenant held, but the length of his term was agreed on orally:—Held, that, to shew the expiration of the term,

it was not necessary to produce the rules. *Hey* v. *Moorhouse*, 6 Bing. (N.C.) 52; 8 Scott, 156; 9 L. J., C. P. 113.

In an action to recover back a sum alleged to have been overpaid by a tenant to his landlord, upon a settlement between them in relation to a distress for arrears of rent, it appeared that the defendant held the premises under a lease from Michaelmas, 1832:—Held, that a memorandum written in the margin of the draft of the lease whereby the tenant engaged to pay rent for the preceding half-quarter, was admissible for the purpose of negativing the claim. *Cowne* v. *Garment*, 1 Scott, 275; 1 Bing. (N.C.) 318.

In an action for breach of an agreement between a tenant of S. and the plaintiff, that the tenant should deliver to the plaintiff the farm occupied by the former, "upon the terms and conditions of the agreement under which the said tenant held of S.," it is not necessary to produce at the trial the lease by S. *Wallis* v. *Littell*, 11 C. B. (N.S.) 369; 31 L. J., C. P. 100; 8 Jur. (N.S.) 745; 5 L. T. 489; 10 W. R. 192.

Where a lessee, after the expiration of his lease, remains in possession and pays rent, it is a question for the jury upon what terms his tenancy continues. *Oakley* v. *Monck*, 4 H. & C. 251; 35 L. J., Ex. 87; L. R. 1 Ex. 159; 12 Jur. (N.S.) 213; 14 L. T. 20; 14 W. R. 406—Ex. Ch.

A tenant for life granted a lease containing a covenant that he would, at the expiration of the term, pay and allow the lessee, a nurseryman, for all fruit trees and shrubs then on the premises which had been planted by him. At the expiration of the lease the lessee continued in possession, and paid rent, and upon the death of the tenant for life he paid the same rent to the remainderman, who was not aware of the covenant in the lease:—Held, that there was no evidence for the jury that the tenancy continued upon the terms of the lease, so as to bind the remainderman by the covenant. *Ib.*

A lessor of a term of years created by a writing not under seal, containing a particular contract of tenancy, conveyed the freehold to the plaintiff. The defendant afterwards and during the term paid rent to the plaintiff, and otherwise admitted him to be his landlord on the terms of the original demise:—Held, though the term of years first created was still unexpired, that there was evidence for the jury in support of the demise stated; and that, on their verdict of such a demise, the plaintiff had a right of action for the non-observance of such particular contract of tenancy. *Brydges* v. *Lewis*, 3 Q. B. 603; 2 G. & D. 763; 11 L. J., Q. B. 268.

See also post, I. 1, *e*.

Heir of Lessor estopped from disputing Execution.]—An heir-at-law producing a lease granted by an ancestor, under whom he claims, although it is to be used as evidence against his right, is estopped from disputing the due execution of the instrument. *Doe* d. *Tindale* v. *Hemming*, 2 Car. & P. 462.

Costs of Preparation of Lease.]—See SOLICITOR.

F. TENANCIES FROM YEAR TO YEAR.

1. HOW CREATED.

What is.]—A landlord agreed to let, and a tenant to take, an office from the 29th of September, 1869, at the yearly rent of 20*l.*, payable quarterly in advance. The agreement alluded more than once to the term thereby created, and provided that in case the term should be determined otherwise than by effluxion of time or by legal notice, then the tenant should pay to the landlord 5*l.*, equivalent to one quarter's rent, as and by way of liquidated and ascertained damages, and to be recoverable as such by the landlord. The tenant without any notice gave up possession of the premises before the 29th September, 1870, having paid in advance all rent for the year ending on that day:—Held, that the terms of the agreement created a yearly tenancy, and that the landlord was entitled to recover 5*l.* from the tenant for the rent due on the 29th September in advance. *Florence* v. *Robinson*, 24 L. T. 705.

W. being entitled to a leasehold interest, the term of which expired on 25th December, 1881, agreed in writing to let the same to K. at the yearly rental of 36*l.*, and agreed not to give K. notice to quit so long as he continued to pay the rent. A railway company agreed to purchase at the price of 470*l.* this interest, described as the interest which K. held of W. for any term at tenant's option, but not beyond the term and interest of W. in the premises which term will expire on the 25th December, 1881. The railway company subsequently objected that this was only a tenancy from year to year:—Held, that it was a tenancy for the remainder of the term, but that even if it were not the company was bound by their agreement. *King, In re, East London Ry., Ex parte*, L. R. 16 Eq. 521; 29 L. T. 288; 21 W. R. 881.

By a written instrument, not under seal, and dated the 28th of February, 1872, W. purported to demise a messuage to the defendant, as tenant from year to year, for so long as he should keep the rent paid, and as W. should have "power to let the premises"; the defendant entered and paid rent quarterly:—Held, that the only estate vested in the defendant was a tenancy from year to year. *Wood* v. *Beard*, 46 L. J., Q. B. 100; 2 Ex. D. 30; 35 L. T. 866.

By an agreement under seal the premises in dispute were let for the term of one year, at a yearly rent, payable quarterly; and it was agreed that the lessee might determine the tenancy at the expiration of the term of one year by giving to the lessor three months' previous notice in writing, and that the lessee might continue tenant after the expiration of the term, on punctual payment of the rent, free from disturbance or eviction by the lessor as long as the rent was punctually paid:—Held, that the estate created by the instrument and the payment of the rent was a tenancy from year to year, and that a clause declaring that such a tenancy was not to be determinable by a notice to quit was inconsistent with and repugnant to the nature of such estate; and that the lessor, who had served a notice to quit, was entitled to recover. *Holmes* v. *Day*, Ir. R. 8 C. L. 235.

A. agreed to let, and B. agreed to hire, a piece of land, containing about fifteen acres, at an annual surface rent; B. to use the land for the purpose of making bricks, and to pay A. 3*s.* per 1,000 on the quantity made; the quantity made to be not less than 4,000,000 annually; the ground not to be excavated beyond the depth of eight feet without the permission of A. in writing. A portion of the land being required by a railway company, B.'s claim for compensation in respect

of his estate and interest in the land so required, and for deterioration to the residue, was referred to arbitration. The umpire found that the interest of B. under this agreement was that of merely a tenant from year to year; and he assessed the compensation upon that basis:—Held, that the construction put by the umpire upon the agreement was correct; and that evidence tending to shew that by the custom of the brickmaking trade brick land is never hired from year to year was properly rejected. *Stroud, In re*, 8 C. B. 502; 19 L. J., C. P. 117.

An agreement dated the 19th April, 1841, by which part of a dwelling-house was let, stipulated for "the yearly rent of 42*l*., payable quarterly, the first payment of 7*l*. 13*s*. 6*d*., to be made on the 24th June next, being the proportion of rent from the 19th April, 1841, to that date." And, further, that the tenant should hold and enjoy the possession "until one of the parties should give to the other six calendar months' notice in writing to quit at the expiration of any such notice":—Held, that a yearly tenancy was not created, and that a six months' notice to quit expiring on the 5th December, was a sufficient notice to put an end to the tenancy. *Doe* d. *King* v. *Grafton*, 21 L. J., Q. B. 276; 16 Jur. 833.

H. and R., by indenture of February, 1805, granted and leased premises unto and to the use of J. H., his heirs, executors, administrators, and assigns for ever, yielding and paying therefor a yearly rent. Proviso for re-entry on nonpayment of rent. Covenant by J. H. for payment of the rent, for repairs and for insurance:—Held, that in the absence of proof that the premises were, at the date of the instrument, in the occupation of tenants, and the expressed intention of the parties precluding the presumption of livery of seisin, the instrument could not operate as a conveyance of the fee subject to a rent-charge, but only to create a tenancy from year to year. *Doe* d. *Roberton* v. *Gardiner*, 12 C. B. 319; 21 L. J., C. P. 222.

A. agreed to let, and B. to take, a cottage for three months from 29th December, at a yearly rent of 18*l*., the first monthly payment to be made 25th January, free from all taxes, which were to be paid by the tenant, and allowed out of the rent. Three months' notice to quit from either party to be sufficient. B. occupied for eighteen months:—Held, a tenancy from year to year, so as to give the tenant a settlement under 6 Geo. 4, c. 57, s. 2. *Willesden Overseers* v. *Paddington Overseers*, 3 B. & S. 593; 32 L. J., M. C. 109; 9 Jur. (N.S.) 874; 7 L. T. 784; 11 W. R. 425.

A renting of a tenement for an indefinite period, and an occupation for a year, constitute a tenancy for a year. *Reg.* v. *St. Giles, Cripplegate*, 4 B. & S. 509; 33 L. J., M. C. 3; 10 Jur. (N.S.) 205; 9 L. T. 411; 12 W. R. 125.

By articles of agreement under seal, the plaintiff covenanted with E. that he would from time to time, when and so soon as he should have erected and covered in one or more of the messuages agreed to be built by him upon land therein described and agreed to be demised by indenture, demise and lease unto E., his executors, administrators, or assigns, the whole or such part or parts whereon one or more of the messuages or tenements should have been built, for ninety-eight years from the 29th of September then last (1852), at a certain yearly rent payable quarterly, the rents to be so apportioned that the yearly rent to be reserved on any such lease should not exceed one-sixth of the yearly value of the land and buildings demised, with a proviso that if the yearly rent or rents to be reserved upon the lease or leases to be granted of any part or parts only of the land should amount to or make up the full yearly rent reserved, the remainder of the land, when built upon, should be demised at the yearly rent of a peppercorn only. The articles contained a covenant by E. with the plaintiff to pay the rent agreed to be reserved, and to pay rates, to erect the messuages, and also a covenant that until the land and the buildings erected should be leased in execution of the covenant in that behalf, E., his executors, administrators, or assigns, would pay for the same the several yearly rents stipulated or agreed to be reserved in the leases to be granted to such persons, and in such manner and proportions and at such times as the same would be payable in case such leases were actually granted. There was also a proviso for re-entry by the plaintiff, in case the whole or any part of the yearly rent or rents thereby or by the leases to be granted should be behind or unpaid for twenty-one days. In 1854, E. assigned all his interest in the agreement to the defendant, who thereupon entered and occupied the land, erected certain buildings thereon, and paid the stipulated yearly sums, and then assigned to B.:—Held, that neither E. nor the defendant acquired any estate in the premises under the building agreement, nor was any tenancy from year to year created thereby, or by the occupation of the land, and payment of the stipulated rents. *Camden* (*Marquis*) v. *Batterbury*, 5 C. B. (N.S.) 808; 28 L. J., C. P. 187; 5 Jur. (N.S.) 627. Affirmed, 7 C. B. (N.S.) 864; 28 L. J., C. P. 335; 5 Jur. (N.S.) 1405; 7 W. R. 616—Ex. Ch.

In December, 1819, the testator's father was tenant of a farm belonging to the plaintiff until the following Lady-day. The plaintiff's steward, in the month of December, proposed to let the farm, and read from a printed paper the terms of letting. The testator was present, and assented to those terms, agreeing to succeed his father at Lady-day, but no writing was signed. He did then enter, and continued tenant till his death, since which his executors occupied and paid rent. At the foot of the printed paper of terms was written a memorandum, not signed by either party, but by the attorney of the plaintiff, who was present at the time of the letting. This memorandum commenced in the following terms: "A. B., as agent of the plaintiff, agreed to let, and C. D. agreed to take," and went on to state the farm, rent, and when payable; that the term was for one year certain from Lady-day next, and so from year to year, until a due notice to quit was given:—Held, that this agreement, followed by entry and payment of rent, created a tenancy, upon the terms contained in the printed paper and memorandum, and that they might be referred to by the attorney, as shewing what the terms of the demise were. *Bolton* (*Lord*) v. *Tomlin*, 1 N. & P. 247; 5 A. & E. 856; 2 H. & W. 368; 6 L. J., K. B. 45.

The defendant, being in possession, under a lease for fourteen years, assigned it, by way of mortgage, to the plaintiff, and then committed a forfeiture, for which the lessor brought ejectment. It was then agreed, at a meeting of all the parties, that judgment should be signed in the ejectment, that the lessor should grant a new lease to the plaintiff, and that the plaintiff should grant an under-lease to the defendant.

The new lease was accordingly granted to the plaintiff, who then delivered the defendant the key, saying, "Go on as usual, pay the money" (due on mortgage), "and when you have done so you shall have an under-lease"; no rent was ever paid:—Held, that this did not constitute the defendant a tenant from year to year. *Doe* d. *Rogers* v. *Pullen*, 3 Scott, 271; 2 Bing. (N.C.) 749; 2 Hodges, 39; 5 L. J., C. P. 229.

A. let land to B. on a tenancy from year to year, which B. continued to hold for several years after A.'s title had determined, paying rent to A., and he at length gave up possession on a notice to quit from A. Subsequently to the determination of A.'s title, but before B. had given up possession, B. under-let to C. C. paid rent to B. as long as B. continued to hold, but paid no rent to any one subsequently. In an ejectment by A. against C., after B. had given up possession:—Held, that it might be presumed, as a matter of fact, that a new tenancy, from year to year, had been commenced by B. after A.'s title had ceased, and that C. therefore could not dispute A.'s title. *L. & N. W. Ry.* v. *West*, 36 L. J., C. P. 245; L. R. 2 C. P. 553.

An agreement for the holding of certain quarries provided that the rent should be 50*l.* a year; that the tenant was to work the whole of the stone, but not to employ more than a given number of men; that the rent was not to be advanced; and that that agreement was to have the effect of creating a new yearly tenancy between the parties. It would, in fact, take five years to work out the stone with the limited number of men:—Held, that this created only a tenancy determinable by notice to quit at the end of the first year. *Doe* d. *Skrine* v. *Watson*, 8 L. J. (O.S.) K. B. 12.

Intention to create Tenancy.]—In order to create a tenancy from year to year, there must be some circumstances to shew an intention to do so, such as payment of rent quarterly, or some other aliquot part of a year. *Doe* d. *Hull* v. *Wood*, 14 M. & W. 682; 15 L. J., Ex. 41; 9 Jur. 1060.

Tenant at Will at Yearly Rent.]—A tenant at will, at a yearly rent, is a tenant from year to year. *Pope* v. *Garland*, 4 Y. & C. 394; 10 L. J., Ex. Eq. 13.

Effect of.]—A tenant from year to year has a lease for a year certain, with a growing interest during every year thereafter, springing out of the original contract and parcel of it. *Cattley* v. *Arnold*, 1 Johns. & H. 651; 28 L. J., Ch. 352; 5 Jur. (N.S.) 361; 7 W. R. 245.

Determination and Renewal of Lessor's Interest.]—A tenancy from year to year under a middleman, whose own interest in the premises is derived under a lease for lives, does not, where the middleman has obtained a new lease, terminate, without notice to quit, upon the death of the last surviving life in the original head lease, even though the new head lease contains a covenant against sub-letting. *Hayes* v. *Fitzgibbon*, Ir. R. 4 C. L. 500.

A tenancy from year to year is a continuing tenancy. *Ib.*

Adoption by Remainderman of Tenancy created by Tenant for Life.]—I. being tenant for life of lands with remainder to the plaintiff, created a yearly tenancy in the defendant, which was subsisting on the 9th of June, 1877, when I. died. The defendant continued in occupation, and tilled the land in that and the following year. He had interviews with the plaintiff after I.'s death, but no reference was made by either party to any new tenancy. No rent was demanded or paid, but the plaintiff did not intimate any intention to dispossess the defendant, or do any act either recognising or repudiating a tenancy until some time in 1878, which was not more particularly fixed by the evidence, when the defendant tendered the amount of rent which would have been then payable by him under the terms of his former tenancy, if continuing: the plaintiff then refused to accept such rent, demanded possession on the 31st December, 1878, and, without serving notice to quit, commenced, on the 28th January, 1879, an action to recover possession:—Held, that there was evidence proper to be submitted to the jury of an adoption by the plaintiff of the pre-existing yearly tenancy in the defendant. *Doe* d. *Cates* v. *Somerville* (6 B. & C. 126) followed. *O'Keefe* v. *Walsh*, 8 L. R. Ir. 184—C. A.

Evidence as to.]—In ejectment the plaintiff proved that S. was the tenant of the premises when he became the owner, and had paid rent to him for many years; that she was succeeded by H.; that N. succeeded H. and paid rent. At the beginning of September, 1858, the defendant and N. severally asked the plaintiff if he would accept the defendant as tenant. On each occasion the plaintiff said he would. On the 7th of September the defendant took possession, and in October of the same year paid the rent to Michaelmas, 1858, for which the plaintiff gave a receipt. The plaintiff received the rent at Christmas, 1858, and gave a receipt for it to the defendant. In March, 1859, the plaintiff gave to the defendant notice to quit at Michaelmas, or otherwise at the end of the year of the tenancy which should expire one half-year from that notice. On the 17th of December, 1859, the plaintiff's agent served a notice on the defendant to quit at Midsummer. The defendant said the plaintiff might have the house if he paid the valuation of the fixtures and goodwill:—Held, that it was a question for the jury and not for the judge at which time the tenancy commenced, that there was evidence of a tenancy ending at Michaelmas, and that it was a misdirection to withdraw from the jury all the facts, except the conduct of the defendant when the notice to quit at Midsummer was served on him. *Walker* v. *Gode*, 6 H. & N. 594; 30 L. J., Ex. 172; 4 L. T. 16.

—— **Payment of Rent.**]—Payment and receipt of rent are evidence against a corporation of a demise by them from year to year. *Doe* d. *Pennington* v. *Taniere*, 12 Q. B. 998; 18 L. J., Q. B. 49; 13 Jur. 119.

On the issue whether the plaintiff is tenant of the defendant under a demise for one year from 23rd April, 1821, and thence afterwards from year to year, evidence that the plaintiff has paid the defendant rent is not sufficient proof of the demise in issue. *Phillips* v. *Moseley*, 1 Car. & P. 262.

The receipt of rent under a lease granted by the tenant for life under a will, by a receiver appointed by the Court of Chancery during the minority of an infant remainderman, who is a ward of such court, is no evidence of a yearly tenancy between the infant ward and the lessee.

Jegon v. *Vivian*, 35 L. J., C. P. 73 ; L. R. 1 C. P. 9 ; 12 Jur. (N.S.) 184 ; 14 W. R. 227.

—— **Payment of Annual Sum.**]—The payment of a small annual sum inadequate to the value of the demised premises for a number of years is not per se evidence from which a tenancy from year to year can be inferred. *Reynolds* v. *Reynolds*, 12 Ir. Eq. R. 172.

2. OCCUPATION.

a. Under an Agreement for a Lease.

Terms must be Agreed upon.]—No tenancy is created where one has got into possession of a house without the privity of the landlord, although they afterwards enter into a negotiation for a lease, but differ as to the terms. *Doe* d. *Knight* v. *Quigley*, 2 Camp. 505 ; 11 R. R. 780.

What sufficient to constitute Tenancy.]—An occupation of premises, pending the execution of a lease, constitutes the relation of landlord and tenant, and will entitle the latter to sue the former upon a quantum valebat, although no distress for rent can be made. *Hamerton* v. *Stead*, 5 D. & R. 206 ; 3 B. & C. 478 ; 3 L. J. (O.S.) K. B. 33 ; 27 R. R. 407. And see *Doe* d. *Hollingsworth* v. *Stennett*, 2 Esp. 717 ; 5 R. R. 769.

So, an occupation for eighteen years, under an unstamped agreement for a lease for twenty-one years, was held to constitute a tenancy, though no lease had ever been tendered by the lessor, or demanded by the lessee. *Weakly* d. *Yea* v. *Bucknell*, Cowp. 473.

A tenant holding lands under an accepted proposal for a lease, specifying the term, and bearing date prior to the 16th of August, 1832, is liable to the payment of the tithe composition, and is not to be considered as a tenant from year to year, within the 12th section of 2 & 3 Will. 4, c. 119. *Langley* v. *Langley*, Ll. & G. t. Plunk. 361.

By a memorandum, dated 23rd June, 1842, made between A. as agent for and on behalf of the churchwardens of the parish of St. M. (not naming them), of the one part, and B. of the other part, it was agreed that the churchwardens should grant a lease to B. for twenty-one years from Midsummer-day then next, under the clear yearly rent of 30*l.*, and B. agreed to accept such lease ; and that, until such lease should be granted, the yearly rent should be payable and recoverable by distress or otherwise, in like manner as if such lease had been executed :—Held, that the tenancy thereby created was a tenancy from year to year. *Doe* d. *Bailey* v. *Foster*, 3 C. B. 215 ; 15 L. J., C. P. 263.

Where a person held premises under an agreement in writing, from quarter to quarter, and the agreement provided that the tenant should quit possession upon receiving six months' notice in writing, and, in the event of his losing his licence to sell ale, through misconduct at any time during the term, should then forthwith quit possession on being requested so to do by his landlord :—Held, that he had neither a tenancy from year to year, nor a term certain in the premises, within 1 Geo. 4, c. 87, s. 1, so as to entitle the landlord in ejectment to compel him to give security for costs under that act. *Doe* d. *Carter* v. *Roe*, 10 M. & W. 670 ; 2 D. (N.S.) 449 ; 12 L. J., Ex. 27 ; 6 Jur. 1044.

A party signed an instrument by which he agreed to take certain premises at a fixed yearly rent, commencing at a specified time, and which was directed to the landlords of the premises, who did not execute it ; but it was proved that he was put into possession ; that certain fixtures belonging to the landlords were appraised to him, and that he was in possession at the expiration of a year :—Held, that there was evidence from which the jury might infer a demise from year to year. *Taylor* v. *Young*, 6 L. J., K. B. 141.

When Rent has been Paid.]—Where there has been an agreement for a lease and an occupation without payment of rent, the occupier is a mere tenant at will. *Braythwayte* v. *Hitchcock*, 10 M. & W. 494 ; 12 L. J., Ex. 38 ; 6 Jur. 976. See *Riseley* v. *Ryle*, 11 M. & W. 16 ; 12 L. J., Ex. 38.

If he subsequently pays rent under that agreement, he thereby becomes tenant from year to year. *Ib.*

But, in order to establish a tenancy from year to year in such case, the payment of rent means a payment of rent with reference to a yearly holding. *Ib.*

The receipt of rent may be explained so as to rebut the implication of a yearly tenancy arising out of payment. *Doe* d. *Lord* v. *Crago*, 6 C. B. 90 ; 17 L. J., C. P. 263 ; 12 Jur. 705. S. P., *Hurley* v. *Hanrahan*, 15 W. R. 990.

In an action for rent, stating a demise of a messuage by the plaintiff to H. for one year, and so on from year to year, if they should respectively please, at the yearly rent of 140*l.*, payable quarterly, and an assignment by H. to the defendant, the plaintiff proved an agreement (signed by himself only) for a lease of the premises by him to H. for seven years, at 140*l.* a year ; that no lease had been actually executed, but that H. had entered into possession shortly after the date of the agreement, and had paid two quarters' rent, at the rate of 140*l.* a year :—Held, that this was sufficient evidence of a tenancy from year to year, as stated in the declaration, and in which H. had an assignable interest. *Braythwayte* v. *Hitchcock*, 10 M. & W. 494 ; 12 L. J., Ex. 38 ; 6 Jur. 976.

A party took possession of premises under an agreement for a lease to be granted to him for a term of ten years, at a yearly rent payable half-yearly ; no lease was executed, nor was the quantum of the rent to be paid ascertained ; but he occupied under the agreement for three years, paying rent for two :—Held, that this created a tenancy from year to year. *Knight* v. *Benett*, 11 Moore, 222 ; 3 Bing. 361 ; 4 L. J. (O.S.) C. P. 94 ; 28 R. R. 640.

Where the occupier, under an agreement for a lease at a certain rent, pays the rent, he becomes tenant from year to year, on the terms of the agreement, and the landlord may distrain. *Mann* v. *Lovejoy*, R. & M. 355.

Where A., having entered into an agreement for a lease, has been let into possession, and has paid the stipulated rent, a tenancy from year to year is created. *Doe* d. *Westmorland* v. *Smith*, 1 M. & Ry. 137 ; 6 L. J. (O.S.) K. B. 44.

Payment of rent is primâ facie evidence of a tenancy from year to year. *Doe* d. *Pritchard* v. *Dodd*, 2 N. & M. 838 ; 5 B. & Ad. 689.

Secus, semble, where the existence of such a tenancy would imply that devisees in trust had conveyed away their estate, whilst a duty still remained to be performed by them. *Ib.*

The presumption is completely rebutted by shewing that the rent paid and reserved is of

the same amount as the rent reserved in an unexpired lease, the premises being at the time of such payment of rent of much greater value than the rent so reserved and so paid. *Ib.*

When no Rent has been Paid.]—A party entered into possession of premises under an agreement for a lease at a certain rent, and occupied them more than a year, but paid no rent. An account was afterwards delivered to him by the landlord, charging him with half a year's rent, the amount of which he at first disputed, but admitted that a half-year's rent was due, and named the amount, and the account was altered accordingly:—Held, that a yearly tenancy might thereby be implied; and that the landlord had a right to distrain. *Cox* v. *Bent*, 2 M. & P. 281; 5 Bing. 185; 7 L. J. (O.S.) C. P. 68; 30 R. R. 566. See also *Braythwayte* v. *Hitchcock*, supra, and *Faby* v. *O'Donnell*, 4 Ir. R., C. L. 332.

Since Judicature Acts.]—Since the Judicature Acts, the rule no longer holds that a person occupying under an executory agreement for a lease is only made tenant from year to year at law by the payment of rent, but that he is to be treated in every court as holding on the terms of the agreement. *Walsh* v. *Lonsdale*, 52 L. J., Ch. 2; 21 Ch. D. 9; 46 L. T. 858; 31 W. R. 109.

Notice to Quit.]—If a tenant holds under an agreement for a lease at a yearly rent, whereby it is stipulated that the agreement shall continue for the life of the lessor, and that a clause shall be inserted in the lease, giving the lessor's son power to take the house for himself when he comes of age, the son must make his election in a reasonable time after he comes of age. The delay of a year is unreasonable, and the tenant cannot be ejected upon a half-year's notice to quit, served after such a delay. *Doe* d. *Bromfield* v. *Smith*, 2 Term Rep. 436; 6 East, 530; 2 Smith, 570.

A. agreed by parol to sell an estate to B. on certain terms, provided B. would continue C. his tenant, not for one year only, but from year to year (C. having just before been let into possession, under a contract for the purchase of the estate, which he had failed to pay for in time, and had therefore forfeited his deposit); and A. thereupon agreed to take C.'s forfeited deposit as part of the purchase-money: A. and B. afterwards reduced their agreement respecting the purchase into writing, in which no notice was taken of the stipulation concerning C.'s tenancy; yet held, that this stipulation being collateral to the written agreement, was binding upon B.: and that the agreement operated as a tenancy for two years certain at least, though no rent was then mentioned, but was to be settled afterwards; and that the tenancy could not be put an end to at the end of the first year, by six months' previous notice to quit. *Denn* d. *Jacklin* v. *Cartwright*, 4 East, 29.

b. Under a Contract for Sale.

Generally.]—An occupation under an agreement for the sale of premises, if a title could be made, creates a tenancy. *Doe* d. *Newby* v. *Jackson*, 2 D. & R. 514; 1 B. & C. 448.

In an agreement for the sale of leasehold premises, to be paid for by instalments, it is stipulated that, in default of payment of the instalments at specified times, the former instalments shall be forfeited, and the vendor shall not be compellable to convey; upon which the purchaser is let into possession, and makes default; he is thenceforth a mere tenant upon sufferance. *Doe* d. *Moore* v. *Lawder*, 1 Stark. 308.

One who is put in possession upon an agreement for the purchase of land, cannot be ousted by ejectment before his lawful possession is determined by demand of possession or otherwise. *Right* d. *Lewis* v. *Beard*, 13 East, 210.

Purchase not completed.]—A. having agreed to buy certain lands of B. had paid part of the purchase-money, and was let into possession. B. had not executed any conveyance:—Held, that this was a mere tenancy at will in A., and that if B. had made a demand of possession to determine the tenancy at will, he might recover the lands by ejectment. *Doe* d. *Hiatt* v. *Miller*, 5 Car. & P. 595.

A. entered into possession of certain premises under an agreement with B. and wife for sale, which agreement conveyed no legal estate, and B.'s wife was replaced in possession by A. as a caretaker. After some time, B. and wife, alleging that A. had not completed his agreement, made a lease to C., and gave possession of the premises to C., without A.'s privity. In an action of trespass by A. against C.:—Held, that A., by taking possession under the agreement, only became tenant at will to B.; that that interest at will was determined by the lease from B. to C., and that C. was not estopped from shewing that A.'s interest had so determined, after B. had accepted possession from A., though determined by B.'s own act. *Farrelly* v. *Robins*, Ir. R. 3 C. L. 284.

Agreement between P. and W. for the sale of lands to W., to be completed on the 25th March, and before the day W. agrees to let to the defendant from that day, and the defendant is let into possession before that day by the consent of P., upon notice to P. that W. had agreed to let to him; on the 29th May, conveyance executed as of the 25th March, subject to a term redeemable on payment by W. of purchase-money with interest, with power to P. to enter for default of payment by W.:—Held, that P. might bring ejectment for default of payment, without giving the defendant notice to quit. *Doe* d. *Parker* v. *Boulton*, 6 M. & S. 148.

If the vendor of a term before the whole of the purchase-money is paid, agrees with the purchaser that the latter shall have possession of the premises till a given day, paying the reserved rent in the meantime, and that if he does not pay the residue of the purchase-money on that day, he shall forfeit the instalments already paid, and shall not be entitled to an assignment of the lease; the purchaser being thus put into possession, if the residue of the purchase-money is not paid at the day appointed, no tenancy is created, and the vendor may maintain ejectment without any notice to quit, or demand of possession. *Doe* d. *Leeson* v. *Sayer*, 3 Camp. 8.

A party who has been let into the possession of land under a contract of sale which has not been completed, is a tenant at will to the vendor. *Ball* v. *Cullimore*, 2 C. M. & R. 120; 1 Gale, 96; 5 Tyr. 753.

A. agreed with B. that he, A., would on payment of 900*l.* as thereinafter mentioned, grant, sell, and convey to B. the messuages, lands, and premises mentioned; and B. covenanted to pay the sum on or before the 1st January then next,

or whenever a good title to the messuages, &c., should be tendered to him; but it was agreed that if B. should, on or before the 1st January, be desirous that that sum should remain a charge on the premises, then B. might require the same, so that upon completion by A. of the conveyances, B. should execute to A. proper conveyances for securing the 900*l.* on the premises, with interest. Covenant by B. to pay the interest so long as the principal should remain unpaid. Proviso, that, in case the interest should be in arrear thirty days next after the same should have become due, B. should be considered as a tenant to A. of the messuage, lands, &c., from the date thereof, at the yearly rent of 40*l.* 10*s.*, payable on the 16th April and the 16th October in every year; and it should be lawful for A., his heirs and assigns, to enter and distrain, and to sell and dispose of the distress, or otherwise to deal with the same, in like manner as in distress for rent reserved by lease, to the end that A. might be fully paid and satisfied the interests and costs. B. gave due notice that he would require the purchase-money to remain a charge on the premises for five years; he was let into possession and received the rents, and in July, 1828, became bankrupt, and half a year's interest being in arrear for more than thirty days, A. distrained on the tenants then in possession of the premises. The assignees paid the amount of the distress:—Held, that the agreement was substantially an agreement for a purchase of the premises, and that it did not become a lease or an agreement for a lease, by reason of the interest having been in arrear more than thirty days, and of the proviso contained in the agreement; that the unpaid vendor was entitled to have the estate resold, and the produce and interest applied in payment of the purchase-money, and to prove against the estate for the residue; and consequently that the claim for interest was a debt provable under the commission, and therefore barred by the certificate. *Hope* v. *Booth*, 1 B. & Ad. 498; 9 L. J. (O.S.) K. B. 21.

A party who occupied a house as tenant from year to year, entered into the following agreement with his landlord: "1831, September 2, S. S., the tenant, purchased an estate in the parish of C., bought of R. G. (the landlord), at the sum of 100*l.* Received on account, 10*s.* R. G. is willing to let the sum lie by paying 4 per cent." :—Held, that as there was an implied condition in the contract that the landlord should make out a good title, the agreement for the purchase did not operate as a surrender of the tenancy by operation of law. *Doe* d. *Gray* v. *Stanion*, 1 M. & W. 695; 5 L. J., Ex. 253.

A person who contracts for the purchase of land, and is let into possession by the vendor, but is prevented from completing the purchase by the vendor failing to make a good title, is not liable, in an action for use and occupation in respect of the time of his holding, in the expectation that such good title would be made, and the purchase would be completed. *Winterbottom* v. *Ingham*, 7 Q. B. 611; 14 L. J., Q. B. 298; 10 Jur. 4.

With a Condition.]—A contract was made for the purchase of a public-house; 50*l.* was paid as a deposit; 70*l.* more was to be paid on the landlord's consent being obtained to a change of the tenancy. The purchaser sent some furniture to the house in question, and resided in a part of it, the vendor also still remaining in it:—Held, that the contract was conditional on a valid consent of the landlord being given; and that a verbal consent afterwards revoked before any change of tenancy in fact had occurred, was not binding; that there had been no partial enjoyment of the object of the contract, and that, therefore, on the failure of the condition, the 50*l.* might be recovered as money had and received. *Wrighton* or *Wright* v. *Newton*, 2 C. M. & R. 124; 1 Gale, 67; 5 Tyr. 736.

Evidence as to.]—A tenant in common of five houses, occupying one of them, joined his cotenant in the sale of the five, and continued in the occupation of the one for two years afterwards:—Held, that these facts alone were not evidence of a tenancy, and that he could not be sued by the purchaser for use and occupation. *Tew* v. *Jones*, 13 M. & W. 12; 14 L. J., Ex. 94.

c. Under Void Lease.

Effect of receiving Rent.]—The plaintiff was owner in fee of cottages and land conveyed to him subject to an unexpired lease for sixty years. He received rent from the tenant under this lease at the nominal rate, reserved under the lease, of 6*d.* a year, and gave a receipt for it for chief rent. The lease had been granted by a former tenant for life without leasing power, and contained a covenant for quiet enjoyment. In an action of ejectment by the plaintiff against the tenant in possession under this lease:—Held, that as the void lease gave no action on the covenant for quiet enjoyment to the defendant against the plaintiff, it afforded no defence to this action; and the receipt of rent under the circumstances did not create a tenancy from year to year. *Smith* v. *Widlake*, 47 L. J., Q. B. 282; 3 Q. B. D. 10; 26 W. R. 52—C. A.

So, where one enters under a void lease by a tenant for life, and after his death the remainderman receives rent. *Doe* d. *Martin* v. *Watts*, 7 Term Rep. 83; 2 Esp. 501; 4 R. R. 87. And see *Ludford* v. *Barber*, 1 Term Rep. 86; 1 R. R. 156.

Yet, if the remainderman receives money as rent after the death of the tenant for life, it is an admission of a tenancy from year to year. *Ib.*

And in such cases the tenant holds under the terms of the lease in all other respects except the duration of time. *Doe* d. *Rigge* v. *Bell*, 5 Term Rep. 471; 2 R. R. 642.

A tenant in tail having received an ancient rent of 1*l.* 18*s.* 6*d.* from the lessee in possession, under a void lease granted by the tenant for life under a power, the rack-rent value of which was 30*l.* a year, cannot maintain an ejectment, at least after laying his demise on a prior day, without giving the lessee some notice to quit, so as to make him a trespasser after such recognition of a lawful possession either in the relation of tenant, or at least as continuing by sufferance till notice. *Denn* d. *Brune* v. *Rawlings*, 10 East, 261; 10 R. R. 287. And see *Doe* d. *Brune* v. *Prideaux*, 10 East, 158; 10 R. R. 258; and *Whitecare* d. *Boult* v. *Symonds*, 10 East, 13; 10 R. R. 224.

In 1786, a dean and chapter and P. granted a lease of premises for ninety-nine years, reserving a rent to the dean and chapter and another rent to P. This lease purported to be made in pursuance of leasing powers given by a private statute, but was in fact not in accordance with them. The rents reserved by the lease had been

from time to time regularly paid to and received by the successive deans and chapters, and to and by P. and his representatives. Quære, whether the lease was void or only voidable; but held, that if voidable, it had been set up by acceptance of rent by each successive dean and chapter; and if void, the payment and receipt of rent were evidence from which a demise from year to year by the dean and chapter would be presumed. *Doe* d. *Pennington* v. *Taniere*, 12 Q. B. 998; 18 L. J., Q. B. 49; 13 Jur. 119.

Where a party became tenant for a period exceeding three years, under a lease void at law, as not being made by deed under 8 & 9 Vict. c. 106, s. 3, and the receipts given to him for rent which he had paid for two years stated the rent to be payable in advance:—Held, that he became a yearly tenant, on the terms of paying the rent in advance. *Lee* v. *Smith*, 9 Ex. 662; 23 L. J., Ex. 198; 2 W. R. 377; 2 C. L. R. 1079.

Notice to Quit.]—An agreement for a lease at a certain rent, containing a stipulation that the lessor should not turn out the tenant so long as he paid the rent, and did not sell, &c., any article injurious to the lessor's business, either purports to be a lease for life, and would then be void, as not being creatable by parol, or, if it operates as a tenancy from year to year, it must necessarily be determinable by either party giving the regular notice to quit. *Doe* d. *Warner* v. *Browne*, 8 East, 166; 9 R. R. 397.

By an agreement in writing made on the 17th December, 1850, the plaintiff agreed to let to the defendant premises for a term of three years from the 25th December inst. The defendant occupied under this agreement during the three years, and paid the rent reserved. The plaintiff, without giving notice to quit, brought ejectment:—Held, that though the lease, not being by deed, was void by 8 & 9 Vict. c. 106, s. 3, the defendant became tenant from year to year, subject to the terms of the agreement, and that his interest expired at the end of the three years without a notice to quit. *Tress* v. *Savage*, 4 El. & Bl. 36; 2 C. L. R. 1315; 23 L. J., Q. B. 339; 18 Jur. 680; 2 W. R. 564.

3. Holding over.

What is.]—When a lease for a term of years expired at Midsummer, 1821, and the tenant refused to relinquish possession, and insisted that he was entitled to a notice to quit, and continued in possession until Christmas following, and paid rent to that time, when he tendered the keys of the premises to his landlord, which the latter refused to accept:—Held, that such continuing in possession by the tenant did not amount to a holding over by him, but was conclusive evidence on presumption of law of a tenancy from year to year, which entitled the landlord to maintain an action for the use and occupation of the premises to recover the amount of a quarter's rent, which became due from Christmas, 1821, to Lady-day in the following year. *Bishop* v. *Howard*, 3 D. & R. 293; 2 B. & C. 100; 1 L. J. (o.s.) K. B. 243; 26 R. R. 291.

If a tenant, whose lease is expired, is permitted to continue in possession pending a treaty for a further lease, he is not a tenant from year to year, but so strictly a tenant at will, that he may be turned out of possession without notice: but it is otherwise if he has continued in possession for a year, or rent has been received. *Doe* d. *Hollingsworth* v. *Stennett*, 2 Esp. 717; 5 R. R. 769.

By Under-tenants.]—A lessee of a term underlet, and his under-tenant held over for a portion of a year after the expiration of the term against the will of the lessee, so that he could not give up possession to his lessor. During such holding over, the lessee distrained upon the under-tenant for rent previously due:—Held, that the lessee was liable for the period of the under-tenant's holding over, but not for a whole year's rent. *Ibbs* v. *Richardson*, 1 P. & D. 618; 9 A. & E. 849; 8 L. J., Q. B. 126.

An under-tenant (who was tenant from year to year), after the expiration of the tenant's lease, being acquainted with the circumstance, held on under the new tenant for one quarter, and paid him the same rent he had been accustomed to do. He then gave up the premises, not having given any previous notice:—Held, that there was no evidence of a new continuing tenancy, and that, therefore, the under-tenant was not obliged to give a notice to quit. *Freeman* v. *Jury*, M. & M. 19.

An under-tenant who is in possession at the determination of the original lease, and is permitted by the reversioner to hold over, is quasi a tenant at sufferance; and the mere fact of occupation, coupled with the payment of rent for such time of occupation, does not raise the presumption of a demise for years unless there is some evidence to shew an agreement for a demise for the term. *Simkin* v. *Ashurst*, 1 C. M. & R. 261; 4 Tyr. 781.

By Co-tenants.]—A. and B. were tenants to C. for a term of three years. B. never occupied the premises, but A., on the expiration of the term, held over. No assent of B. to the holding over was proved. An action for use and occupation having been brought by C. against A. and B., in which A. suffered judgment by default, C. tendered in evidence a letter written by his agent to B. after the expiration of the term, in which he demanded rent alleged to be due subsequently to the term. No answer was returned to the letter:—Held, that as one tenant cannot bind his co-tenant by holding over without his assent, and as there was no evidence of B.'s assent, B. was not liable for the rent, and therefore the letter to him, although admissible, was not entitled to much weight. *Draper* v. *Crafts*, 15 M. & W. 166; 15 L. J., Ex. 92.

Subsequent Payment of Rent.]—Wherever a tenancy for years comes to an end either by efflux of time, or by the death or end of the title of the lessor, so that either he or his representative, or any independent owner of the demised hereditament, can without notice eject the tenant, and the person entitled to eject leaves the tenant in possession, and receives rent from him without explanation or stipulation, the person receiving the rent is to be assumed to have created a tenancy upon the terms on which the tenant held in the demise originally made to him; and the holding to be presumed is as of a tenancy from year to year according to the former holding of the tenant, and therefore commencing at a time corresponding to that from which he originally held. *Kelly* v. *Patterson*, 43 L. J., C. P. 320; L. R. 9 C. P. 681; 30 L. T. 842.

If on the death of the landlord the tenant who has held on such terms, continues in possession, and pays the same rent to the landlord's successor, it is evidence that the latter has assented to the tenant continuing on all the terms of the original

letting. *Cornish* v. *Stubbs*, 39 L. J., C. P. 202; L. R. 5 C. P. 334; 22 L. T. 21; 18 W. R. 547.

Terms of.]—If, after the expiration of a lease, containing a covenant by the tenant to keep the premises in repair, he verbally agrees to hold over, paying an additional rent, nothing more being expressed between the parties respecting the terms of the new tenancy, he is presumed to hold under the covenants of the former lease, as far as they are applicable to his new situation; and if the premises are afterwards burnt down by accidental fire, he is bound to rebuild them. *Digby* v. *Atkinson*, 4 Camp. 275; 16 R. R. 792.

Where, on the expiration of a lease for a year, the tenant remains in possession with the consent of the landlord, and nothing is said or done inconsistent with his holding on under the terms of the lease, the implication of law is, that a tenancy from year to year has been created on the same terms in so far as they are not inconsistent with a tenancy from year to year. *Dougal* v. *McCarthy*, 62 L. J., Q. B. 462; [1893] 1 Q. B. 736; 4 R. 402; 68 L. T. 699; 41 W. R. 484; 57 J. P. 597—C. A.

When a tenant enters a house under an unsealed agreement to let for a term of more than three years, and occupies and pays rent till the end of the term, he is during the whole term a tenant from year to year, subject to all those stipulations in the agreement which are applicable to such a tenancy, and may be sued for the breach of any of them, e.g. one binding him to paint in the last year of the term. *Martin* v. *Smith*, 43 L. J., Ex. 42; L. R. 9 Ex. 50; 30 L. T. 268; 22 W. R. 336.

By an agreement not under seal, the landlord agreed to let to the tenant, and the tenant to take of him, a house and premises for seven years, upon the terms that he would, in the last year of the term, paint, grain, and varnish the interior, and also whitewash and colour. The tenant entered under the agreement, and occupied and paid rent during the whole period of seven years. In an action for not painting, graining, and varnishing the interior, and whitewashing and colouring in the seventh year:—Held, that he must be taken to have occupied on the terms that, if he should continue to occupy during the whole period of seven years, he would do those things which were by the agreement to be done in the seventh year; and that he was therefore liable. *Ib.*

Where a tenant under lease continues to hold after the expiration of it as a tenant at will, and assigns to another, the tenancy of the assignee will be held to commence at the day on which the original tenancy commenced under the lease, and notice to quit on that day only is good, notwithstanding the assignee came in on a different day. *Doe* d. *Castleton* v. *Samuel*, 5 Esp. 173; 8 R. R. 845.

A person who held glebe lands as tenant to one incumbent, and continues in possession under his successor without disturbance, must be presumed to hold as tenant to the latter, and cannot be dispossessed without a notice to quit. *Doe* d. *Coates* v. *Somerville*, 9 D. & R. 100; 6 B. & C. 126; 5 L. J. (O.S.) K. B. 28.

B. holding land of A. for a term of years, underlets part to C. from year to year. At the expiration of the term, B. agrees with A. to hold on from month to month. In the absence of any new agreement between B. and C., the tenancy from year to year continues. *Peirse* v. *Sharr*, 2 M. & Ry. 418; 6 L. J. (O.S.) K. B. 159.

A. was tenant to the plaintiff of premises which the plaintiff gave him notice to quit on the 11th of October, 1843. After the notice was given, the defendant agreed to take a lease of the premises from that day. Before that day, the defendant was, with the consent of the plaintiff, substituted for A. as tenant during the remainder of A.'s term. The plaintiff and the defendant could not agree as to the terms of the lease to be granted to the defendant; but the defendant continued to occupy the premises for half a year after the 11th of October:—Held, that after the 11th of October, the defendant did not impliedly occupy, subject to the rent of the determined tenancy. *Thetford Corporation* v. *Tyler*, 8 Q. B. 95; 15 L. J., Q. B. 33; 10 Jur. 68.

Where a tenant holds over after the determination of a lease for years and pays rent, he is tenant from year to year: but such tenancy is determinable at the end of the first year by a six months' notice to quit, expiring at the end of the first year; and the same is true of every other mere tenancy from year to year. *Doe* d. *Clarke* v. *Smarridge*, 7 Q. B. 957; 14 L. J., Q. B. 327; 9 Jur. 781.

A tenant holding over after the expiration of a lease for years may be taken to hold upon any of the terms of such former lease which are consistent with a yearly tenancy; whether he does hold on any such terms or not, is a question for the jury on the facts proved. *Hyatt* v. *Griffiths*, 17 Q. B. 505.

Where a lessee, after the expiration of his lease, remains in possession and pays rent, it is a question for the jury upon what terms his tenancy continues. *Oakley* v. *Monck*, 3 H. & C. 706; 34 L. J., Ex. 137; 11 Jur. (N.S.) 376; 12 L. T. 465; 13 W. R. 721. Affirmed, 4 H. & C. 251; 35 L. J., Ex. 87; L. R. 1 Ex. 159; 12 Jur. (N.S.) 213; 14 L. T. 20; 14 W. R. 406—Ex. Ch.

A tenant for life granted a lease containing a covenant that he would at the expiration of the term pay and allow the lessee, a nurseryman, for all fruits and shrubs then on the premises which had been planted by him. At the expiration of the lease the lessee continued in possession and paid rent, and, upon the death of the tenant for life, he paid the same rent to the remainderman, who was not aware of the covenant in the lease:—Held, no evidence for the jury that the tenancy continued upon the terms of the lease, so as to bind the remainderman by the covenant. *Ib.*

—— **Lease Terminable on Condition.**]—A lease under the court for seven years pending the cause, being about to expire, the lands were sold under the decree, and the purchaser stated that he did not wish a new letting, but that the receiver should levy the accruing rents from the tenants, until the conveyance to him should be executed. After the expiration of the lease, the tenant continued to occupy, and the receiver to take the rent as before, but without any express agreement as to the new tenancy. Afterwards, the purchaser, by injunction, took the actual possession, and turned the tenant out. On motion for a writ of restitution, upon the ground that a tenancy from year to year had been created, and that the tenant was entitled to a notice to quit:—Held, that as to the tenancy under the court, the cause is determined by the execution of the conveyance to the purchaser;

and that the tenant over-holding, without special agreement, held impliedly subject to the conditions of the lease, and therefore his tenancy was determined by the execution of the conveyance to the purchaser. *Johnston* v. *Reardon*, 2 Ir. Eq. R. 123.

—— **Liability for Payment of Rent.**]—Where a lease expires, the tenant continues liable to the rent, unless he delivers up complete possession of the premises, or the landlord accepts another in his room. *Harding* v. *Crethorn*, 1 Esp. 57.

Where several persons, directors of a trades' union bank, took certain premises for a year, with a proviso, that the landlord, on one month's notice before the expiration thereof, would grant a lease of the premises; and the directors, before the expiration of eleven months, abandoned the directorship and their possession; before the year had expired, negotiations were entered into for a lease for another year between the landlord and the new directors, but which terminated without any decisive arrangement being entered into, the new directors having continued to occupy after the expiration of the year:—Held, that the original directors remained liable for the rent. *Christie* v. *Tancred*, 7 M. & W. 127; 1 H. & W. 50; 10 L. J., Ex. 228; 4 Jur. 1064.

The defendant agreed by parol to rent a house as tenant from year to year, for the residue of a term, which was three years and three quarters: he held for three years and one quarter, and quitted:—Ruled, that though perhaps he might have quitted without notice at the end of three years, yet the remaining longer implied a contract to pay rent for the residue of the term. *Sauvage* v. *Dupuis*, 3 Taunt. 410.

A party occupied premises under an agreement for three years, at 45*l.* a year, which expired at Midsummer, 1826. He did not then go out, nor did his landlord take any steps to compel him; but, at Michaelmas following, gave him notice to quit at Lady-day, 1827, or pay the rent of 50*l.* a year. He continued in, but refused to pay any more than 45*l.* rent:—Held, that, under the circumstances, he must be taken to have acquiesced in the new proposal, and was bound to pay the rent of 50*l.* *Roberts* v. *Hayward*, 3 Car. & P. 432.

A lessor suffers the lessee to hold the lands, after the lease is determined. Equity will not compel the tenant to account for the mesne profits, unless the lessor was hindered from entering by fraud, or some extraordinary accident. *Bolton* v. *Deane*, Pre. Ch. 516.

Notice to Quit.]—Premises had been let by a tenant in fee on a lease expiring at Midsummer, 1866: at that date the defendant was in occupation as tenant from year to year to the intermediate lessee, on a demise commencing at Michaelmas; the tenant in fee let the premises on a fresh lease to the plaintiff, commencing at Midsummer, 1866: the defendant continued in occupation and paid rent to the plaintiff. Notice to quit at Midsummer was given by the plaintiff to the defendant, who refused to leave the premises. The plaintiff having sued in ejectment:—Held, that the plaintiff having allowed the defendant to hold over, and having received rent as from year to year without explanation or stipulation, the inference was that there had been a tacit agreement that the defendant should hold from year to year according to the terms of his former tenancy, that is to say, from Michaelmas to Michaelmas, that the notice to quit at Midsummer was wrong, and that the plaintiff must be nonsuited. *Kelly* v. *Patterson*, 43 L. J., C. P. 320; L. R. 9 C. P. 681; 30 L. T. 842.

Damages Recoverable by Landlord.]—Where a tenant holds over after the expiration of his tenancy, and after he has had notice that his landlord has relet the premises to another tenant, the landlord may recover against him, as damages, the amount he (the landlord) has been obliged to pay in an action brought against him by the person to whom he had so relet, for not delivering possession according to the terms of such reletting, together with his own and the plaintiff's costs of such action. *Bramley* v. *Chesterton*, 2 C. B. (N.S.) 1144; 27 L. J., C. P. 23; 3 Jur. (N.S.) 1104; 5 W. R. 690.

4. Acceptance of a New Tenant.

The defendant, who had occupied under a lease which expired at Lady-day, 1829, paid a quarter's rent on Midsummer-day, 1829, deducting something for repairs; he was not afterwards seen on the premises, but the rent was paid at irregular intervals by L., who was in occupation for the ensuing two years:—Held, that it was correctly left to a jury to find whether the lessor had accepted L. as a tenant, and the jury having found for the defendant, the court refused to set aside the verdict. *Woodcock* v. *Nuth*, 8 Bing. 170; 1 M. & Scott, 317.

W. and H., by agreement in March, 1827, became tenants to the plaintiff for three years, of premises occupied by them as partners, with the power to them to extend the term for seven years, by giving the plaintiff a notice to that effect. In January, 1829, W. and H. gave notice accordingly. At Midsummer, 1828, W. retired from the partnership, and in January, 1829, H. entered into partnership with S., and H. and S. carried on the business under the firm of H. & S. until 1831. The plaintiff gave receipts for the rent as received from H. after W. retired, and as received from H. & S. after S. became partner with H. In February, 1829, the plaintiff gave to H. a letter from the plaintiff's attorney, signifying that a lease might be made to H. & S., but this letter was kept by H., and not acted upon, and no lease was prepared:—Held, that the original tenancy of W. and H. was not surrendered by act or operation of law, and consequently that W. remained liable for rent. *Graham* v. *Wichelo*, 3 Tyr. 201; 1 C. & M. 188; 2 L. J., Ex. 70.

The plaintiff was in possession of land under a lease granted to him by B., who had previously mortgaged the premises. The transferees of the mortgage (being cognisant of the lease) gave the plaintiff notice of the mortgage, and required him to pay them all rent due, and to become due, in respect of the mortgaged premises:—Held, that this was evidence whence the jury might infer a contract of tenancy for a year, as between the mortgagees and the plaintiff. *Brown* v. *Storey*, 1 Man. & G. 117; 1 Scott (N.R.) 9; 9 L. J., C. P. 225; 4 Jur. 319.

5. Change of Terms.

In Time of Payment of Rent.]—If a tenant enters in the middle of a quarter, and afterwards pays up to the beginning of a succeeding regular

quarter, from which time he pays half-yearly, his tenancy commences from that regular quarter-day to which he paid up. *Doe* d. *Holcomb* v. *Johnson*, 6 Esp. 10; 9 R. R. 800.

In Mode of Payment of Rent.]—Where there was a letting by two tenants in common at an entire rent, and one of them afterwards gave notice to the tenant to pay a moiety of the rent to him:—Held, that it was a question for the jury, whether there was a new contract, or only an alteration in the mode of receiving the rent. *Powis* v. *Smith*, 1 D. & R. 490; 5 B. & Ald. 850; 24 R. R. 587. And see *Harrison* v. *Barnby*, 5 Term Rep. 246; 2 R. R. 584.

In Amount of Rent.]—By increasing the amount of rent payable by a tenant from year to year, a new tenancy is not necessarily created. *Doe* d. *Monck* v. *Geekie*, 5 Q. B. 841: 1 Car. & K. 307; 13 L. J., Q. B. 239; 8 Jur. 360.

During a tenancy from year to year, at a given rent, the rent was raised at the termination of one of the years, by consent of the landlord and tenant:—Held, that, if this created a new contract, it must be a contract to hold on the old terms; and that a contract for a tenancy for two years certain from the time of raising the rent could not be inferred in default of additional evidence, even on the assumption that an original contract for a tenancy from year to year creates a tenancy for two years certain. *Ib.*

An increase of the rent payable by a yearly tenant, by an arrangement during a year of the tenancy, does not per se operate to put an end to the old tenancy and create a new one. *Inchiquin (Lord)* v. *Lyons*, 20 L. R., Ir. 474—C. A.

If there is a written agreement between landlord and tenant, that for certain premises the tenant shall pay 170*l.* a year, and afterwards an arrangement is made by parol that 30*l.* a year shall be allowed out of it, because the landlord is to occupy a certain part for a time, such parol arrangement does not vary the agreement so as to reduce the rent payable under it, and therefore an allegation is correct which states it to be 170*l.* *Hilton* v. *Goodhind*, 2 Car. & P. 591.

After Expiration of Lease.]—A tenant occupied land at the expiration of a lease, with the assent of the lessor, a parson; on the determination of his title, he continued to be tenant to his successor:—Held, that he was tenant under the terms of the original lease. *Hutton* v. *Warren*, 2 Gale, 71; 1 M. & W. 466; 1 Tyr. & G. 646; 5 L. J., Ex. 234.

Sub-lease from Year to Year—Expiry of Lease—Lessee holding for Less than Year.]—Where a yearly tenancy has subsisted between a tenant for years and his under-tenant, it is no legal objection to the continuance of that tenancy, that the term of the tenant for years has run out, and that he continues to hold of the superior landlord as tenant from time to time, for a shorter period than a year. If the under-tenant continues to occupy without any new agreement he will be taken to have occupied as a yearly tenant. *Pearce* v. *Shard*, 6 L. J. (o.s.) K. B. 354.

Other Changes.]—Where there is a demise from year to year, so long as the parties shall please, and a new tenant takes possession, whose occupation as tenant the then reversioner omits to determine by a notice to quit, the pleadings may allege a new relation of landlord and tenant, on the original terms between the reversioner and the occupier. *Buckworth* v. *Simpson*, 1 C. M. & R. 834; 5 Tyr. 344; 1 Gale, 38; 4 L. J., Ex. 104.

A. demised to B. certain lands and premises for one year certain, and then from year to year so long as the parties should think proper, with power to determine it on giving notice to quit; and the lease contained various terms and conditions as to the management of the lands and repairing the buildings. The lessee died, and his executors entered into the occupation of the premises, and continued to occupy, and paid rent:—Held, that they were chargeable in their personal character upon the terms contained in the original demise; their continuing to occupy, and the landlord abstaining from giving notice to quit, raising an implied promise on their part to abide by the terms of the original contract. *Ib.* But see *Jackson* v. *McMaster*, 28 L. R., Ir. 176.

A. granted an annuity to B. out of lands, with the usual powers of distress and entry, if the annuity should fall in arrear. A. afterwards granted a lease for years to the defendant. The annuity having fallen into arrear, B. distrained on the defendant, and informed him that he had a charge upon the premises under lease to him. The defendant thereupon signed an agreement "to attorn and become tenant to B.," and paid him rent:—Held, that this created a new tenancy from year to year between B. and the defendant, determinable on the payment of the arrears of the annuity, upon which the defendant's lease for years would revive. *Doe* d. *Chawner* v. *Boulter*, 1 N. & P. 650; 6 A. & E. 675; W. W. & D. 333; 6 L. J., K. B. 179.

A declaration stated that the defendant held lands under a lease from E. on certain terms, which were set forth; that the reversion came to the plaintiff; and that the defendant, in consideration of an alteration of the rent, promised to hold of the plaintiff on the same terms in all other respects; but that the defendant broke the terms. The plaintiff not having proved an express contract to hold of the defendant on the old terms:—Held, that he could not rely upon an implied contract arising from the old lease without putting it in evidence, and that the old lease could not be used as such evidence unless properly stamped. *Wallis* v. *Broadbent*, 4 A. & E. 877; 2 H. & W. 41; 6 L. J., K. B. 269.

A., B. and C. (C. being an unmarried woman), entered into an agreement, dated 25th December, 1834, to take a house of the plaintiff for seven years at an annual rent, payable quarterly, under which they entered. In September, 1835, C. married; in December, A. became a bankrupt. In an action by the plaintiff against A., B., C. and C.'s husband, for two years' rent, claimed to be due under the demise contained in the agreement, the defendants proved payment, by A.'s assignees, of the quarter's rent due at Michaelmas, 1835, and an admission by the plaintiff of the receipt of the two previous quarters' rent, but it was not shewn when, or by whom, these latter payments were made:—Held, that this was not evidence from which a new yearly tenancy, on the terms of the agreement, could be inferred, so as to charge all the defendants, inasmuch as it was not shewn that the payments were made before C.'s marriage, or with her assent after her marriage. *Doidge* v. *Bowers*, 2 M. & W. 365; M. & H. 170; 6 L. J., Ex. 132.

6. Terms Incident to Holding.

Generally.]—When a party enters into possession of a farm, and pays rent under an agreement for a lease, containing divers covenants to cultivate, pay rent, &c., he is bound by all the covenants in the agreement applicable to a tenancy from year to year, and therefore where the agreement stipulated for the lease to contain a condition for re-entry if the tenant should grow two successive crops of white corn without fallow, he might be ejected without notice if he committed a breach of this covenant. *Doe* d. *Thompson* v. *Amey*, 4 P. & D. 177; 12 A. & E. 476.

A covenant in a lease for years, ending at Michaelmas, that the tenant shall and may retain and sow forty acres of wheat on the arable land demised (consisting of 213 acres) at the seed-time next after the end of the term, and leave the standing thereof till the harvest then next following rent-free, with the use of the premises for threshing, &c., till a day named, is a term which may be made incident to a tenancy from year to year. *Hyatt* v. *Griffiths*, 17 Q. B. 505.

The rule that a tenant holding over, after the expiration of his lease, without entering into a new contract, continues to hold, upon the terms of the lease, so far as they are applicable to a tenancy from year to year, applies to a proviso for re-entry for nonpayment of the rent. *Thomas* v. *Packer*, 1 H. & N. 669; 26 L. J., Ex. 207; 3 Jur. (N.S.) 143; 5 W. R. 316.

A term contained in a demise for a period exceeding three years to keep open a shop, and use the best endeavours to promote the trade of it, is a term applicable to a tenancy from year to year. *Sanders* v. *Karnell*, 1 F. & F. 356.

An agreement for a lease contained a stipulation that the tenancy should continue until after two years' notice to quit had been given. The tenant occupied the farm, paid rent for some years, but no lease was executed:—Held, that it could not be implied that the stipulation as to the two years' notice to quit was one of the terms under which the tenant held. *Tooker* v. *Smith*, 1 H. & N. 732.

An agreement that an outgoing tenant shall be paid for tillages on the expiration of his tenancy is not inconsistent with the terms of a tenancy from year to year. *Brocklington* v. *Saunders*, 13 W. R. 46.

—— **To Deliver up in Repair.**]—See infra, M. 3, *b*.

7. Other Matters Relating to.

Landlord must have Legal Estate.] — No tenancy can be implied under a party who has not the legal estate. *Morgell* v. *Paul*, 2 M. & Ry. 303; 6 L. J. (O.S.) K. B. 290.

Acknowledgment of Tenancy.] — Where one who had built a cottage on the waste had, on three occasions, paid 6*d*. as rent to the person who had bought the adjoining old inclosure:—Held, that it was a proper question for a jury whether there had been an acknowledgment of tenancy. *Doe* d. *Jackson* v. *Wilkinson*, 5 D. & R. 273; 3 B. & C. 413.

T. holding pictures of P.'s as a security for an alleged debt, hired rooms of the plaintiff in which to deposit them. P. having died, his administrators contested T.'s claim by a suit in chancery. Pending the suit, in order to prevent the pictures from being distrained, they petitioned the court to satisfy the plaintiff's rent out of certain funds paid into court in the course of the cause. T.'s claim having been disallowed by the court, the pictures were ordered to be delivered to the administrators, who, in order to obtain them, paid rent to the time of delivery:—Held, that these circumstances did not constitute the defendants tenants to the plaintiff. *Strahan* v. *Smith*, 4 Bing. 91; 12 Moore, 289; 5 L. J. (O.S.) C. P. 95.

The defendant hired of the plaintiff apartments in his dwelling-house at a fixed rent, payable half-yearly, and entered into possession at Michaelmas, 1822. At Lady-day, 1823, he paid one half-year's rent, and at the Midsummer following gave up possession without having given any notice to quit; but at Michaelmas, in the same year, he paid another half-year's rent. At Lady-day, 1824, the plaintiff demanded a third half-year's rent, which the defendant refused to pay:—Held, that a tenancy from year to year could not be inferred from these facts. *Wilson* v. *Abbott*, 4 D. & R. 693; 3 B. & C. 88; 2 L. J. (O.S.) K. B. 215.

Demise by Tenant from Year to Year to Hold from Year to Year.]—A demise by a tenant from year to year to another, also to hold from year to year, is in legal operation a demise from year to year during the continuance of the original demise to the intermediate landlord, and is properly so described in pleading, although at the time of making the contract no such qualification is mentioned. *Pike* v. *Eyre*, 9 B. & C. 909; 4 M. & Ry. 661; 8 L. J. (O.S.) K. B. 69.

Determination of Tenancy.] — The nonpayment of rent for the space of sixteen years, and no demand being proved to have been made, is of itself sufficient evidence to presume the determination of a tenancy from year to year. *Stagg* v. *Wyatt*, 1 Arn. 327; 2 Jur. 892.

A tenancy from year to year, so long as both parties please, is determinable at the end of the first as well as of any subsequent year, unless in creating such tenancy the parties use words shewing that they contemplate a tenancy for two years at least. *Doe* d. *Clarke* v. *Smaridge*, 7 Q. B. 957; 14 L. J., Q. B. 327; 9 Jur. 781.

Premises were demised under a written agreement, dated 4th August, 1845, "the tenancy to be from year to year from Michaelmas next," at the rent of 55*l*. payable half-yearly, "except the last half-year, which portion of rent shall be paid on or before the 1st August in that year, and to be deemed then due for all legal remedies for recovering rent in arrear." The tenant "to allow the landlord or incoming tenant, in the last year, to enter on 1st May to make fallows and carry out the manure," for which compensation was to be paid. The tenant to have "the use of the barns for stacking and threshing the crops of the last year till the 1st day of May after the tenancy":—Held, that these stipulations did not necessarily import that the tenancy was to be extended beyond the first year; consequently, that the tenancy was determined by a notice, dated 24th March, 1846, to quit at Michaelmas that year. *Doe* d. *Plumer* v. *Vainby*, 10 Q. B. 473; 16 L. J., Q. B. 303; 11 Jur. 308.

A tenancy from year to year is to be considered

as recommencing every year. *Tomkins* v. *Lawrence*, 8 Car. & P. 729.

—— **Of Glebe Land.**]—A tenancy from year to year of glebe land is determined by the death of the incumbent. *Doe* d. *Kerby* v. *Carter*, R. & M. 237.

Death of Tenant—No Personal Representative—Statute of Limitations.]—After the death of a tenant from year to year, his son remained in possession and paid rent, and was treated by the landlord as tenant of the premises for more than twenty years from his father's death. No personal representative of the father was appointed:—Held, that the tenancy from year to year vested in the father was extinguished. *Jackson* v. *McMaster*, 28 L. R., Ir. 176—C. A.

Liability of Tenant under Instrument not amounting to present Lease.]—A tenant who had been let into possession under an instrument, which did not amount to a present lease, and had paid rent under the agreement, was held liable for the mismanagement of the farm, under a count stating the premises to have been demised to him. *Tempest* v. *Rawling*, 13 East, 18.

Interest of Personal Representatives of Tenant.]—In a case of tenancy from year to year, the personal representatives of the tenant have the same interest in the land which he had. *James* v. *Dean*, 15 Ves. 241; 8 R. R. 178.

G. TENANCIES FOR SMALLER TERMS.

1. At Will.

a. What is.

Generally.]—A person who lives in a house rent-free by the sufferance of the owner, is a tenant at will. *Rex* v. *Collett*, R. & R. 498. S. P., *Rex* v. *Jobling*, R. & R. 525.

A minister of a dissenting congregation placed in the possession of a chapel and a dwelling-house by certain persons, in whom the legal estate was vested, in trust to permit and suffer the chapel to be used for the purpose of religious worship, is a mere tenant at will to those trustees; and his tenancy is determined instanter by a demand of possession. He is not entitled de jure before the determination of his tenancy to have a reasonable time for the removal of his furniture. *Doe* d. *Nicholl* v. *M'Kaeg*, 10 B. & C. 721. S. P., *Doe* d. *Jones* v. *Jones*, 10 B. & C. 718; 8 L. J. (O.S.) K. B. 310.

The words "I give you a close to enjoy as long as I please, and to take again when I please, and you shall pay nothing for it," create a tenancy at will. *Rex* v. *Fillongley*, 1 Term Rep. 458.

If an agreement is made to let premises so long as both parties like, and reserving a compensation, accruing de die in diem, and not referable to a year, or any aliquot part of a year, it does not create a holding from year to year, but a tenancy at will strictly so called. And though the tenant has expended money on the improvement of the premises, that does not give him a right to hold them until he is indemnified. *Richardson* v. *Langridge*, 4 Taunt. 128; 13 R. R. 570.

A party who enters into the possession of premises under a paper signed by the owner, undertaking to execute to him a lease of them, is a tenant at will until he pays rent for the premises for either a year or some portion of time having reference to a year; after which he becomes a tenant from year to year. *Braythwayte* v. *Hitchcock*, 10 M. & W. 494; 12 L. J., Ex. 38; 6 Jur. 976.

But a mere payment of rent, without having reference to a year or some aliquot part of a year, is not sufficient. *Ib.*

Proviso in a deed: A. agrees to become tenant to C. and D. of the premises, "at their will and pleasure, at and after the rate of 25*l.* 4*s.* per annum payable quarterly." A. remained in possession under this agreement for two years, and paid a year's rent, after which C. and D. distrained for four quarters' rent:—Held, that A. was tenant at will, and not from year to year. *Doe* d. *Bastow* v. *Cox*, 11 Q. B. 122; 17 L. J., Q. B. 3.

A mere permission to occupy constitutes a tenancy at will. *Doe* d. *Hull* v. *Wood*, 14 M. & W. 682; 15 L. J., Ex. 41; 9 Jur. 1060. And see *Pollen* or *Pollon* v. *Brewer*, 7 C. B. (N.S.) 371; 6 Jur. (N.S.) 509.

The possession of a tenant at will is the possession of the lessor. *Denn* d. *Warren* v. *Fearnside*, 1 Wils. 176.

Under Void Lease.]—If a man enter under a void lease, and pays rent, he is not a disseisor, but a tenant at will. *Denn* d. *Warren* v. *Fearnside*, 1 Wils. 176.

A parol agreement to lease lands for four years only creates a tenancy at will. *Goodtitle* d. *Gallaway* v. *Herbert*, 4 Term Rep. 680.

And see ante, col. 884.

Under Parol Grant of Freehold Interest.]—An interest of freehold or quasi freehold character cannot be created by parol or by mere written agreement. A party holding under such an agreement is a tenant-at-will, and removable by ejectment, without prejudice to his equitable rights. *Dossee* v. *East India Co.*, 1 L. T. 345; 8 W. R. 245.

S. having for some years held a piece of ground under the East India Company, which they proposed to take for the purpose of public improvement, a negotiation took place for S. surrendering the land and re-acquiring it on condition of giving up possession on one month's notice. At the time of proposing the surrender, S. believed the improvement in question was a new road which would greatly benefit his adjacent property, and such was also at first the intention of the company. Seemingly, however, the company varied the nature of the improvement ultimately contemplated. S. afterwards, without any definite notice of the improvement, surrendered the land and executed an agreement reciting the transaction and referring generally to the improvement as "a public improvement," without further describing it, and agreeing to quit at a month's notice:—Held, that the company were entitled at law to bring an ejectment for the land after a month's notice, and that S. had no defence; but that his remedy, if any, was in equity. *Ib.*

Whether constituted by Attornment Clause in Mortgage.]—A member of a building society borrowed 7,500*l.* from the society, which was to be repaid in a series of monthly instalments of 71*l.* 17*s.* 6*d.* each, including interest at 7 per

cent. The instalments were payable at the monthly meetings of the society, and, if the member neglected to pay them when due, he became liable to a fine at the rate of 5 per cent. per month on the total amount in arrear and unpaid at each meeting. To secure the loan he executed to the trustees of the society a mortgage of real estate. The deed contained a proviso that if the member should fail for three monthly meetings to pay his subscription, interest, fines, or other moneys, or to observe the regulations of the society, or in the event of his becoming bankrupt, the mortgagees might enter into possession or receipt of the rents of the mortgaged property. And "for the better securing the payments which by the rules of the society ought to be made by the mortgagor," it was agreed that, if the mortgagees should at any time become entitled to enter into possession or receipt of the rents, and the mortgagor should then or afterwards be in the occupation of the whole or part of the property, he should during such occupation be tenant thereof from month to month to the mortgagees, at a monthly rent equal in amount to the moneys which ought to be paid monthly by the mortgagor from time to time for subscriptions, interest, fines, and other moneys under the rules, and that the tenancy should commence on the day up to which he should have fully paid all and every part of such subscriptions, interest, fines, and other moneys, and the rent for the period intervening between the commencement of the tenancy and the day on which the trustee should be entitled to enter into possession or receipt of rents should be payable and paid on that day, and the monthly rent due upon and subsequently to that day should become due monthly in advance, and be payable at the monthly meetings, the first payment of rent becoming due on the day on which the mortgagees should first become entitled to enter into possession. Power was given to the mortgagees to determine the tenancy by fourteen days' notice. The deed was not executed by the mortgagees, nor was it registered under the Bills of Sale Act. The mortgagor committed default in his payments, and was afterwards adjudicated a bankrupt:—Held, that the tenancy under the attornment clause was not made by s. 1 of the Statute of Frauds a tenancy at will. *Voisey, Ex parte, Knight, In re*, 52 L. J., Ch. 121; 21 Ch. D. 442; 47 L. T. 362; 31 W. R. 19—C. A.

Pending Contract for Sale.]—*See cases*, cols. 881-884.

Notice to Quit.]—Where a party was let into possession of land under an agreement of purchase, he paying interest after the rate of 5 per cent. per annum on the purchase-money, until the completion of the purchase, which was to be in three months; and the purchase not being then completed, he continued in possession on the same terms:—Held, that this was only a tenancy at will, which might be determined without notice to quit. *Doe* d. *Tomes* v. *Chamberlaine*, 5 M. & W. 14; 9 L. J., Ex. 38.

Cestui que Trust.]—The doctrine, that a cestui que trust who is in possession of the estate by the consent or acquiescence of the trustee must be regarded as his tenant at will, only applies where the cestui que trust is the actual occupant; where he is merely allowed to receive the rents, or otherwise deal with the estate in the hands of occupying tenants, he is merely the agent of the trustees. *Melling* v. *Leak*, 16 C. B. 652: 3 C. L. R. 1017; 24 L. J., C. P. 187; 1 Jur. (N.S.) 759; 3 W. R. 595.

The management of an estate was intrusted by the trustees (in fee) to the cestui que trust (for life) as beneficial owner; and the latter, having never been in actual occupation, let C. into possession, who occupied during the life of the cestui que trust, for more than twenty years, without paying rent or acknowledging title:—Held, that a tenancy at will had not been created between the cestui que trust and the trustees, and that C. had therefore acquired a good title, by adverse possession under 3 & 4 Will. 4, c. 27. *Ib.*

Presumption of.]—By indenture of lease of the 26th of June, 1810, between A. of the one part, and B. of the other part, after reciting a former lease, dated 27th of July, 1801, made between W. S. of the one part, and A. of the other part, whereby one undivided moiety of certain lands, and two undivided moieties of other lands, containing eighty acres, were demised by W. and M. S. to A., for the term of forty years, the whole of the lands, containing eighty acres, and the moiety of the other lands, were demised by A. to B. for the remainder of the term of forty years, except the last ten days. A. died in 1813, leaving the plaintiff his real and personal representative, and B. died in 1818, leaving the defendant his personal representative, who continued to occupy the lands demised until the time of the trial. The rent was regularly paid by B. and the defendant to A. and the plaintiff up to Lady-day, 1841, when the lease expired, and in December, 1841, the defendant paid rent for the whole of the eighty acres to M. S. The defendant went into evidence to shew that neither A. nor the plaintiff had, in fact, any title to the undivided third part of the eighty acres, but that the whole was in M. S.:—Held, that, at all events, the lease of 1810 established a primâ facie case of title in the plaintiff, which the defendant must rebut by his evidence; and that the plaintiff had a right to treat the defendant as a tenant at sufferance of the undivided third part of the eighty acres, and to sue him for the use and occupation thereof after the expiration of the lease. *Bayley* v. *Bradley*, 5 C. B. 396; 16 L. J., C. P. 206.

Statute of Limitations—Waiver.]—W. H. died intestate in 1798, seised of a house and land, leaving a widow and an only son (by her), J., fifteen years old. The widow continued to reside on the property, and about a year after the death of W. H. married the defendant, and resided with him on the premises; J. also remaining with him till 1805, when he went away, but occasionally returned for about a fortnight at a time till 1842. About that time the defendant applied to the lessor of the plaintiff to advance 100*l.* on mortgage of the property, and on that occasion the title-deeds being produced, the solicitor stated that it was necessary that J., being the heir-at-law of W. H., should execute the conveyance. The defendant accordingly brought J., who executed the mortgage and signed the receipt for the 100*l.*, which was received by the defendant:—Held, that a jury might well presume on the state of facts, that the defendant was tenant at will to J., and that the defendant by his conduct had waived all right to set up the Statute of Limitations, 3 & 4

Will. 4, c. 27, to defeat the right of entry of J. *Doe* d. *Groves* v. *Groves*, 10 Q. B. 486; 16 L. J., Q. B. 297; 11 Jur. 558.

b. How Determined.

Feoffment and Livery of Seisin.]—A feoffment, with livery of seisin made on the land, determines a tenancy at will, though the tenant is not present, nor assenting to the feoffment; and the feoffee may maintain trespass against the tenant at will who has been entered on his possession. *Ball* v. *Cullimore*, 2 C. M. & R. 120; 1 Gale, 96; 5 Tyr. 753; 4 L. J., Ex. 137.

Demand of Possession.]—A letter from the attorney of a lessor to the attorney of a tenant at will, stating that, unless the tenant paid the lessor what he owed him, he would, without delay, take measures for recovering possession of the property, is a sufficient indication of the lessor's will to put an end to the tenancy, and equivalent to a demand of possession previously to the commencement of the action. *Doe* d. *Price* v. *Price*, 2 M. & Scott, 464; 9 Bing. 356.

A. lessor at will, B. lessee at will, C. underlessee at will; a demand of the possession, made upon the premises from the wife of C. is sufficient to entitle A. to maintain ejectment. *Roe* d. *Blair* v. *Street*, 4 N. & M. 42; 2 A. & E. 329; 4 L. J., K. B. 67.

A party, who defends in ejectment as landlord as to W., and as tenant as to B., cannot take advantage of a defect in the service of a demand of possession, made upon the tenant of B. for the purpose of determining an estate at will. *Ib.*

Notice.]—Where a tenant is in possession of land under an agreement for a lease for twenty-one years but has paid no rent, he is a tenant at will and the landlord may determine the tenancy by giving notice to quit. *Coatsworth* v. *Johnson*, 55 L. J., Q. B. 220; 54 L. T. 520—C. A.

A tenant at will cannot put an end to his tenancy, even by an assignment, without giving notice to his landlord. *Pinhorn* v. *Souster*, 8 Ex. 763; 22 L. J., Ex. 266; 16 Jur. 1001; 1 W. R. 336.

Agreement to Purchase.]—A tenancy at will is determined by an agreement to purchase. *Daniels* v. *Davison*, 16 Ves. 252; 10 R. R. 171.

Entry under Authority of Lessor.]—The defendant occupied land, under parish officers, and had paid rent; they gave an invalid notice to quit at the end of the first year, and, by a lease signed only by two of them, demised to the plaintiff for a term of years, to commence from the end of the defendant's tenancy. Under this lease the plaintiff entered; but the defendant refused to give up certain plants he had himself planted, and subsequently entered and took them away:—Held, that he was liable in trespass; that though the lease was invalid, there was evidence that the plaintiff entered under the authority of all the parish officers, and that therefore the defendant's tenancy being either a tenancy at will or on sufferance, was lawfully determined, and his entry wrongful. *Wallis* v. *Delmar*, 29 L. J., Ex. 276.

Death.]—Generally the death of either party determines a tenancy at will. *James* v. *Dean*, 11 Ves. 391. Affirmed, 15 Ves. 236; 8 R. R. 177.

Demand of Keys.]—Where a person, who has had the keys of a house given him in order that he may see over it, takes the opportunity to bring in his furniture and family, and the landlord afterwards sends for the keys, and, upon the refusal of them, enters himself, and turns out the party and his goods:—Held, that (the jury having found a tenancy at will to have been created) there was ample evidence in the facts to shew a determination of the tenancy. *Pullen* or *Pollon* v. *Brewer*, 7 C. B. (N.S.) 371; 6 Jur. (N.S.) 509.

Insolvency of Lessor.]—Where a party creates a tenancy at will, and afterwards becomes insolvent, the vesting order, with knowledge thereof by the tenant, is a determination of the tenancy; and if the tenant, after such information, continues in possession, he may be treated as a trespasser. *Doe* d. *Davies* v. *Thomas*, 6 Ex. 854; 20 L. J., Ex. 367.

Carrying away Stone by Lessor.]—A. in 1817 let B. into possession of a farm as tenant at will, and in 1827 A. entered upon the land without B.'s consent, and cut and carried away stone therefrom:—Held, that this entry amounted to a determination of the estate at will. *Turner* v. *Doe* d. *Bennett*, 9 M. & W. 643; 11 L. J., Ex. 453—Ex. Ch.

Determination of—Fresh Tenancy at Will—Statute of Limitations.]—A., having been in possession of a house and land adjoining, as tenant at will to the lord of a manor, was told by a subsequent lord that he must leave. On his refusal to do so, a writ of ejectment was served upon him; it was then verbally arranged that A. should give up part of the land, and retain the house and remaining land during the life of himself and wife:—Held, that these acts amounted to a determination of the tenancy at will, and as a new tenancy at will was thereby created, the Statute of Limitations, 3 & 4 Will. 4, c. 27, ss. 7, 10 and 14, began to run from that time, and not from the date of the original tenancy. *Locke* v. *Matthews*, 13 C. B. (N.S.) 753; 32 L. J., C. P. 98; 9 Jur. (N.S.) 874; 7 L. T. 824; 11 W. R. 343.

2. Other Tenancies.

A Year certain.]—A tenancy for "a year certain" is "less than a tenancy from year to year," because:—

Per Dowse, B.: A tenancy from year to year is a tenancy for a year certain, and every year afterwards it is a springing interest arising upon the first contract and parcel of it, so that if the lessee occupies for a number of years, these years, by computation from the time past, make an entire tenancy for so many years, and after the commencement of each new year it becomes one entire lease certain for the year past, and also for the year entered upon, so that it is not a reletting after the commencement of the second and subsequent years. *Wright* v. *Tracey*, Ir. R. 8 C. L. 478—Ex. Ch.

Per Deasy, B.: If a tenant from year to year demises for a term of years, and the original tenancy from year to year lasts beyond that term, such a demise is not an assignment, but there is a reversion. *Ib.*

A tenancy for "a year certain" is not "less than a tenancy from year to year," because:—

Per Fitzgerald, J.: A tenancy from year to

year is legally and technically a tenancy for one year certain and no more, but to which is superadded, by construction of law, that if neither party expresses his will to determine or give up at the end of the year, then it shall continue for another year. *Ib.*

Per Fitzgerald, B. (and adopted by Whiteside, C.J.): A tenancy from year to year in the uncertainty of its duration, still retains its character of a tenancy at will; but, by reason of judicial decisions, the will cannot be determined before the end of the first year at least, and thus the tenancy becomes certain for a year. *Ib.*

Per Palles, C.B.: The tenancy from year to year, pointed at by s. 69, is a tenancy from year to year in the abstract, and the necessary duration of a tenancy from year to year in the abstract is a term fixed and certain, that is, the term of one year. *Ib.*

Week to Week.]—A weekly tenancy is a reletting of the premises by the landlord at the beginning of each successive week. *Sandford* v. *Clarke*, 57 L. J., Q. B. 507; 21 Q. B. D. 398; 59 L. T. 226; 37 W. R. 28; 52 J. P. 773.

—— **What amounts to.**]—Where the only evidence of the terms on which a furnished house was taken, was the following receipt put in by the landlord: "Received from C. 12*l.* for rent of furnished house, from the 8th May to the 1st August, 1846":—Held, that the jury might properly infer that the tenancy was weekly. *Towne* v. *Campbell*, 3 C. B. 921; 16 L. J., C. P. 128.

—— **Notice to Determine.**]—Notice is necessary to determine a weekly tenancy. *Sandford* v. *Clarke* (21 Q. B. D. 308) explained; *Jones* v. *Mills* (10 C. B. (N.S.) 788) followed. *Bowen* v. *Anderson*, [1894] 1 Q. B. 164; 10 R. 47; 42 W. R. 236; 58 J. P. 213.

—— **Removal of Goods after.**]—A stipulation on the occasion of a weekly letting, that, after the expiration of such tenancy by the usual week's notice, the tenant shall have a reasonable time for the removal of his goods, is a valid stipulation and operates as an extension of the term, so as to give the tenant a right to enter and do what is necessary for such removal. *Cornish* v. *Stubbs*, 39 L. J., C. P. 202; L. R. 5 C. P. 334; 22 L. T. 21; 18 W. R. 547.

When it is a part of the terms of a tenancy created by parol that the tenant shall be allowed to place goods on land not comprised within the letting, the tenant, who has acted upon such licence, though not by deed, and was afterwards revoked by the determination of the tenancy, has a right to go and remove the goods which he has so placed there, and is entitled to have a reasonable time to do so. *Ib.*

—— **Restraining Nuisance by Lessor of.**]—The owner or lessor of houses let or sub-let to weekly tenants cannot maintain a suit to restrain a temporary nuisance, such as the noise of machinery in adjacent premises. *Jones* v. *Chappell*, 44 L. J., Ch. 658; L. R. 20 Eq. 539.

Semble, that such a suit could be maintained by a weekly tenant if the nuisance was of such a nature as to be injurious to his health or comfort. *Ib.*

For Six Months and then Three Months.]—A party hired apartments upon the terms contained in the following memorandum: "I hereby agree (according to our conversation of last evening) to pay you for the occupation of your first floor, furnished, from Monday, March 4th, 1839, to September the 4th, 1839, the sum of 52*l.* 10*s.* I also agree either to occupy the said rooms from the 4th September to the 4th December, furnished, on the same terms, viz. 26*l.* 5s., for the three months, or take them unfurnished at the rate of 84*l.* per annum":—Held, that this did not create a tenancy from year to year, but was properly declared on as an agreement to take the apartments furnished for six months; and for a further period of three months, furnished or unfurnished at the option of the tenant. *Atherstone* v. *Bostock*, 2 Scott (N.R.) 637; 2 Man. & G. 511; 1 Drink. 96; 10 L. J., C. P. 113.

On Sufferance.]—*See* HOLDING OVER, supra, F. 3 (ante, cols. 885 et seq.).

H. RENT.

1. CONTRACTS FOR.

When Concluded.]—Two of the plaintiffs were the legal owners of a leasehold interest in a house, and claimed 37*l.* from the defendant for the use and occupation of it during the three last months of their term. They authorised him to pay this amount to another of the plaintiffs, who was owner of the reversion. She called on the defendant, who expressed his willingness to pay her the money, though he did not make any actual tender of it, but she refused to receive it, and demanded more. The plaintiffs then sued the defendant for the use and occupation, and claimed 238*l.* The defendant paid 37*l.* into court:—Held, that as soon as the defendant expressed to the agent his readiness to pay the 37*l.* there was a concluded agreement between him and the plaintiffs for that amount, and that the plaintiffs could not recover more. *Gretton* v. *Mees*, 7 Ch. D. 839; 38 L. T. 506; 26 W. R. 607.

Held, also, that the defendant was entitled to the costs of the action from the time of the payment into court. *Ib.*

Construction.]—A net rent is a sum to be paid to the landlord clear of all deductions. *Bennett* v. *Womack*, 7 B. & C. 627; 1 M. & Ry. 644; 3 Car. & P. 96; 6 L. J. (O.S.) K. B. 175; 31 R. R. 270.

A covenant that half a year's rent shall remain in the hands of the tenant till the last year, means the current half-year. —— v. *Nicholls*, Lofft, 393.

Where a contract was made by the plaintiff and A., that A. should build houses on the plaintiff's land and procure tenants for the same at a given rate, and himself pay the rent till he so procured tenants from the Michaelmas then next ensuing:—Held, that, under this contract, no tenancy was created between the plaintiff and A. *Taylor* v. *Jackson*, 2 Car. & K. 22.

Implied.] — There is an implied covenant for payment of rent under the words "yielding and paying." *Iggulden* v. *May*, 9 Ves. 330; 7 East, 237; 3 Smith, 269; 2 Bos. & P. (N.R.) 449; 8 R. R. 623. *See* 9 R. R. 104, n.

Qualified.] — Lease by the plaintiff to T., for years, of a messuage and farm, at a yearly rent, payable quarterly, and T. covenanted to pay the rent on the days and in manner therein mentioned, and also to pay interest in case the

rent should be behind three quarters; and the defendant covenanted that T. should, at all times during the term, well and truly pay to the plaintiff the rent at the respective days, and also interest, and should duly observe all the covenants, and that in case T. should neglect to pay the rent for forty days, the defendant should pay on demand:—Held, that the defendant was not chargeable until after forty days and demand made. *Sicklemore* v. *Thistleton*, 6 M. & S. 9; 18 R. R. 280.

B., as surety for J., became party to an indenture, whereby A. leased land to J., at a rent payable by J., for a term determinable on A.'s death; and B. and J. covenanted jointly and severally for themselves and their heirs, that B. and J., or one of them, or their heirs, executors, &c., should pay the rent reserved, and also a further rent, as liquidated damages, if the land was farmed contrary to the covenants of the lease. After B.'s death, rents of both kinds became due:—Held, that B.'s devisees were not liable under 3 & 4 Will. & M. c. 14, to an action of debt for any of the sums due. *Farley* v. *Briant*, 3 A. & E. 839; 1 H. & W. 775; 5 N. & M. 42.

Dependent or Independent Covenants.]—In a lease for seven years, containing the usual covenants that the lessee should pay the rent, and keep the premises in repair, there was a proviso that the lessee might determine the term at the end of the first three or five years, giving six months' previous notice, and that then, and from and after the expiration of such notice, and payment of all rents and duties to be paid by the lessee, and performance of all his covenants until the end of the three or five years, the indenture should cease and be utterly void:—Held, that the payment of rent and performance of the other covenants were conditions precedent to the lessee's determining the term at the end of the first three years; and that his merely giving six months' notice, expiring with the first three years, was not sufficient for that purpose. *Porter* v. *Shephard*, 6 Term Rep. 665; 3 R. R. 305.

A. demised to B. a coal mine for forty-two years, at a yearly rent. The lease contained numerous covenants on the part of the lessee for payment of rent, and in respect of the working of the mine, with a proviso for re-entry on breach of any of them; and a proviso that if the lessees should be desirous to quit the premises at the end of the first eight years of the term, and of such their desire should give the lessor notice in writing eighteen calendar months before the expiration of such eighth year, then all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessee having been observed and performed, the lease should, at the expiration of the eighth year, be utterly void; but, nevertheless, without prejudice to any claim or remedy which any of the parties might then be entitled to for breach of any of the covenants:—Held, that the performance of all the covenants by the lessee was a condition precedent to his right to determine the lease. *Friar* v. *Grey*, 5 Ex. 597; 15 Jur. 814—Ex. Ch. Affirmed, 4 H. L. Cas. 565; 18 Jur. 1036.

Covenant to Pay Rent at a Certain Time—Proviso for Acceptance of Reduced Rent if Covenant Performed.] — A lease made in 1853 reserved the yearly rent of 556*l.*, payable half-yearly, and contained a power of distress in case such rent or any part of it should be in arrear; and also a covenant by the lessee to pay it on the gale days. Then followed a clause of re-entry in case such rent or any part of it should be thirty-one days in arrear, and a proviso that if the lessee should perform "the several covenants, clauses, conditions, reservations and agreements" thereinbefore on his part contained, the lessor would accept the "yearly sum of 278*l.*" in full satisfaction of the "yearly rent of 556*l.*" An ejectment having been brought for non-payment of 556*l.* as due for the year ending 1st November, 1877, claiming the higher rent on the ground that the lessee had not kept his covenant to pay or tender it on the gale days:—Held, reversing the decision below, that the tender of rent ad diem was not necessary to entitle the lessee to the benefit of the proviso for the acceptance of the reduced rent. *M'Kay* v. *M'Nally*, 4 L. R., Ir. 438.

Commencement of Rent.]—In an action for specific performance of an agreement to grant a lease of premises, which contained the term for which and the rent at which the lease was to be granted, but did not state when the term was to commence, it was held that the term commenced from the date of the agreement, and judgment was given to that effect, together with damages. When the lease was being settled a question arose as to the date at which the rent was to commence:—Held, that the rent commenced at the date of the entry into possession by the lessee, as the damages were to recompense him only for the loss of profit while kept out of possession by the lessor. *Jaques* v. *Millar*, 47 L. J., Ch. 544; 6 Ch. D. 153; 38 L. T. 99; 26 W. R. 368. *See next case.*

An executory agreement for a lease does not satisfy the Statute of Frauds, unless it can be collected from it on what day the term is to begin, and there is no inference that the term is to commence from the date of the agreement in the absence of language pointing to that conclusion. *Jaques* v. *Millar* (6 Ch. D. 153) overruled. *Marshall* v. *Berridge*, 51 L. J., Ch. 329; 19 Ch. D. 233; 45 L. T. 599; 30 W. R. 93; 46 J. P. 279—C. A.

Rent for a colliery, commencing the first quarter-day after a certain quantity of coal had been dug, ordered to be paid from the quarter-day prior to which that quantity would have been dug but for the fraudulent delay of the lessee. *Green* v. *Sparrow*, 3 Swanst. 408; 19 R. R. 248.

—— **Of Medical Practice.**] — The plaintiff wishing to sell a medical practice, with the lease of the house where it was carried on, placed it on the books of a medical agent. This led to negotiations with the defendant. The premiums asked for the practice and for the lease were stated in a letter from the agent to the defendant, but no time for completing the purchase was mentioned. The defendant replied in a letter to the agent accepting the terms offered, and adding that he should be ready to pay the deposit-money "on receipt of corrected agreement," and at the same time he wrote to the plaintiff personally, also accepting the terms offered, and adding, "I shall trust to you to give me the best introduction you can during three months and afterwards, if necessary." The plaintiff replied, thanking the defendant for acceding to his terms, and saying that "it would be his aim as well as his duty to give him an effectual introduction to his patients." A.

formal agreement was drawn up, but never signed, and after some further correspondence the defendant refused to complete the purchase:—Held, that inasmuch as the time for the commencement of the purchase was left uncertain, and the stipulation as to the three months' introduction was not agreed to, and as the parties contemplated a formal agreement, there was no binding contract between the parties, and the action was dismissed. *May* v. *Thomson*, 51 L. J., Ch. 917; 20 Ch. D. 705; 47 L. T. 295—C. A.

Damages or Rent.]—In 1862, A. agreed to lease a mine to B. Disputes arose between the parties, and A. brought an action against B. under the agreement, and B. filed a bill against A. to have the agreement set aside. The parties then referred all the matters in dispute between them to arbitration, and the arbitrator awarded that the agreement for a lease was valid; that it should be cancelled, and that B. should pay to A. 5,513*l*. B. died, and a suit was instituted to administer his estate, under which A. carried in a claim to rank as a specialty creditor in respect of the sum awarded:—Held, that the sum was awarded by way of damages and not for rent, and therefore was not entitled to rank as a specialty debt. *Talbot* v. *Shrewsbury* (*Earl*), 42 L. J., Ch. 877; L. R. 16 Eq. 26; 21 W. R. 473.

Property taken by Railway Company—Liability of Tenant.]—A party was the tenant from year to year of a house and premises, at a rent payable half-yearly, on the 1st April and the 1st October. The premises being required for the purposes of a railway, the railway company, in pursuance of a power given by their act of parliament, gave the tenant six months' notice to quit, which expired in the middle of a half-year, viz. on the 28th July. The tenant gave up possession to the company accordingly at the expiration of six months, without obtaining or requiring compensation for his interest in the premises, which he was entitled to under the act:—Held, that he was liable for the rent of the half-year ending on the following 1st October. *Wainwright* v. *Ramsden*, 5 M. & W. 602; 1 Railw. Cas. 714; 9 L. J., Ex. 120.

Right of Tenant to Retain—For Repairs.]—Agreement that the lessee should spend 200*l*. in repairs, to be inspected and approved of by the lessor, and to be done in a substantial manner; the lessee to be allowed to retain the sum out of the first year's rent of the premises:—Held, that the lessor's approval was not a condition precedent to the lessee's retaining the rent. *Dallman* v. *King*, 4 Bing. (N.C.) 105; 5 Scott, 382; 3 Hodges, 283; 7 L. J., C. P. 6.

Not Enforced.]—Upon the marriage of A., the grandson of W., from whom A. had large expectations, a house and lands were settled upon A., and it was agreed that the grandfather should occupy the house and lands, and also some glebe lands belonging to A. There was evidence as to the rent that was to be paid, which was about the actual value. A. never enforced the rent during the eight years of his grandfather's occupancy, which ceased with his death, but had received sums in money and goods equal to about half the alleged rent. Stuart, V.-C., allowed an exception to the master's report allowing the rent, as alleged. But Cranworth, C., reversed his decision, coming to the conclusion that there was either an express contract to pay the rent, or an agreement to occupy as any other tenant, and pay a quantum meruit; the sums and goods paid to go towards the rent. *Alington* v. *Booth*, 3 Jur. (N.S.) 50.

What constitutes fresh Demise.]—The defendant entered into a written agreement with the plaintiff to take premises at a rent of 20*s*. a week, payable on demand and subject to four weeks' notice to quit on either side. During the continuation of this tenancy, a verbal agreement was made between the parties that the rent should be 16*s*. a week, and the defendant for several weeks paid this reduced amount, and on one occasion submitted to a distress:—Held, that there was no fresh demise, and that the original rent continued to be the rent payable for the premises. *Crowley* v. *Vitty*, 7 Ex. 319; 21 L. J., Ex. 135.

A. demised to B. premises from the 15th of May, 1851, at the yearly rent of 145*l*., payable on November 14th and May 14th. These premises had been let to C., whose tenancy expired on the 13th May, 1851, and who had omitted to give a notice to quit to one of his under-tenants, who occupied a cottage, at a yearly rent of 5*l*.; and in consequence B. could not obtain possession of that part of the premises. It was then agreed that A. should receive from the under-tenant rent for two half-years, and deduct that 5*l*. from the rent to be paid for the whole by B., and that B. should pay 70*l*. to A. on the 14th of November, 1851, and 14th of May, 1852:—Held, that such agreement operated as a new demise, and that A. was entitled to distrain for 70*l*. which became due on the 14th of November. *Watson* v. *Ward*, 8 Ex. 335; 22 L. J., Ex. 161; 1 W. R. 133.

Time of Payment.]—Memorandum dated the 31st of January, 1840, between B. and J. J. agrees to become the tenant of the S. farm at the customary time of entry, under the following conditions: viz. that 260*l*. annual rent shall be paid at the usual time for the house, premises and lands as agreed upon; and B. agrees to lay out in the improvements of the farm-house a sum not exceeding 200*l*.:—Held, that this agreement did not necessarily import, in point of law, that the year's rent was to be payable at the end of the year from the time of entry; but that it might be shewn from the contemporaneous or subsequent dealings of the parties that their understanding was, that the rent should become payable at an earlier period. *Gore* v. *Lloyd*, 12 M. & W. 463; 13 L. J., Ex. 366.

It was proved that the usual time of entry on the neighbouring farms was on 12th May, and that the rents of the estate of which the farm G. was a part were payable at Michaelmas. The audit day being in January, T. entered on the farm in spring, 1840, and continued in possession till 1842. In May, 1842, he was in arrear for rent to the extent of 160*l*., and, being pressed by his landlord, executed a warrant of attorney for 420*l*., being the amount of the arrears and of the year's rent, the understanding being that a fi. fa. was to be delivered to the sheriff upon a judgment to be entered up, but that it was not to be executed unless the writs of other creditors were sent to the sheriff. In October, 1842, T. was applied to for another year's rent, of which he paid a portion, promising to pay the rest before Christmas. In November the sheriff, who had received writs from other persons

against the property of T., executed the fi. fa.:—Held, that these facts warranted the jury in finding that a year's rent became due at Michaelmas; and, secondly, that the giving by T. of the warrant of attorney was not such a procuring of his goods to be taken in execution as amounted to an act of bankruptcy. *Ib.*

Tithe Commutation Rent-charge.]—The plaintiff being the owner of a farm, and lessee of the tithe commutation rent-charge, under a dean and chapter, at a rent of 60*l.* per year, let the land verbally to the defendant at a rent of 400*l.* a year, tithe free:—Held, that, as by 6 & 7 Will. 4, c. 71, s. 80, in the event of the defendant distraining for the tithe rent, she would be compelled to allow the same to the plaintiff in account, the plaintiff was tenant to the defendant, at a rent of 400*l.* *Meggison* v. *Glamis*, 7 Ex. 685; 21 L. J., Ex. 284.

Extent of Promise to Pay.]—A declaration averred that the plaintiffs, being tenants to H., of chambers at a certain rent, payable quarterly, underlet them to the defendant, who undertook to pay the rent to H., and agreed that if he did not do so he would indemnify the plaintiffs in respect thereof, and that the defendant did not pay the rent to H., nor indemnify the plaintiffs:—Held, that whether the contract meant that the defendant was to pay to H. the rent due from the plaintiffs to H., or to pay the rent under the demise from the plaintiffs, the promise of the defendant to pay did not extend beyond the term of his own tenancy. *Smith* v. *Coles* or *Lovell*, 1 L. M. & P. 794; 10 C. B. 6; 20 L. J., C. P. 37; 15 Jur. 250.

Premises originally of no Value.]—When a lessee covenants to pay the rent reserved and keep the demised premises in repair, he is bound, during the term, to perform both covenants as long as the subject-matter of the demise continues to exist, although it was originally of no value. *Meath* (*Earl*) v. *Cuthbert*, Ir. R. 10 C. L. 395.

Joint Tenants—Liability of Executors of deceased Tenant during Sole Tenancy of Survivor.]—A mineral lease for thirty-one years was granted to L. and M., "and the survivor of them, but expressly excluding assigns and subtenants, whether legal or conventional." By the lease L. and M. bound themselves and their respective heirs, executors and successors, all conjunctly and severally renouncing the benefit of discussion, to pay the rent. The lease also provided that if L. or M. became bankrupt it should, in the option of the lessor, become void. Shortly after the commencement of the lease L. became bankrupt, and M. died, but the lessor never exercised his option to determine the lease:—Held, that by the terms of the clause of obligation the lessees were conjunctly and severally liable for rent irrespective of their interest, and that after M.'s death, his representatives, though they had no interest as tenants, remained liable for rent during the currency of the lease. *Burns* v. *Bryan* or *Martin*, 12 App. Cas. 184—H. L. (Sc.)

Liability of Under-Tenant.]—An under-tenant of a part of the lands demised, subject to the payment of rent to the immediate lessee, is not in the eye of the law an assignee of such immediate lessee. *Berney* v. *Moore*, 2 Ridgw. P. C. 323.

An under-tenant is not bound by any of the covenants contained in the original lease. *Ib.*

An under-tenant of premises comprised in an ejectment (for non-payment of rent) brought by the first lessor is not barred from relief if he files a bill in equity against such lessor within six months after execution had, and within that time deposits in the court the whole arrear of rent ascertained to be due to the lessor. *Ib.*

And in such case it is not necessary that any new lease should be executed by the first lessor. *Ib.*

The statutes giving to landlords the remedy by ejectment for non-payment of rent are not mandatory on the court of equity to set up an immediate lease which had been evicted under the said statutes, upon a bill filed, and the rent and cost deposited within six months after the habere executed by an under-tenant claiming one-fourth of the lands demised, and against the consent of the immediate lessee. And if a lease be so set up against the consent of the lessee, the statute 11 Anne, c. 2, subjects him to the several covenants. *Ib.*

Chief Rents.]—Land on which an improved chief rent, which was purchased by the plaintiff's testator in 1853, had been reserved by a former vendor of the land, was ordered to be sold to pay the arrears of the chief rent which had accrued due since that date. *Horton* v. *Hall*, L. R. 17 Eq. 437; 22 W. R. 391.

Liability of Auctioneer.]—S. and M. carried on business in premises rented by M. of C. Being about to dissolve partnership, their respective attorneys gave a joint order to an auctioneer to take possession of the goods upon the premises, "realise the same with all convenient despatch, and to hold the proceeds as stakeholder until we shall join in directing you as to the disposition thereof." The auctioneer took possession, and sold the goods by auction, under conditions, one of which was as follows:—"Each lot shall be paid for immediately after the sale and previously to its removal. Each and all lots shall be taken to be delivered at the fall of the hammer, after which time they shall remain and be at the exclusive risk of the purchasers, and the auctioneer shall not be called upon for compensation for any injury or loss sustained after that time." After the lots were sold, but before all had been taken away by the purchasers, the agent of C. told the auctioneer that he could not allow the things to go until he was paid rent then in arrear. The rent was the private debt of M., who asked the auctioneer to pay it out of the proceeds of the sale. S. gave him notice not to pay the rent, and the attorneys gave him notice to pay the net proceeds to S., he being entitled to the whole. The auctioneer paid the rent to C., and the balance of the proceeds to S.:—Held, that the auctioneer was not justified in paying the rent, and that S. was entitled to maintain an action against him to recover the residue of the proceeds. *Sweeting* v. *Turner*, 41 L. J., Q. B. 58; L. R. 7 Q. B. 310; 25 L. T. 796; 20 W. R. 185.

Receipts for Rent—Evidence.]—An alteration, in the landlord's receipts for rent, of the names of the occupying tenants does not, unless known to have been assented to by all the parties interested, afford any evidence from which can

be inferred either a change of the tenancy or a transfer of the legal rights. *Bourke* v. *Bourke*, Ir. R. 8 C. L. 221.

Indemnities against Payment.] — A lessee of a farm for an unexpired term at a yearly rent, payable quarterly, gave up possession to the defendant, under an invalid assignment of the unexpired residue of the lease. He entered, occupied and paid the reserved rent quarterly to the lessor for the lessee. The lessor never accepted or objected to the defendant as his tenant. The defendant quitted on a quarter-day without giving the lessee any notice to quit:— Held, that a promise by the defendant to indemnify the lessee against the rent for any period after the defendant had ceased to occupy, could not be inferred as a matter of law. *Crouch* v. *Tregoning* or *Tregonning*, 41 L. J., Ex. 97; L. R. 7 Ex. 88; 26 L. T. 286; 20 W. R. 536.

On Grant of Reversion.]—*See* post, cols. 1082, 1083.

Relief against Breach.]—A lessee applying to redeem a lease which has become forfeited at law by nonpayment of rent is not required by the statute 4 Geo. 2, c. 28, s. 3, before the hearing to pay into court the arrears of rent, or the costs at law, if no injunction is granted until the hearing, and the lessor is in possession. *Bowser* v. *Colby*, 1 Hare, 109; 11 L. J., Ch. 132; 5 Jur. 1106.

A court of equity, when asked by a lessee to grant him relief, will consider the conduct of the lessee in dealing with the property, whether that conduct does or does not involve a breach of covenant. *Ib.*

A lease provided that, in case of any breach of covenant, it should be lawful for the lessor to re-enter and expel the lessee; and the lease should in that case be forfeited, and be utterly null and void. The lessee committed a breach by nonpayment of rent. Semble, such a lease is voidable and not void. *Ib.*

A court of equity will relieve a lessee from a forfeiture by nonpayment of rent where there is a proviso that in that case the lease shall be void, as well as where there is a mere power of re-entry. *Ib.*

Relief against breach of covenant for nonpayment of rent; lessor, therefore, compelled to proceed on some other covenant. *Lovat* (*Lord*) v. *Ranelagh*, 3 Ves. & B. 30.

Distinction as to injunction between landlord and tenant, upon an actual lease and a mere agreement; in the latter case no relief, if the covenant would have been violated; in the former, some ground necessary, either by the conduct of the lessor, or under the statute 4 Geo. 2, c. 28. *Ib.*

A. recovers judgment against B., and has a lease sold to him by the sheriff; C., the ground landlord, enters, and having judgment in ejectment for nonpayment of the ground rent, offers A., upon payment of arrears of rent and costs at law, to make him a new lease for the remainder of the term; A. refusing this offer, C. lets it to another. A. brings his bill to be relieved against the recovery and forfeiture at law, having first tendered the arrears and costs; bill dismissed with costs. *Dorrington* v. *Jackson*, 1 Vern. 449.

One makes a lease, and the lessee covenants to pay the rent and to repair; the lessee makes one hundred under-leases; the rent is behind, and the premises out of repair; the original lease is avoided for nonpayment of rent. Some of the under-lessees bring a bill to be relieved against the forfeiture. Equity will not apportion the rent, but the plaintiffs must pay the whole rent in arrear, and repair all the houses, and may compel the other under-lessees to contribute. *Webber* v. *Smith*, 2 Vern. 103.

Relief is granted from forfeiture under covenant for re-entry for nonpayment of rent; but not where the recovery in ejectment was also upon a breach of other covenants. *Wadman* v. *Calcraft*, 10 Ves. 67.

A court of equity will not interfere generally to restrain an ejectment brought against a lessee for breaches of covenant in the lease, except for breach in nonpayment of rent. *Nokes* v. *Gibbon*, 3 Drew. 681; 26 L. J., Ch. 433; 3 Jur. (N.S.) 726; 5 W. R. 400.

Upon a bill by a lessee evicted for nonpayment of rent seventeen years before, though imputing fraud, unsupported in proof, but praying for liberty to try validity of the eviction at law by the removal of temporary bar (a mortgage of the tenant's interest vested in the landlord):— Held, that he was entitled to such relief, there being no equitable circumstances to bar him of that right, he having acquiesced in ignorance of his rights; and the defendant having, by the concealment of a fact, obtained illegal advantage, which, consistent with good conscience, should not be allowed to protect his title on such a trial. *Blennerhassett* v. *Day*, 2 Ball & B. 104.

After judgment and execution in ejectment for nonpayment of rent, a bill does not lie at the suit of the tenant for an account, and to be restored to the possession on payment of what shall appear due, without bringing the rent and costs into court, if the question appears to be merely whether so much rent was due, and not to be of too complicated a nature to be tried at law. The account sought in this case consisting only of three disputed items admitted to have been paid, if at all, on account of rent, and being such as a jury might easily have investigated, the bill was dismissed with costs. It would have been otherwise, semble, if there had been a ground of defence, which could not be set up in the ejectment, but which it was unconscionable in the landlord not to admit, or if the account had been so complex that it could not properly have been taken at law. *O'Mahoney* v. *Dickson*, 2 Sch. & Lef. 400.

Where a decree, giving relief to a party whose title was gone at law, directs the accounts of the rents reserved in bonâ fide leases of tenants, not parties to the suit; the party relieved will be restrained from proceedings at law to evict the tenants, they being tacitly protected by the decree. *Shine* v. *Gough*, 1 Ball & B. 436.

Only in a strong case, if at all, will the court grant an injunction to restrain proceedings for nonpayment of rent. *Clancy* v. *Roberts*, 1 Ir. Eq. R. 21.

The court will not restrain a plaintiff in an ejectment for nonpayment of rent from executing his habere, where the bill is filed after judgment in the ejectment. *Ivess* v. *Hunt*, Fl. & K. 408.

Tenant having a claim against his landlord for unliquidated damages, occasioned by cutting timber on the demised premises, in pursuance of a power so to do, reserved by the lease, the landlord brought an ejectment for nonpayment of rent; on bill filed by tenant, stating his

claim, and charging that if ascertained, and credit given for it, there would not be a year's rent in arrear; and on that fact being established upon an issue, tenant was restored to the possession (which landlord had obtained in the meantime) on paying the balance due by him; and decreed entitled to an account of mesne profits, &c. *Beasley* v. *Darcy*, 2 Sch. & Lef. 405, n.

Where there have been various dealings between landlord and tenant, so as to produce an account too complicated to be taken at law, and the landlord has brought ejectment for nonpayment of rent, the tenant may file a bill, before judgment at law, for an account on the foot of those dealings and to have the balance applied to the rent claimed to be due; and the tenant need not bring in the rent, under statute 4 Geo. 1, c. 5. *O'Connor* v. *Spaight*, 1 Sch. & Lef. 305.

Equity does not connect the tenant's right, under the statute, to redeem premises evicted for nonpayment of rent, with any extrinsic matter, so as to make the tenant pay compensation, as a condition connected with his relief; therefore, on a bill by a tenant to redeem premises evicted for nonpayment of rent, relief granted, although he had committed breaches of covenant. *Swanton* v. *Biggs*, Beat. 170.

B., the assignee of certain leases of lands in Ireland, for long terms of years, being in arrear for rent, suffered judgment to be recovered in ejectment by the lessor, and possession of the lands was delivered by writs of habere on the 18th July, 1823. By the Irish statute 4 Geo. 1, c. 5, s. 3, a court of equity is empowered to annul the proceedings in ejectment, and restore the possession to the lessee, if a bill is filed, and the amount of rent and costs paid into court within six calendar months after execution has been executed. On the 17th January, 1824, B. filed a bill in the exchequer to redeem the lands, and obtained an order, dated on the 17th January, and signed by one of the barons of the exchequer, to lodge the amount of rent in arrear and costs in the Bank of Ireland. The order was left with the accountant-general on the 17th, after the bank was shut. On Monday, the 19th January, the money was paid into the bank, and the accountant-general gave a certificate accordingly. A treaty for a compromise then took place, and was for some time pending. On the 7th May, 1825, on the motion of B., it was ordered that the order for lodging the rent and costs should be entered as of the 17th January, and that the lodgment of the money should be receipted on that day, instead of the 19th, and that a certificate should be granted accordingly by the accountant-general. On the 7th July, 1825, the lessor obtained an order to take out of court, without prejudice to the rights of the parties, the rent and costs which had been deposited, and that he might be at liberty to proceed in the recovery of the lands. Having, under this order, taken the money out of court, the lessor appealed against the order directing the alteration in the date of the payment of the rent and costs. The order was reversed. *Vesey* v. *Bodkin*, 4 Bli. (N.S.) 64; 1 Dow & Cl. 456. Reversing Jones, 139.

—— **Mortgagee of Lease.**]—The mortgagee of a lease has the same title to relief against an ejectment for nonpayment of rent, and upon the same terms, as the lessee against whom the recovery is had. *Doe* d. *Whitfield* v. *Roe*, 3 Taunt. 402.

A mortgagee of a lease, who is not in possession, is entitled to relief against a forfeiture of the lease through nonpayment of rent by the lessee, if he is willing, within six months after a judgment enforcing the forfeiture has been obtained by the lessor, to pay all rent in arrear and all costs and damages, and to perform all the covenants in the lease; except in the case where a third party has acquired rights between the forfeiture and the application for relief. *Newbolt* v. *Bingham*, 72 L. T. 852; 14 R. 526—C. A.

Landlord bringing ejectment for nonpayment of rent, and having notice of a mortgage of the tenant's interest, must serve the mortgagee with the ejectment, although the mortgage was not registered pursuant to the provisions of statute 8 Geo. 1, c. 2, s. 5. *Biddulph* v. *St. John*, 2 Sch. & Lef. 521.

To a bill by mortgagee or trustee of a leasehold interest evicted for nonpayment of rent against the landlord seeking a redemption, a demurrer, the lessee not being a party, allowed. *Adams* v. *St. Ledger*, 1 Ball & B. 181.

—— **Statutory.**]—*See* post, J. 2, *i.*, ii. & iii. (post, cols. 1028 et seq.)

2. Reservation of.

Parties.]—Upon a lease by tenants in common the survivor may sue for the whole rent; although the reservation is to the lessors according to their respective interests. *Wallace* v. *M'Laren*, 1 M. & Ry. 516; 31 R. R. 334.

Where rent has become due under a lease made by several joint tenants, an assignment of the reversion by one does not alter the nature of the bygone rent, and therefore the right of distrainment for it is gone. *Staveley* v. *Alcock*, 16 Q. B. 636; 20 L. J., Q. B. 320; 15 Jur. 628.

A. let a house to B. as tenant from year to year, and afterwards granted a lease by deed to C. of the house and other property, for twenty-one years:—Held, that this transaction transferred the reversion of the house to C., and that A. could not recover against B. for rent due after the lease. *Harmer* v. *Bean*, 3 Car. & K. 307.

A joint demise by two tenants in common, in fee, with a general reddendum, not specifying to whom the rent is to be payable. The rent follows the reversion, and on the death of one of the tenants in common the reversion is split, and his share of it descends to his heir, who is entitled to the rent. *Beer* v. *Beer*, 12 C. B. 60; 21 L. J., C. P. 124; 16 Jur. 923.

One or two joint tenants may demise his or their portion to another, so as to create the relationship of landlord and tenant between them, with a right to distrain in respect of rent in arrear. *Cowper* v. *Fletcher*, 6 B. & S. 464; 34 L. J., Q. B. 187; 11 Jur. (N.S.) 780; 12 L. T. 420; 13 W. R. 739.

Where one seised in fee settles lands on himself for life, with remainders to other persons, reserving a leasing power, which he afterwards exercises, reserving rent to himself, his heirs and assigns, those in remainder shall have the rent. *Greenaway* v. *Hart*, 14 C. B. 340; 2 C. L. R. 370; 23 L. J., C. P. 115; 18 Jur. 449; 2 W. R. 702.

So where one seised in fee settles lands on A. for life, with remainders, and gives him a leasing

power, which he exercises, reserving rent during the term to himself, his heirs and assigns, those in remainder shall take it. *Ib.*

The defendant being in possession of premises under a lease from two trustees, of a term which had expired, a new lease was granted for a further term, but was executed by one only of the trustees. The defendant paid rent to both trustees until one of them died, and for the rent due after his death the other trustee brought an action for use and occupation :—Held, that he might maintain the action in his own name and right, and was not bound to sue as surviving trustee. *Wheatley* v. *Boyd*, 7 Ex. 20.

Where a termor makes a lease to A. for twenty-one years, reserving rent to herself, her executors, administrators and assigns, and the lessee covenanted to pay it "to her and her assigns," and she afterwards conveys the reversion expectant on the lease to trustees, in trust for the wife of A. during her life, the administratrix of the surviving trustee may sue the lessee for arrears of rent due as well before as after the decease of the intestate, for the purpose of defraying thereout expenses properly incurred on behalf of the property ; and it is no answer for the lessee to allege, that with the consent of the intestate, and of the administratrix since the death, he had been allowed to pay over the rents to his wife, the money not being settled to her separate use. *Dollen* v. *Batt*, 4 C. B. (N.S.) 760 ; 27 L. J., C. P. 281 ; 4 Jur. (N.S.) 835.

As to right to rent of assignee or mortgagee of the reversion, *see further*, post, K. 2. (cols. 1081 et seq.)

Severance of Land and Rent.]—Lands were subject to a lease of a way-leave at a certain rent for sixty-three years, which the lessee had the power of determining. The land and rent were sold separately by auction in two lots, and were purchased by two different persons. After some time, the purchaser of the land entered into an arrangement with the lessee, to put an end to the lease, and entered into a different one, in order to defeat the right of the purchaser of the rent : —Held, that this was contrary to equity, and the right of the purchaser of the rent was made good out of the new contract. *Wood* v. *Londonderry (Marquis)*, 10 Beav. 465 ; 16 L. J., Ch. 460 ; 12 Jur. 735.

Alternatively.]—By a turnpike act it was provided, that in leases of the tolls, the rent should be made payable to the treasurer, and that in default, every such lease should be null and void to all intents and purposes whatsoever. A lease was made whereby the rent was reserved to the trustees or their treasurer :—Held, first, that the reservation in the alternative was bad within the former part of this clause ; and, secondly, that the words "null and void to all intents and purposes" were to be construed as meaning absolutely void, and not voidable only. *Pearse* v. *Morrice*, 4 N. & M. 48 ; 2 A. & E. 84 ; 4 L. J., K. B. 21.

Lease of Mines—Royalty.]—A lessee of mines of ironstone, coals, and other minerals, for a term of thirty years, to be computed from March, 1839, demised the same, in November, 1846, to the defendant for twenty-three years, reserving a royalty upon the ore and coal raised by him, or an annual sum in lieu thereof, if the royalties in any year should not amount to that sum ; with power to the lessee to distrain for the rents, reservations, and royalties. The lessee, during the demise, assigned to the plaintiff "the rents, reservations, and royalties, and all his other the estate, right of, in, or in respect of the demised premises, and the benefit of the covenants in the lease contained." In an action by the plaintiff to recover arrears in lieu of royalties accrued since the assignment :—Held, that, by the deed of the lessee in 1846, a rent was created, and not a mere covenant in gross ; that such rent was assignable, and that the plaintiff, as assignee, could sue the defendant for such rent. *Williams* v. *Hayward*, 1 El. & El. 1040 ; 28 L. J., Q. B. 374 ; 5 Jur. (N.S.) 1417 ; 7 W. R. 563.

Time.] — A subsequent agreement may by relation operate to make a reservation of rent from the beginning. *M'Leish* v. *Tate*, Cowp. 781.

On a parol demise, rent was to be payable from the Lady Day following : evidence of the custom of the country is admissible to shew that the parties meant Old Lady Day. *Doe* d. *Hall* v. *Benson*, 4 B. & Ald. 588. S. P., *Denn* d. *Peters* v. *Hopkinson*, 3 D. & R. 507.

The defendant avowed that the rent was payable at Martinmas, to wit, November 23rd :—Held, that this must be taken to mean New Martinmas ; and the plaintiff having shewn that the rent was, in fact, payable at Old Martinmas, the court refused to set aside a verdict given for him. *Smith* v. *Walton*, 8 Bing. 235 ; 1 M. & Scott, 380 ; 2 L. J., C. P. 85.

Under an agreement for the quarterly payment of rent, the first payment becomes due at the end of the first quarter, and the custom of the country to pay rent in advance cannot be imported into it. *Doe* d. *Mitchell* v. *Weller*, 1 Jur. 622.

Under a reddendum of a yearly rent, payable by four equal quarterly payments, commencing from the 25th day of March, then instant ; the first quarter's rent is payable on the said 25th day of March ; and, consequently, the rent is a beforehand rent. *Hopkins* v. *Helmore*, 3 N. & P. 453 ; 8 A. & E. 463 ; 1 W. W. & H. 386 ; 7 L. J., Q. B. 195 ; 2 Jur. 856.

By a memorandum in writing, A. agreed to let to B. a house at a yearly rent of 50*l.*, with a proviso that A. should, in consideration of the yearly rent being duly paid, give B. quiet possession of the house ; and B. agreed to pay the rent, and all taxes. The memorandum concluded thus :—"likewise the stable, and loft over, now occupied by H., at a further rent of 25*l.* per annum, to be paid on the usual quarter-days" :—Held, that the reservation of quarterly payments applied only to the 25*l.* rent, and not to the 50*l.* *Coombes* v. *Howard*, 1 C. B. 410.

A. agreed to let, and B. agreed to take, the second floor in a house, to hold from the 25th March, 1844, for a twelvemonth certain, and thence for the continuance of the term of A.'s interest in the premises, until determined by a six months' notice from B., expiring at any quarter of a year, at the rent of 120*l.* a year :—Held, that, after the expiration of the first twelve months, the rent continued to be payable yearly. *Collett* v. *Curling*, 10 Q. B. 785 ; 16 L. J., Q. B. 390 ; 11 Jur. 890.

When Rent becomes due.]—By an agreement dated the 8th September, the defendant agreed to let a house to the plaintiff for seven years, at

an annual rent, payable quarterly, the first payment to be made on the 25th of March following:—Held, that a quarter's rent only became due on the 25th March. *Hutchins* v. *Scott*, 2 M. & W. 809; M. & H. 194; 6 L. J., Ex. 186.

Payable in Advance.]—Where there was a stipulation for "rent to commence at Michaelmas, and to be paid three months in advance, such advance to be paid on taking possession":—Held, that the stipulation could only go for the advance of the first quarter's rent. *Holland* v. *Palser*, 2 Stark. 161.

A. held premises of B. under a lease for three, seven or ten years, determinable on notice, with a stipulation that the amount of a quarter's rent should be paid by A. on taking possession, which was to be allowed to him for the last quarter's rent "on the determination of the tenancy." After a notice to determine the lease at the expiration of the third year had been given, and before its expiration, the parties verbally agreed that A. should continue tenant for another year, no express mention being made of the terms of the tenancy:—Held, that the above was, in substance, a stipulation for a forehand rent, and that in the absence of any express mention of other terms, A. continued to hold, subject to the terms of the original lease, and consequently, that the payment made on taking possession was applicable to the last quarter of the fourth year. *Finch* v. *Miller*, 5 C. B. 428.

In 1851 A. became tenant of premises under terms of a written agreement (not under seal) for a term exceeding three years, the rent payable quarterly in advance. A. occupied the premises for some time, and paid several quarters' rent, and the receipts given to him by the agent of the landlord stated that such payments were in advance, although, in fact, A. never paid the rent in advance:—Held, that although the agreement was void under 8 & 9 Vict. c. 106, s. 3, as not being under seal, still that the receipts taken were ample evidence of the tenancy being upon the terms of the rent being payable quarterly in advance. *Lee* v. *Smith*, 9 Ex. 662; 2 C. L. R. 1079; 23 L. J., Ex. 198; 2 W. R. 377.

By an agreement for the sale of a house and land, 75*l*., part of the purchase-money, was payable on signing the agreement, and 1,500*l*., the remainder of the purchase-money, was payable with interest on a day certain; and after stipulating for the delivery of an abstract of title and the time within which the title should be deemed accepted, the agreement stated that as the purchaser was to be let into immediate possession, and for the purpose of securing the due performance of the several agreements therein contained, the purchaser admitted himself to be a tenant from week to week to the vendor of the hereditaments thereby agreed to be sold, at the weekly rent of 80*l*., payable in advance:—Held, that the agreement gave a right of distress to the vendor for the sum payable as a weekly rent. *Yeoman* v. *Ellison*, 36 L. J., C. P. 326; 17 L. T. 65.

An agreement to take a house having been entered into, conditioned to pay two quarters' rent in advance, the tenant entered and failed to perform such condition. In an action to recover that sum:—Held, that a count for use and occupation did not apply to such a case, and that the plaintiff could only recover under a special count on the agreement. *Angell* v. *Randall*, 16 L. T. 489.

Defendant occupied premises from 1st December, 1830, under an agreement dated February, 1831, for the term of one year, the rent to be paid on the usual quarter days, "the first day of payment to be on the 25th December last." He paid four quarters' rent, the last payment being on 29th September, 1831, and on 4th December sent the key of the premises to the landlord, who on the 20th gave possession to a new tenant:—Held, that the agreement was for payment of rent in advance, and therefore that defendant was entitled to costs under 43 Geo. 3, c. 46, on an arrest and holding to bail for a whole quarter's rent. *Allen* v. *Bates*, 3 L. J., Ex. 39.

Amount.]—If A. agrees to let, and B. to take a messuage, from a day past, for a term of ten years, "at and under the rent of 80*l*.," this is an agreement by B. to pay a rent of 80*l*.; and therefore, if there is a power of re-entry in case of a breach of "any of the agreements therein contained," A. has a power of re-entry for non-payment of rent, and may bring ejectment, although there is no express agreement to pay the rent. *Doe* d. *Rains* v. *Kneller*, 4 Car. & P. 3.

A. demised a colliery to B., and B. covenanted to pay as rent "one-third part of the money that should arise, be made, received, or produced from the sale of the coals"; and covenanted to keep "true accounts of all coal daily raised, and to make and deliver true copies thereof to A.":—Held, that taking the two covenants together, the rent was to be calculated on the amount of coal sold, and not on the amount of money actually received. *Edwards* v. *Rees*, 7 Car. & P. 340.

In an action on an indenture of demise of a coal mine, made on the 8th July, 1805, reserving one-fourth of the coal raised, or the value in money, at the election of the lessor; and if the one-fourth fell short of 400*l*. per annum, then reserving such additional rent as would make up that annual sum, to be rendered monthly in equal portions:—Held, that the lessor having elected to take the whole in money might declare for two years and three months' rent in arrear. But even if the money rent was reserved annually, the plaintiff might remit his claim to the three months' rent, and enter up judgment for the two years' rent only. *Buckley* v. *Kenyon*, 10 East, 139.

A lease of mines was granted for thirty years in consideration of 250*l*. paid down, and a reservation of 500*l*. to be paid annually during the first ten years, which, with a power of re-entry in case of nonpayment, was reserved to the lessor, his heirs and assigns. The payments were to be made clear of all deductions for rates and taxes except property tax, and, if more than one acre per annum was worked, the 500*l*. for that year was to be increased proportionately, but no payments were to be made after the total sum of 5,000*l*. had been thus paid:—Held, that the annual payments of 500*l*. were of the nature of rent, and were not instalments of unpaid purchase-money. *Barrs* v. *Lea*, 33 L. J., Ch. 437; 12 W. R. 525.

A tenant from year to year—evicted by a civil bill decree but still in actual occupation—entered into an agreement with the landlord, by which it was agreed that he should thenceforth be tenant from year to year at a rent to be ascertained by three persons named; those persons having declined to determine the amount of the rent, and the tenant having refused to pay an increased rent demanded by the landlord, the

latter took possession under the decree :—Held, that the tenant was entitled to maintain trespass against the landlord. *M'Creesh* v. *McGeough*, Ir. R. 7 C. L. 236.

A water company was required by its act to supply water to every occupier of a house within the district, upon payment of a rate varying with the rent of such house :—Held, that the word "rent" did not necessarily mean the actual rent paid by the occupier, but must be construed to mean the proper rent to a tenant who paid the rates and charges regularly falling upon the tenant. *Sheffield Waterworks Co.* v. *Bennett*, 42 L. J., Ex. 121 ; L. R. 3 Ex. 196 ; 28 L. T. 509 ; 21 W. R. 686—Ex. Ch.

—— **How Computed.**]—In a lease of land for twenty-one years, from the 25th of March, 1848, it was covenanted that the lessee should pay a stipulated sum for the first year, with a proviso that the rent for each subsequent year of the term should be reduced or increased, according to the average price of wheat in any one year of the term, such average to be taken and ascertained from the then current year's averages, which were taken in the month of January in every year, under and by virtue of the Tithe Commutation Act (6 & 7 Will. 4, c. 71), s. 56, which is the result of the sales during seven years ending on Thursday next before Christmas Day then next preceding :—Held, that the rent must be computed according to each septennial average so published in each year. *Kendall* v. *Baker*, 11 C. B. 842 ; 21 L. J., C. P. 110 ; 16 Jur. 479.

Under a covenant in a lease the court will grant a rule to have it computed what is due for arrears of rent. *Wingfield* v. *Cleverly*, 13 Price, 53.

—— **Additional—Parol Evidence to prove.**]—Parol evidence is not admissible to prove an additional rent payable by a tenant, beyond that expressed in the written agreement for a lease. *Preston* v. *Morceau*, 2 W. Bl. 1249.

—— **Damages for Rent.**]—In a covenant for five years' rent due at the expiration of a term of years, the rent day for the last half-year not falling within it, the plaintiff may recover damages for all, except the last half-year's rent. *Long* v. *Barroughs*, 1 Vern. 247.

Improved Annual Value.]—An agreement was entered into for a lease of premises in the city of London to A. for a term of years, in consideration of a yearly reserved rent of 102*l.* 10*s.*, and of a covenant to expend 2,000*l.* in building a house upon the premises. The house was built, and the lease granted at the rent agreed. The improved annual value, after the erection of the house, was 250*l.* :—Held, that tithes, at the rate of 2*s.* 9*d.* in the pound, were to be computed not merely on the rent reserved by the lease, but on the full annual value of the premises to let, as improved by the expenditure of the 2,000*l.* *Vivian* v. *Cochrane*, 4 De G. M. & G. 818 ; 25 L. J., Ch. 553 ; 1 Jur. (N.S.) 809 ; 3 W. R. 254.

Nominal Amount—"Rent having no Money Value."]—An annual rent of merely nominal amount, e.g. 3*s.*, is not "a rent having no money value" within s. 65, sub-s. 1, of the Conveyancing Act, 1881, even though it may have in practice not been regularly paid, those words meaning, rather, a rent which, when received, has no money value. *Smith & Stott's Contract, In re*, 48 L. T. 512 ; 31 W. R. 411.

3. Apportionment.

On Death.]—Upon the death of a tenant in tail, the rent shall be apportioned. *Paget* v. *Gee*, Amb. 198 ; 3 Swanst. 694.

The 4 & 5 Will. 4, c. 22, s. 2, applies to cases in which the interest of the person interested in such rents is terminated by his death, or by the death of another person ; but does not apply to the case of a tenant in fee, or provide for apportionment of rent between the real and personal representatives of such person, whose interest is not terminated at his death. *Brown* v. *Amyot*, 3 Hare, 173 ; 13 L. J., Ch. 232. Approved in *Beer* v. *Beer*, 12 C. B. 60 ; 21 L. J., C. P. 124 ; 16 Jur. 223.

Rights of Lessee.]—Where a lease was made to A. of two houses adjoining each other, at one entire rent of 65*l.* 10*s.*, and the lessor conveyed one of the houses by deed (to which the lessee was no party) to B. in fee, at an apportioned rent of 40*l.* :—Held, that such apportionment should have been made by a jury to give it validity, inasmuch as the grantee had not acquired the same rights and remedies against A., the lessee, as he would have acquired under the legal apportionment by a jury ; the lessee not being bound by the apportionment in the conveyance to which he was no party, and the propriety of which he might dispute. *Bliss* v. *Collins*, 5 B. & Ald. 876 ; 1 D. & R. 291 ; 24 R. R. 601.

One lessee alone cannot come into chancery for apportionment. *Stafford* v. *London City*, 1 Stra. 95.

What Apportionable.]—An owner of a house, having mortgaged it in fee, and continuing in possession, let it as a ready-furnished house to the defendant. He afterwards became bankrupt, and then with the assent of his assignees, let the house ready furnished to the defendant by the week, who, after three weeks' occupation, received notice from the mortgagee to pay rent to him :—Held, in an action brought by the assignees for use and occupation of the house and furniture, that they were entitled to recover for the use of the furniture ; that the rent of the house and furniture might be apportioned, or if not, that upon the entry of the mortgagee claiming the house, and having no interest in the furniture, a new agreement might be inferred, to take the house at a reasonable rent from the mortgagee, and to pay a reasonable amount as compensation for the use of the furniture to the assignees. *Salmon* v. *Matthews*, 8 M. & W. 827 ; 11 L. J., Ex. 59.

Semble, that if an act of parliament takes away a portion of the subject-matter of a demise, the lessee is not entitled to an apportionment of the rent. *Harris* v. *Morrice*, 10 M. & W. 260 ; 12 L. J., Ex. 42.

Where land in the possession of a tenant for years is conveyed by deed, the right of the purchaser, as assignee of the reversion, to receive the whole rent for the current quarter cannot be controlled by a contemporaneous parol agreement to apportion the quarter's rent between assignor and assignee. *Flinn* v. *Calow*, 1 Man. & G. 589.

A lease for years by a rector having ceased by his death, the succeeding incumbent received from the lessee a sum of money as the rent due for the whole year, in the course of which the lessor died :—Held, that the executor was entitled to an apportionment. *Hawkins* v. *Kelly*, 8 Ves. 308.

B. mortgaged certain premises to C., and covenanted to insure, and, in the event of fire, to apply the insurance moneys in rebuilding the mortgaged premises. A fire took place, and B. rebuilt, but the premises so erected extended beyond the boundary line of the mortgaged property on to an adjoining slip of land belonging to the mortgagor. B. subsequently mortgaged this slip of land to H., and also gave him a second mortgage on the premises in mortgage to C. ; and H. afterwards joined with C. in a demise of the whole of the property, the rent being made payable to C., all parties being under the impression that the premises originally mortgaged to C. comprehended the property subsequently mortgaged to H. Upon a bill filed by H., praying an apportionment of the rent :—Held, that it was a mistake of facts, against which the court would relieve ; and an apportionment of the rent was decreed accordingly. *Harryman* v. *Collins*, 18 Beav. 11 ; 18 Jur. 501.

—— **Determination by Value.**]—When a gift of part of a farm, subject to an entire rent, described it as "containing about ninety-eight acres, subject to the proportion of rent same bears to the whole," and the gift of the other part of the farm had described it as "containing about twenty acres, subject to the proportion of rent to which the entire of the lands is subject," the proportion of the rent to be borne by the twenty acres and ninety-eight acres respectively is to be determined by their relative value, and not by acreage. *O'Connor* v. *O'Connor*, 19 W. R. 90.

—— **Of Leases for Lives.**]—An equitable tenant for life under a settlement of freehold leases for lives obtained a renewed grant for lives to himself. At his death the property was in the occupation of yearly tenants, under parol demises by him :—Held, that the rents were not apportionable either under 11 Geo. 2, c. 19, or under 4 & 5 Will. 4, c. 22. *Mills* v. *Trumper*, L. R. 4 Ch. 320 ; 20 L. T. 384 ; 17 W. R. 428.

—— **Of Land Tax.**]—Land-tax, quit-rent, &c., are not apportionable as between tenant for life and remainderman. *Sutton* v. *Chaplin*, 10 Ves. 66.

Prior Lease existing.]—A lessee of 100 acres of land accepted the lease, and entered upon the land. Upon his entry he found eight acres in the possession of a person entitled under a prior lease from the lessor, and that person kept possession of the eight acres until half a year's rent became due, and excluded the lessee from the enjoyment during that period, the lessee continuing in possession of the remainder. The prior lease was for a term extending beyond the duration of the latter lease :—Held, that the latter demise was wholly void as to the eight acres ; and that the rent was not apportionable, and the lessor was not entitled to distrain for the whole rent or any part of it. *Neale* v. *Mackenzie*, 1 M. & W. 747 ; 2 Gale, 174 ; 6 L. J., Ex. 263—Ex. Ch. Reversing 2 C. M. & R. 84 ; 5 Tyr. 1106 ; 4 L. J., Ex. 185.

Under 11 Geo. 2, c. 19, s. 15, and 4 & 5 Will. 4, c. 22, s. 2.]—The 4 & 5 Will. 4, c. 22, s. 2, does not apply to cases where the party entitled to the rent himself puts an end to the term. *Oldenshaw* v. *Holt*, 4 P. & D. 307 ; 12 A. & E. 590 ; 1 A. & H. 1 ; 11 L. J., Q. B. 221 ; 4 Jur. 1012.

A., in 1836, let land to B. under a building agreement ; the rent was to commence at Christmas, 1838, and A. to have a right of re-entry in case of non-performance on the part of B. A. availed himself of this right of re-entry, and brought an ejectment, laying the demise on the 1st January, 1839. In September, 1838, he had relet the land to C., at a rent to commence in 1840, which was equivalent in amount to that provided for by the first agreement. In an action by A. for breaking the first agreement :—Held, first, that the demise in the ejectment was to be taken as the date of the re-entry by A. ; and that he was not entitled to that portion of the rent between the previous Christmas and that day, under 4 & 5 Will. 4, c. 22, s. 2. *Ib.*

Held, that, secondly, it was properly left to the jury, as a mere money calculation, to say whether A. had sustained more than nominal damages by breach of the agreement. *Ib.*

The 4 & 5 Will. 4, c. 22, s. 2, does not apply to rents payable by tenants from year to year, which have not been reserved by an instrument in writing. *Markley, In re*, 4 Myl. & C. 484 ; 3 Jur. 767.

The 4 & 5 Will. 4, c. 22, applies where either the instrument creating the life interest or the lease under which the rent is payable is dated after the statute. *Llewellyn* v. *Rous*, 35 Beav. 591 ; L. R. 2 Eq. 27 ; 12 Jur. (N.S.) 580.

The 4 & 5 Will. 4, c. 22, s. 2, applies to rents reserved by leases granted after the passing of the act, in pursuance of a power created before the act. *Plummer* v. *Whiteley*, Johns. 585 ; 29 L. J., Ch. 247 ; 5 Jur. (N.S.) 1416 ; 1 L. T. 230 ; 8 W. R. 120. S. P., *Lock* v. *De Burgh*, 4 De G. & S. 470 ; 20 L. J., Ch. 384 ; 15 Jur. 961.

The devisee of an estate for life is not entitled, as against him in remainder, to an apportionment of rents upon parol leases from year to year, created by his testator, and not since determined by himself by any act inter vivos. *Cuttley* v. *Arnold*, 1 Johns. & H. 551 ; 28 L. J., Ch. 352 ; 5 Jur. (N.S.) 361 ; 7 W. R. 245.

A tenant from year to year has a lease for a year certain, with a growing interest, during every year thereafter, springing out of the original contract and parcel of it, and therefore, where such a tenancy has been created by an owner in fee of lands, who devises them to one for life with remainders over, the interest of the tenant from year to year, unless terminated by the devisee for life by some act inter vivos, does not determine upon the decease of the tenant for life ; and, consequently, the rent then accruing due is not apportionable under 11 Geo. 2, c. 19, s. 15. Nor, unless reserved by an instrument in writing, is such rent apportionable under 4 & 5 Will. 4, c. 22. *Ib.*

A. by will directed that, for twenty-one years next after his death, his trustees should receive and accumulate the rents and profits of his real estate, and apply them towards payment of his debts and legacies, and, subject to that term, he gave the beneficial interest in the income of his estate to B. for life :—Held, under 4 & 5 Will. 4, c. 22, s. 2, that the rent which fell due after the expiration of the twenty-one years must be apportioned between those beneficially interested

in the accumulations, and the tenant for life who was entitled on the expiration of the term. *St. Aubyn* v. *St. Aubyn*, 1 Drew. & Sm. 611; 30 L. J., Ch. 917; 5 L. T. 519; 9 W. R. 922.

A portion of the income was derived from royalties payable under mining sets or leases, when the ore should be obtained:—Held, that the rent not becoming due at fixed periods, it did not come within 4 & 5 Will. 4, c. 22, s. 2. *Ib.*

When a tenant for life, under a settlement of an estate pur autre vie, renewed the lease for lives to himself and his heirs, purchased the fee, made a parol demise for a year, but died before the end of the current half-year, and a remainderman entered and received the rent:—Held, that the rent must be apportioned between the executor of the tenant for life and the remainderman, under 11 Geo. 2, c. 19, s. 15. *Mills* v. *Trumper*, L. R. 1 Eq. 671; 12 Jur. (N.S.) 329; 14 L. T. 220; 14 W. R. 630.

A tenant in fee demised lands from year to year. He died, having devised the lands for life. The devisee for life received rent, but did not live long enough to have a right to determine the yearly tenancy:—Held, that the administrator of the tenant for life was not entitled to an apportionment of the rent under 11 Geo. 2, c. 19, s. 15. *Botheroyd* v. *Woolley*, 5 Tyr. 522; 1 Gale, 66; 4 L. J., Ex. 153.

Under Act of 1870.]—Rent as between landlord and tenant is apportionable under the Apportionment Act, 1870. *Hartcup* v. *Bell*, 1 Cab. & E. 19. Affirmed in C. A.

—— **Eviction.**]—A landlord who has wrongfully evicted his tenant between two quarter days is not entitled to the apportioned rent up to the day of eviction under the Apportionment Act, 1870. *Clapham* v. *Draper*, 1 Cab. & E. 484.

—— **Eviction by Title Paramount.**]—Where rights of shooting were demised by deed at a yearly rent (without specified gale-days) for a term of years, and during the currency of one of the years, the lessee was evicted from the premises by title paramount:—Held, that the annual rent was apportionable under the Apportionment Act, 1870, and that the lessee was bound to pay a proportionate part of the year's rent, to be apportioned in respect of time. *Elvidge* v. *Meldon*, 24 L. R., Ir. 91.

—— **Liability.**]—The Apportionment Act of 1870 not only affects the right to receive rent but the liability to pay it. *Hastings* (*Lord*), *Ex parte*, *Wilson*, *In re*, 62 L. J., Q. B. 628; 5 R. 455; 10 Morrell, 219.

—— **Valuation — Outgoing Tenant — Custom of Norfolk.**]—According to the custom of the county of Norfolk, the amount payable by the landlord in respect of valuation to the outgoing tenant is not the absolute value put by the valuers on the subject-matter of the valuation, but is the balance of that sum after deducting any arrears of rent. *Ib.*

4. ABATEMENT.

Misrepresentation as to Value.]—Reference, under the circumstances, to master upon petition of tenant to inquire into the expediency of abatement of rent both for the past and future, the landlord having been guilty of misrepresentation as to the value of the premises. *Millbank* v. *Stevens*, C. P. Cooper, 45.

By an indenture of lease a farm was demised by A. to B. at a yearly rent of 1,320*l.* for a term of twenty-one years. B., the lessee, alleged that he had taken the demised premises at the above rent upon A.'s representations of the value, which were found to be incorrect, and A. thereupon suffered the rent to remain in arrears; and about 1,000*l.* was in arrear on A.'s death in December, 1833. A.'s will contained trusts for persons, some of whom were married women and infants. The trustees of the will had forborne to sue B. for the arrears, but he had been compelled to pay the whole rent due after A.'s death. On B.'s affidavit of the above circumstances, and on affidavits of surveyors and farmers as to the exorbitancy of the rent, and from the fact that the testator himself had not enforced the rent, a reference was directed as to the proposed abatement of the rent. *Ib.*

Destruction of Premises.]—A lease contained a proviso that, in case the warehouse, or any part thereof, should at any time during the term "be destroyed or damaged by fire, flood, storm, tempest, or other inevitable accident," the rent, or a just proportion of it, should cease or abate so long as the premises should continue wholly or partly untenantable or unfit for use or occupation in consequence of such destruction or damage. During the period in which the lessor was executing the repairs the lessee was excluded from the use and occupation of the whole or a part of the premises, and he claimed an abatement of rent under the proviso:—Held, that the words "inevitable accident" imported something ejusdem generis with what had been previously mentioned, and did not apply to that which, though not avoidable so far as the lessee was concerned, was not in its nature inevitable, but resulted from the default of the lessor, and that the lessee was not entitled to an abatement of rent. *Saner* v. *Bilton*, 47 L. J., Ch. 267; 7 Ch. D. 815; 38 L. T. 281; 26 W. R. 394.

—— **By Fire.**]—*See* infra, col. 928.

Lease by Assignees of Bankrupt.]—On an application of a tenant of the assignees, a reference was made to the commissioner, who reported the rent should be reduced, which was done. On the application of some creditors, one of whom offered higher rent, the court refused to interfere. *De Begnis*, *Ex parte*, *Chambers*, *In re*, 1 Mont. & Ayr. 277; 4 Deac. & C. 225; 3 L. J., Bk. 43.

Landlord a Minor.]—This court will not make any abatement of rent of tenant of minor who holds for lives renewable for ever. *Hamilton* v. *Hamilton*, 1 Hog, 71.

If receiver, or those concerned for minor, offer any unreasonable opposition to tenant who applies for an abatement of rent, they will be compelled to answer petition of tenant and court will judge of abatement of rent. *Anon.*, 1 Hog, 68.

Landlord a Lunatic.]—The court will not direct a reference as to the reduction of rent, upon the petition of a tenant of lunatic's estate. *Town*, *Ex parte*, Turn. & R. 137.

In Foreclosure Suit.]—Where tenants hold under leases of a date prior to that of the

appointment of a receiver in a foreclosure suit over the lands which they hold, the court has not jurisdiction either to remit arrears or to grant a prospective abatement of the rents which by their leases the tenants are bound to pay, unless the owner of the lands, and the plaintiff, and other parties interested in the rents, consent to such remission or abatement; secus autem, in the case of the estate of an infant or lunatic under the control of the court. *Hamilton* v. *Nagle*, 1 Ir. Ch. R. 513.

Agreement for — Specific Performance.]—A bill will not lie by a tenant against his landlord for a specific performance of a promise in writing signed by him to reduce the rent of lands demised by indenture in consideration of previous expenditure thereon, though there had been an acceptance of the reduced rent for seven years. *Fitzgerald* v. *Portarlington*, 1 Jones, 431.

But the tenant ought to have reasonable notice from his landlord, that he would insist on the rent reserved by the lease. *Ib.*

A. being possessed for a term of 820 years of lands and premises at B. in 1832 demised them to C. for 800 years, at a rent of 140*l.*, subject to the usual covenants to repair and pay the yearly rent. C. having entered and expended money on the premises, conceiving the reserved rent too high, at his solicitation A., in 1838, agreed by letter to reduce the rent, "in consideration of the permanent improvements made and promised to be made at 130*l.* per annum for the residue of the term." C., after the date of the letter, continued making improvements, and then sublet at a fine to D. at the original rent of 140*l.* D. afterwards, for 100*l.*, purchased from C. a similar reduction in his rent, and thereupon A.'s letter was handed over from C. to D. A. received the reduced rent for some years from D., but then insisting on the full rent, on a bill filed by C., to which D. was no party, against A. for a specific performance of this agreement:—Held, that the consideration for the promise by A. to reduce the rent was too vague and uncertain to allow a court of equity to decree a specific performance. Held, also, that there must be mutuality in the agreement, and it ought to be enforced. Held, also, that D. ought to have been a party to the bill. *Morgan* v. *Rainsford*, 8 Ir. Eq. R. 299.

And see *M'Kay* v. *M'Nally*, ante, col. 904.

—— **Non-payment—Distress for full Rent—Recovery of Difference.**]—Where a landlord had, on an assignment of the lease, assented to a readjustment in the mode of paying the rent, and the tenant made default in payment at the reduced rate, and subsequently became bankrupt, when the landlord distrained for the full rent reserved under the lease, the court held that the tenant's trustee in bankruptcy could not recover from the landlord the difference between the full and reduced rent, the landlord's rights having revived on non-performance by the tenant of the terms of the agreement. *Fitzgerald* v. *Portarlington* (supra), explained. *Smith & Hartogg, In re, Official Receiver, Ex parte*, 15 R. 641; 73 L. T. 221; 44 W. R. 79; 2 Manson, 400.

—— **Presumption of.**]—An agreement for the reduction of rent presumed from the receipt of the reduced rent, which was consistent with the recital in a settlement, though, during the greater part of the period, a tenant for life received the rent; and the reduction held to extend to the entire interest, which was an estate for lives and a term of years in remainder, and not to be confined to the estate for lives. *Enraght* v. *Haughton*, 8 Ir. Eq. R. 274.

Reference as to.]—Where a tenant applied for a reference as to whether a composition should be accepted for his arrears of rent, it was granted at his expense, and upon other very strict and special terms. *Fitzgibbon* v. *Flynn*, Sau. & Sc. 687.

In an administration suit reference was made, under the circumstances, on the petition of the tenant, to inquire whether there ought to be an abatement of his rent. *Lateward* v. *Schreiber*, C. P. Cooper, 46, n.

Motion for.]—A motion for an abatement by a tenant who held at an exorbitant rent, was refused with costs, though not opposed by the parties in the cause. *Maguire* v. *Richards*, Sau. & Sc. 690.

5. Premises Let for Immoral Purposes.

An action will not lie at the suit of a party who has let lodgings to an immodest woman to enable her to consort with the other sex; otherwise, if the woman merely lodges there, and receives her visitors elsewhere. *Appleton* v. *Campbell*, 2 Car. & P. 347.

So, where the lodging was under a weekly tenancy, and it did not appear that the premises had been originally let for the purpose of prostitution:—Held, that the plaintiff could not recover the weekly rent which accrued after he was fully informed of the defendant's mode of life. *Jennings* v. *Throgmorton*, R. & M. 251; 27 R. R. 746. And see *Lloyd* v. *Johnson*, 1 Bos. & P. 340; 4 R. R. 822.

In an action for use and occupation of a lodging, it being set up that the defendant was an infant and a prostitute, and shewn that the lodging was so let with the plaintiff's knowledge, for the purpose of prostitution, the action was held not to be maintainable. *Crisp* v. *Churchill*, 1 Bos. & P. 340; 4 R. R. 822. S. P., *Girardy* v. *Richardson*, 1 Bos. & P. 341, n.; 1 Esp. 13.

6. Premises not Tenantable.

Implied Condition.]—There is no implied warranty attached by law to a demise of land or the vesture of land, that it will answer the purpose which the lessee had in view when he took it. *Sutton* v. *Temple*, 12 M. & W. 52; 13 L. J., Ex. 17; 7 Jur. 1065. S. P., *Hart* v. *Windsor*, 12 M. & W. 68; 13 L. J., Ex. 129; 8 Jur. 150.

Therefore, where a party entered into a written agreement to take certain acres of eatage for cattle, from the 8th September, 1842, till the 6th April, 1843; and after he had put in his cattle, discovered that the land was covered with lumps of refuse paint, which poisoned several of the cattle; but there was no evidence to shew that the paint was put there by the landlord, or that he knew of its being on the land:—Held, that the tenant was not released from the obligation of paying the rent stipulated for up to the end of the term. *Ib.*

The decision in *Smith* v. *Marrable*, 11 M. & W. 5; 12 L. J., Ex. 223 (post, col. 1281), that every

ready-furnished house is let under an implied condition that it is in a fit state for immediate occupation, is distinguishable on the ground that it is a mixed contract for a house and for personal chattels. *Ib.*

In an action by a landlord for rent, the tenant pleaded, in substance, that through the neglect and default of the landlord the house and premises which formed the subject of the letting had become unfit for habitation, in consequence of defects which the tenant was not bound to rectify, and that the landlord having refused to remedy these defects when required to do so, the tenant quitted, and gave up to the landlord possession of the house and premises before any of the rent claimed had accrued :—Held, a bad plea. *Murray* v. *Mace*, Ir. R. 8 C. L. 396.

In the absence of any agreement on the subject, a person who agrees to take a house must take it as it stands, and cannot call on the lessor to put it into a condition which makes it fit for living in. *Chappell* v. *Gregory*, 34 Beav. 250.

—— **Furnished Apartments.**]—*See* post, O. 2 (cols. 1281 et seq.)

Express Condition.]—Where a party was tenant from year to year of malting premises, which, by reason of the default of the landlord in not repairing, according to his agreement so to do, had become unfit for malting purposes :—Held, that this was no defence to an action for rent due subsequently to the premises becoming so unfit. *Surplice* v. *Farnsworth*, 7 Man. & G. 576 ; 8 Scott (N.R.) 307 ; 13 L. J., C. P. 215 ; 8 Jur. 760.

Upon the letting of a furnished house for immediate occupation, with an express condition that it is fit for occupation, if it is not so, and is at once given up on that account, the landlord cannot recover either the rent or for use and occupation. On such a contract, whether express or implied, it is a breach of the condition if the house is so infested and overrun with bugs, as to render it unfit for occupation ; and as the condition applies to the whole house, it is a breach if any of the rooms are in that state. But it must appear that the nuisance exists to a serious and substantial extent, and is such as the tenant cannot reasonably be expected either to endure or to extirpate. *Campbell* v. *Wenlock* (*Lord*), 4 F. & F. 716.

7. Premises Let Pending Contract for Sale or Lease.

Sale—When Abortive.]—Where a man agrees to purchase premises on an assurance that the person of whom he purchases has a long term in them, and on the faith of such assurance, at a considerable expense, enters into the possession of them, he will not, on his refusing to complete his purchase (on account of the seller having a shorter term), be charged in an action for use and occupation. *Hearn* v. *Tomlin*, 1 Peake, 253 ; 3 R. R. 684.

Where a party is let into possession of land under a contract of purchase, which afterwards goes off, he is liable to an action for use and occupation at the suit of the vendor, for the period during which he continues in possession after the contract went off. *Howard* v. *Shaw*, 8 M. & W. 118.

If a purchaser takes possession of premises under a contract of sale, which on account of a defect in the vendor's title, fails to be completed, the vendor cannot afterwards recover rent for the period of the purchaser's possession, upon an implied contract for use and occupation. *Kirtland* v. *Pounsett*, 2 Taunt. 145.

Where a person was in possession of premises under an agreement for a lease, which was never executed by reason of a default of the lessor, and afterwards gave up the possession :—Held, that he was not liable, although he had received rent from the under-tenants during the period of his occupation. *Rumball* v. *Wright*, 1 Car. & P. 590.

Where the owner of an estate contracted to sell it to another, who thereupon sold part of the property so contracted for by auction, to a third person, and the sub-vendee obtained possession, and the original vendor afterwards refused to perform his contract ; on which a suit in equity was brought, pending which the original vendor obtained possession from the sub-vendee, on a demand to be restored to it, it being rumoured that the original purchaser had failed in the suit instituted for specific performance ; if, in fact, the plaintiff should ultimately succeed in that suit, and the estate is in consequence conveyed to the purchaser under a decree of the Court of Chancery, the sub-vendee may maintain an action for use and occupation against the original vendee, for all the time during which he held the possession so obtained from the second purchaser. *Hull* v. *Vaughan*, 6 Price, 157.

Where a vendee of an estate sold by auction has been suffered to enter upon and hold the premises while the title was under investigation, and the contract has afterwards been determined for want of title the vendor cannot on these grounds only recover for use and occupation, although the occupation has been beneficial. *Winterbottom* v. *Ingham*, 7 Q. B. 611 ; 14 L. J., Q. B. 298 ; 10 Jur. 4.

A. purchased lands from B. under a contract of sale not in writing, went into possession, and under such contract remained in such possession for several years without paying rent :—Held, that B. could not maintain an action for use and occupation against A., as the facts of the case rebutted the implied contract to pay rent for the lands. *Corrigan* v. *Woods*, Ir. R. 1 C. L. 73 ; 15 W. R. 318.

When a purchaser has entered into possession of lands under a contract of sale, which is subsequently rescinded, he is not liable for use and occupation during the period between the entry and the rescission. *Markey* v. *Coote*, Ir. R. 10 C. L. 149.

If, after the rescission, the purchaser remains in possession, he is liable in respect of his subsequent occupation, and it is for the jury to say whether there was a creation of a new tenancy at will, containing an implied agreement on the part of the purchaser to pay a fair compensation for his occupation, or whether the former tenancy had simply been determined without the creation of any new tenancy, and the purchaser had become liable as a trespasser. *Ib.*

When a purchaser enters under a contract of sale, the tenancy at will arising therefrom is determined by a rescission of the contract, without any demand of possession. *Ib.*

Claim, that by an agreement for the purchase by the plaintiff of property belonging to the defendant, the purchase was to be completed on the 29th of September, 1869, from which time

the plaintiff was to receive all rents and profits and to pay interest on the purchase-money until the completion of the purchase. That the purchase was not completed until the 13th of March, 1876, and that the plaintiff had duly paid the interest. That the defendant had remained in possession, but had paid no rent. That the plaintiff claimed rent for use and occupation at the rate of 150*l.* per annum as a fair value. The defendant demurred:—Held, that under the agreement a fair rent must be paid by the defendant for the time he remained in possession, and that by demurring he had admitted 150*l.* a year to be a fair rent. *Metropolitan Ry.* v. *Defries*, 2 Q. B. D. 387; 36 L. T. 494; 25 W. R. 841.

In July, 1867, L. sold to a railway company a house in which he was carrying on the business of a victualler, the terms being that the purchase-money was to be paid on the 25th of March, 1869, or at such earlier time as the company should choose, possession to be given on payment, they paying 5 per cent. interest in the meantime; and he was to be their tenant at a given rent, the tenancy not to be determined before the 25th of March, 1869, unless the company, after three months' notice, paid the money sooner, but to be determinable on the 25th of March, 1869, by a week's notice. The interest and rent were paid up to the 25th of March, 1869. L. gave due notice to determine the tenancy on that day; but the company not having the purchase-money ready, he refused to give up possession, and in April filed a bill for specific performance. On the 18th of November, 1869, a decree for specific performance, with a declaration that the title had been accepted, and an order for payment of the purchase-money, with interest from the 25th of March, 1869, was made; and an inquiry was added whether, having regard to the circumstances and conduct of the parties, the company was entitled to any and what allowance in respect of L.'s occupation of the premises after the 25th of March, 1869:—Held, that the company was not entitled to any allowance by way of occupation rent. *Leggott* v. *Metropolitan Ry.*, L. R. 5 Ch. 716; 18 W. R. 1060.

Lease.]—An occupation under an agreement for assigning a lease, where it was agreed that the assignee should pay the lessee, until the completion of the assignment, at the rate of 100*l.* per year, constitutes the relation of landlord and tenant between the lessee and assignee. *Saunders* v. *Musgrave*, 6 B. & C. 524; 9 D. & R. 529; 2 Car. & P. 294; 5 L. J. (O.S.) K. B. 192; 30 R. R. 414.

Agreement to grant a lease to S., when he should have erected certain buildings on the premises to be demised. No covenant to pay rent before the execution of the lease. S., after the buildings were erected, holds the premises, subject to the terms in the lease, but is liable for use and occupation. *Banister* v. *Usborne*, Peake, Ad. C. 76.

A receiver of an estate in which the plaintiff had an equitable interest under a settlement vesting it in trustees, let the defendant into possession under an agreement with himself in writing, in which he described himself as agreeing, "on behalf of the estate," to let for a term of years. The plaintiff declining to sanction any other than a yearly letting, a correspondence ensued between him and the defendant, in which the latter intimated that, as he could not get a lease, he should leave as soon as he could; and he did leave before he had been six months in possession:—Held, that he was not liable to the plaintiff, either in trespass or for use and occupation; and, semble, that he was not liable at all. *Sloper* v. *Saunders*, 29 L. J., Ex. 275.

8. After Premises have been Destroyed by Fire.

Generally.]—The landlord of premises demised under a written agreement may recover against his tenant in an action for use and occupation, for the rent accruing after the premises are burnt down, and no longer inhabited by the tenant. *Baker* v. *Holtpzaffell*, 4 Taunt. 45; 4 Ves. 115; 13 R. R. 556.

There is no equity in favour of a lessee of a house liable to repair with the exception of damage by fire, for an injunction against an action under the contract for payment of rent, upon the destruction of the house by fire. *Ib.*

Tenants from year to year occupied a second floor, which, during their occupation, was consumed by an accidental fire:—Held, that, notwithstanding the destruction of the premises, they were liable to an action for use and occupation for the period which had elapsed between the fire and the regular determination of their tenancy. *Izon* v. *Gorton*, 5 Bing. (N.C.) 501; 2 Arn. 39; 7 Scott, 537; 8 L. J., C. P. 272; 3 Jur. 653.

Where furnished apartments in a house have been let by verbal contract at a sum payable quarterly, and the premises are destroyed by fire in the middle of the quarter, an action lies for the use and occupation during the current quarter, until the fire, at a rate proportioned to the time of actual occupation, if it appears that both parties have agreed that the occupier's liability does not continue after the occurrence of the fire; for such agreement negatives the supposition of a demise for a certain time, and shews a contract in respect of the occupation de die in diem. *Parker* v. *Gibbins*, 1 Q. B. 421; 1 G. & D. 10; 5 Jur. 1036.

A lessee who covenants to pay rent and to repair, with an express exception of casualties by fire, is liable upon the covenant for rent, though the premises are burnt down, and not rebuilt by the lessor after notice. *Belfour* v. *Weston*, 1 Term Rep. 310; 1 R. R. 210.

No equity in favour of a lessee of a house liable to repair with the exception of damage by fire, for an injunction against an action under the contract for payment of rent upon the destruction of the house by fire. *Holtpzaffell* v. *Baker*, 18 Ves. 115.

Lessee of a house and wharf covenants to repair, accidents by fire excepted. The house is burned down, and the lessor having insured, received the insurance money, but neglected to rebuild, and brought an action at law for the rent. Bill for an injunction, and held proper till the house is rebuilt, but went off on another matter. *Brown* v. *Quilter*, Ambl. 619; 2 Eden, 210. *But see* 1 Sim. 146.

A tenant covenanting to repair, damage by fire only excepted, continues liable to payment of rent notwithstanding the premises are destroyed by fire. *Hare* v. *Groves*, 3 Anstr. 687; 4 R. R. 835.

When Tenant liable to reinstate.]—A testator directed his trustees to allow A. to occupy a

mill, so long as he should think proper to do so, "he, nevertheless, keeping the premises in good and tenantable repair, and repairing," at a rent of 100*l*. A. accepted the gift, but the premises were afterwards totally destroyed by accidental fire :—Held, that he was bound to reinstate them, and was liable for the rent in the meanwhile, and that he could not escape from the liability to rebuild by declining any longer to retain them. *Gregg* v. *Coates*, 23 Beav. 33 ; 2 Jur. (N.S.) 964 ; 4 W. R. 735.

Letting of Premises and Steam Power—Liability of Tenant.]—The plaintiffs agreed to let and the defendants to take, in consideration of a yearly payment, all the room and power in a mill, except a portion of the premises in which the machinery stood. The agreement provided that the plaintiffs should put in steam pipes, find certain machinery and put the place in tenantable repair, and that the engine should run a certain number of hours a week. The payment was to commence in proportion to the amount of machinery running. During the defendants' occupation the premises were burnt down. The plaintiffs sued for payment for a period after the fire :—Held, that, notwithstanding that the fire had prevented the plaintiffs from performing their part of the agreement in keeping the machinery at work, still the payment sued for was rent, and the defendants were liable. *Selby* v. *Greaves* (L. R. 3 C. P. 594) approved. *Marshall* v. *Schofield*, 47 L. T. 406 ; 31 W. R. 134—C. A.

Deduction in Rent made.]—By an agreement between F., the receiver appointed in chancery for lands and buildings thereon, and J., it was recited that J. had expended money in improving the premises on the understanding that a lease should be granted to him, on the terms after mentioned, pursuant to a previous agreement with parties at the time interested, in consideration whereof F. had consented to enter into this agreement. And it was witnessed that F., in consideration of the premises, and according to his power, agreed with J. to let to him, and J. agreed to take the land, with the buildings thereon lately converted at J.'s expense into a mill, and other things to hold for twenty-one years, at rent payable quarterly ; and it was agreed that, when that agreement should have been approved of by the court of chancery, or the master, or if it should be ascertained that such sanction was not necessary, a lease should be executed by F. to J. (and a counterpart by J.) under the terms of the agreement stipulated, which should contain covenants on the part of J. to pay the said rent in manner before mentioned, damage by fire excepted ; and that, until the lease should be granted, F. might distrain "for all or any part of the rent hereby agreed to be paid." Provided that the agreement should be in all respects subject to the approbation of the court of chancery or the master, F. undertaking to endeavour to obtain such approbation, but if the approbation were refused, the agreement to be void. J. entered into possession, and erected new buildings :—Held, that J. was tenant from year to year on such terms as would be inserted in a lease pursuant to the agreement so far as they were applicable to a tenancy from year to year. That, if any part of the premises originally demised was destroyed by fire, the result would be, not to destroy or suspend the whole rent, but to entitle J. to a deduction from the rent according to the proportion which the annual value of the destroyed part bore to the annual value of the whole, taking the whole to be the premises as originally demised, not as improved by subsequent additions made by J. *Bennett* v. *Ireland*, El. Bl. & El. 326 ; 28 L. J., Q. B. 48 ; 4 Jur. (N.S.) 1104.

9. Eviction and Surrender.

Eviction.]—Where a tenant from year to year, at a rent payable half-yearly, quitted at the end of a current year without giving notice ; and the landlord relet the premises before the end of the next half-year to another tenant :—Held, that the landlord had evicted the first tenant, and could not maintain use and occupation against him for any rent subsequent to the period when he quitted. *Hall* v. *Burgess*, 8 D. & R. 67 ; 5 B. & C. 332 ; 4 L. J. (O.S.) K. B. 172.

Where premises are let at an entire rent, an eviction from part, if the tenant thereupon gives up possession of the residue, is a complete defence to an action for use and occupation. *Smith* v. *Raleigh*, 3 Camp. 513 ; 14 R. R. 829. *Newton* v. *Allin*, 1 G. & D. 44 ; 1 Q. B. 518 ; 10 L. J., Q. B. 179 ; 6 Jur. 99.

Where lands have been let to one, who underlets to others, and the latter receive a notice to quit from the original landlord, in consequence of which one of them does so, and the lands occupied by him remain unlet for a year, and are then let by the original tenant, the original landlord cannot recover for the rents of the unoccupied premises ; such circumstances amount to an eviction, and may be pleaded to the whole demand. *Burn* v. *Phelps*, 1 Stark. 94 ; 18 R. R. 749.

An eviction by a landlord of his tenant from a part of the demised premises creates a suspension of the entire rent during the continuance of the eviction, but the tenancy is not thereby put an end to, nor is the tenant thereby discharged from the performance of his covenants other than the covenant for the payment of the rent. *Morrison* v. *Chadwick*, 7 C. B. 266 ; 6 D. & L. 567 ; 18 L. J., C. P. 189.

To constitute an eviction of a tenant by his landlord, which will operate as a suspension of rent, it is not necessary that there should be an actual physical expulsion from any part of the premises ; but any act of a permanent character, done by the landlord or by his procurement, with the intention of depriving the tenant of the enjoyment of the premises as demised, or any part of them, will operate as such eviction. *Upton* v. *Townend*, 17 C. B. 30 ; 25 L. J., C. P. 44 ; 1 Jur. (N.S.) 1089 ; 4 W. R. 56.

The existence of the intention is a question for the jury. *Ib.*

Where, after a fire on premises let to two different tenants by A., who was entitled to have the premises restored by the superior landlord, out of certain insurance moneys, A. approved of a new plan, submitted to him by the superior landlord without the consent of the tenants, and the premises when rebuilt on that plan, were, in the one case, a little smaller, and in the other a little larger than before, and there was evidence of an intention to oust the tenants :—Held, in an action by A. for use and occupation, for rent accruing after the premises were so far advanced

in rebuilding as to be permanently altered, that there was an eviction to which A. was a party, and that, therefore, the rent was suspended. *Ib.*

The rent of four houses, demised for a term of years, being in arrear, and the lessee having assigned his lease, and two of the houses being unoccupied, the lessor took possession of these two, first by putting a police constable in charge of them, and subsequently by putting a person in possession, under a parol agreement to grant a lease of the four houses as soon as possession of the two others was obtained:—Held, that taking possession of the unoccupied houses did not amount to an eviction. *Wheeler* v. *Steverson*, 6 H. & N. 155; 30 L. J., Ex. 46; 3 L. T. 702; 9 W. R. 233.

A lessee of mines of ironstone, coals, and other minerals demised the same for a term of years to the defendant, reserving a royalty upon the ore and coal raised by him, or an annual sum in lieu, if the royalties in any year should not amount to that sum, with power to the lessee to distrain for the rents, reservations and royalties, and with liberty to the defendant, during the demise, to use jointly with the lessee a railway then on the land demised; the defendant covenanting to repair the same or to do so jointly with others who might use it, he having leave to divert it at his own expense if he thought fit:—Held, that the fact that the defendant had been prevented by the plaintiff from using the railway, did not constitute an eviction so as to disentitle the plaintiff to the rent, the use of the railway being an easement, and not part of the demise. *Williams* v. *Hayward*, 1 El. & El. 1040; 28 L. J., Q. B. 374; 5 Jur. (N.S.) 1417; 7 W. R. 563.

An owner of a house let the first floor to the defendant, who being desirous to underlet, put a man in to show the rooms, and put up a bill in the window, stating that the rooms were to be let. The owner, annoyed by this proceeding, and by the conduct of the man, turned him out of the house, and took the bill down, but left the keys in the rooms. In an action for rent, the judge left it to the jury to say whether the assault upon the man was for the purpose of expelling him, or with the intention of evicting the defendant:—Held, right. *Henderson* v. *Mears*, 28 L. J., Q. B. 305; 5 Jur. (N.S.) 709; 7 W. R. 554. *S. C.*, at nisi prius, 1 F. & F. 636.

—— **Subsequent Possession.**]—If the tenant, after eviction from part, continues in possession of the residue, he is liable upon a quantum meruit. *Stokes* v. *Cooper*, 3 Camp. 513, n.

In an action upon a parol demise, a plea that during the term it was agreed that the tenant should relinquish the possession to the landlord for a month, after which the possession should be resumed by the tenant; and that he did relinquish the possession, but the landlord would not restore the possession, is bad, as not showing an eviction or a surrender. *Dunn* v. *Di Nuovo*, 3 Man. & G. 105; 3 Scott (N.R.) 487; 10 L. J., C. P. 318.

Surrender.]—A. demised rooms of a house to B. for a year, at a rent payable quarterly. During the current quarter, in consequence of disputes, B. told A. that he would leave; A. assented, and, on B.'s leaving, accepted possession of the rooms:—Held, that A. could recover neither the whole quarter's rent nor rent pro ratâ for occupation for any period short of the quarter. *Grimman* v. *Legge*, 8 B. & C. 324; 2 M. & Ry. 438; 6 L. J. (O.S.) K. B. 321.

If a landlord, in the middle of a quarter, accepts from his tenant the key of the house demised, under a parol agreement that, upon her then giving up the possession, the rent shall cease, and she never afterwards occupies the premises, he cannot recover for the time subsequent to his accepting the key. *Whitehead* v. *Clifford*, 5 Taunt. 518; 15 R. R. 579.

In an action to recover a quarter's rent for the use and occupation of a house, under the terms of a lease held by the defendant of the plaintiffs, who were joint-tenants of the reversion, it appeared that there had been a concealment, at the time of the execution of the lease, of the fact that arrears of ground-rent and land tax were due upon the premises, and that the supply of water had been cut off, and it also appeared that other disputes had afterwards arisen between the parties:—Held, that the delivery of the key of the street door by the defendant's wife to one of the plaintiffs, and its acceptance by him, was a surrender of the lease by operation of law, there being evidence from which the jury inferred an authority in the wife to act for her husband, and in the plaintiff who received the key to act for his co-tenant; and that such surrender, having been made before the rent sued for had become due, was a good defence to the action *Dodd* v. *Acklom*, 6 Man. & G. 672; 7 Scott (N.R.) 415; 13 L. J., C. P. 11; 7 Jur. 1017.

—— **Of Part of Premises.**]—Semble, a surrender of part of the lands demised by a lease will destroy a power of entry for nonpayment of rent. *Mortimer* v. *Shortall*, 1 Con. & L. 417; 2 Dr. & War. 363.

Landlord Advertising Premises to Let.]—In an action for use and occupation of apartments, which the defendant had quitted without giving notice, the plaintiff having put up a bill to let the apartments will not prevent his recovering. *Redpath* v. *Roberts*, 3 Esp. 225.

Landlord in Profitable Occupation.] — If a tenant has left a house unoccupied, and the landlord enters and is in the profitable occupation of the house, he cannot recover rent from the tenant for any time after such profitable occupation; but if he merely puts a person into the house to take care of it and prevent depredations, it would be otherwise. *Bird* v. *Defonvilele*, 2 Car. & K. 415.

Pleadings—Defence.]—To a declaration by A. against B. for 191*l.* 5*s.*, due for two and a half years' rent under a demise by deed, B. pleaded, as to 40*l.* 10*s.*, that before the making of the deed, A. conveyed parcel of the premises to C. in fee, who devised the same to D., his wife and their heirs; that, after the commencement of the suit, D. and E. gave notice of their title, and required of him payment of such portion of the rent not paid over to the plaintiff at the time of such notice as might, on a just apportionment, be the just proportional part thereof in respect of the parcel of the premises; and D. and E. then gave notice to and threatened B., that, if he should neglect or refuse forthwith to pay over such proportional part to D. and E., they would immediately eject and expel him from the parcel; that 40*l.* 10*s.* was the sum which, upon a just apportionment of the rent, would be and was the proportional part of the rent in respect of the parcel,

and was, at the time of the notice, unpaid to A.; that the rent sued for accrued after the death of C.; that if B. had not paid the 40*l.* 10*s.* to D. and E., they would have proceeded to eject the defendant from the parcel of the premises; wherefore B., after the commencement of the suit, necessarily and unavoidably paid them that sum; and that A. never had anything in the parcel of the premises, except as appeared in the plea:—Held, that this was neither a good plea of eviction, the notice being subsequent to the rent becoming due, nor a good plea of payment, inasmuch as the alleged payment was not in satisfaction of any charge upon the land, or of any debt due from A. *Boodle* v. *Cambell*, 7 Man. & G. 386; 2 D. & L. 66; 8 Scott (N.R.) 108; 13 L. J., C. P. 142; 8 Jur. 475.

In an action for nonpayment of rent, on an indenture by husband and wife, and under seal of the wife (according to the provisions of 32 Hen. 8, c. 28, s. 3), the declaration stated that the husband and his wife, since deceased, demised the premises to the defendant for twenty-one years, and that he covenanted to pay rent to the husband and wife, and heirs of the wife; that the wife died, and that after her decease, rent became due to her husband: plea, that the husband never had anything in the premises, but in right of his wife, whose estate they were, and that she died before the rent became due, without issue, and that her heir threatened to eject the defendant unless he would attorn and become tenant to him, and that he was accordingly obliged to do so:—Held, that it was not necessary for the defendant to shew actual eviction by the heir, and that the plea was a discharge to the action; on the grounds that the lease was not voidable by the heir, but was a good and subsisting lease, and that he was only entitled to the rent, and could not have entered to evict or eject the defendant without being considered as a trespasser. *Hill* v. *Saunders*, 7 D. & R. 17; 4 B. & C. 529; 9 Moore, 238; 2 Bing. 112; 1 Car. & P. 80; 4 L. J. (O.S.) K. B. 2; 28 R. R. 375.

In an action by a landlord against his tenant, on a farming lease, assigning breaches on his covenants: — 1, to repair; 2, not to plough meadow land; 3, or depasture orchards; 4, or cut, lop or injure trees, woods or plantations; 5, or assign or underlet the premises, or any part thereof, without the landlord's consent in writing; he pleaded that, before any of the breaches assigned, he was evicted and kept out of part of the demised premises by the authority of the plaintiff:—Held, that the plea afforded no defence to the action. *Newton* v. *Allin*, 1 G. & D. 44; 1 Q. B. 518; 10 L. J., Q. B. 179; 6 Jur. 99.

Proof.]—Action for rent on a lease. Plea, that, before the lease was made, P. impleaded the plaintiffs, and had judgment of elegit against their lands; that the inquisition found the plaintiffs seised of the demised premises then leased to B., subject to two mortgages for years; that the sheriff delivered the premises to P., to hold the same till his damages and costs should be levied; that before the rent became due the defendant was evicted by P., who entered, and ejected, expelled, put out and amoved the defendant therefrom, and kept and continued him so ejected; that the sum of 1,000*l.* was still due to P., which was not levied. At the trial the lease, elegit and inquisition was put in, and it was proved that P. had called on the defendant to pay him rent, or he, P., would turn him out; on which the defendant attorned to him without privity of the plaintiffs, his lessors:—Held, that the plaintiffs were entitled to recover, as P.'s elegit only entitled him to the reversion expectant on the mortgages by the lessors. *Poole Corporation* v. *Whitt*, 15 M. & W. 571; 16 L. J., Ex. 229.

Held, also, that the expulsion as pleaded, was not established by the evidence. *Ib.*

10. Recovery of.

a. By Action.

When Maintainable.]—By a lease it was stipulated that the lessees should be at liberty to retain a rent of 1,100*l.* a year, or any part thereof, upon giving the lessor a bond to pay whatever they so retained, at the end of seventeen years, with interest. The lessees having omitted to pay the rent or give a bond, and the lessor having sued for the rent, the court refused to stay proceedings, on an affidavit, that, since the commencement of the suit, the lessees had executed and tendered to the lessor a bond for the amount retained and to be retained. *Jones* v. *Wingfield*, 3 M. & Scott, 846; 10 Bing. 308.

An action lies for rent reserved by indenture, and accruing before a re-entry for a forfeiture, notwithstanding the lessor, under such re-entry, is to have the premises again, "as if the indenture had never been made." *Hartshorne* v. *Watson*, 4 Bing. (N.C.) 178; 5 Scott, 506; 6 D. P. C. 404; 1 Arn. 15; 7 L. J., C. P. 138; 2 Jur. 155.

Where premises are demised by indenture at an entire rent, and there is a covenant by the lessee to pay such rent, no action for rent in arrear can be brought on such covenant, unless the lessee has been let into the full possession of the premises demised. *Holgate* v. *Kay*, 1 Car. & K. 341.

Where in such an action, the defendant in his plea sets forth the lease, and then avers, that "he entered and was possessed" of the premises thereunder, this will not estop him from proving that, when he entered, he found some part of the premises in the possession of a third party under an adverse title. *Ib.*

A landlord cannot maintain an action of covenant for rent against an under-tenant. *Halford* v. *Hatch*, 1 Dougl. 183. *See also cases*, col. 902, et seq.

—— **Surrender by Operation of Law.**]—The right to recover rent accrued due, and which has been reserved on a parol demise, is not extinguished by a surrender of the term by operation of law, notwithstanding the absence of a personal covenant by the tenant to pay such rent, but can be enforced by an action for the use and occupation of the premises demised, under the provisions of s. 14 of 11 Geo. 2, c. 19. *Shaw* v. *Lomas*, 59 L. T. 477; 52 J. P. 821.

—— **Agreement for Surrender between Lessor and Assignee, saving Rights against Lessee.**]—Where a lessor agrees in writing with an assignee of the lease to accept a surrender without prejudice to his rights against the original lessee, and takes actual or constructive possession of the premises, there is a surrender of the lease by operation of law, and the lessor is not entitled to subsequent rent from the original lessee. *Clements* v. *Richardson*, 22 L. R. Ir. 535.

—— **Under Process of Outlawry—Equitable Relief.**]—Under process of outlawry, even in a civil action, the landlord of the defendant is not in strictness entitled to rent by 8 Ann. c. 14, s. 1. The defendant's goods being forfeited in point of law, the landlord's remedy is by motion to the equitable jurisdiction of the court from which the process issues, and not by action against the sheriff. *Brandling* v. *Barrington*, 6 B. & C. 467; 5 L. J. (o.s.) K. B. 181.

Semble, the court will give relief, by equity of the statute, where the crown is not interested. *Ib.*

—— **By Coparcener.**]—One coparcener cannot sue separately for his portion of rents accruing to him and his fellows. *Decharms* v. *Horwood*, 4 M. & Scott, 400; 10 Bing. 526; 3 L. J., C. P. 198.

An action will not lie by one of three coparceners to recover his portion of rents of the estate received by an agent, where the agent claims the rents under a devise to himself. *Ib.*

—— **By Grantee under Agreement for Overlease not carried out.**]—The defendant having received possession of the premises as tenant for a short period, from trustees of the property, shortly afterwards the trustees entered into a written agreement with the plaintiff, by which, upon the performance of certain conditions, they were to give her a lease of the premises for a long term. This fact was communicated to the defendant; he expressed his satisfaction and the plaintiff's agent made some repairs by his desire. The defendant paid the plaintiff the rent of the running quarter, under a threat of distress; and under a notice, he paid the rent of the ensuing quarter to the trustees. In an action for use and occupation for the quarter's rent thus paid:—Held, that it was competent to the defendant to shew that the agreement for giving the lease was not carried into effect, and consequently that the parties had reverted to their original position, and the plaintiff had no right to receive the rent. *Brook* v. *Biggs*, 5 L. J., C. P. 143; 2 Bing. (N.C.) 572; 2 Sc. 803.

—— **Against Person Occupying in place of Original Tenant.**]—A., the landlord of premises, sued B. as an assignee of a lease, for rent due, with a count for use and occupation. At the trial A. put in the lease, which was a lease to W., who had taken the benefit of the Insolvent Debtors' Act. It was proved that B. had occupied the premises and had treated A. as landlord, and had paid rent to him; but that the lease had never been assigned:—Held, that A. could not recover against B., either for the rent, or for the use and occupation. *Hyde* v. *Moakes*, 5 Car. & P. 42.

Ranks as a Specialty.]—Rent arrear, either by deed or parol, ranks as a specialty. *Thompson* v. *Thompson*, 9 Price, 471.

Form of Action.]—In debt for rent by the assignee of the lessor, the venue is local, but, in covenant under the same circumstances, it is transitory. *Thrale* v. *Cornwall*, 1 Wils. 165.

The assignee of rent may maintain debt for arrears of the rent. *Allen* v. *Bryan*, 5 B. & C. 512; 4 L. J. (o.s.) K. B. 210; 29 R. R. 307.

Debt lies on an express covenant for payment of a freehold rent charged on land conveyed in fee. *Varley* v. *Leigh*, 2 Ex. 446; 17 L. J., Ex. 289.

Pleadings—Claim.]—A declaration for rent stated a demise of a messuage, land and premises, with the appurtenances. The proof was of a demise of a messuage and land, together with the furniture, utensils and implements:—Held, that as the rent issued out of the real property, and not out of the furniture, it was sufficient to allege and prove a demise of the real property, and therefore there was no variance. *Farewell* v. *Dickenson*, 6 B. & C. 251; 9 D. & R. 345; 5 L. J. (o.s) K. B. 154.

The proper mode of declaring in an action on a covenant in a lease, is to set out, that by indenture certain premises therein mentioned were demised, without stating them particularly, subject amongst other things to a proviso, setting out the substance of the covenant and the breach. *Dundas* v. *Weymouth* (*Lord*), Cowp. 665.

A declaration at the suit of the executor of a termor, for a breach of covenant after the death of the termor, should state the interest and title of the latter in the premises. *Mackay* v. *Mackreth*, 2 Chit. 461; 4 Dougl. 213.

A declaration for rent, by the assignee of a reversion for the life of a third person against the assignee of the term omitted to aver that the cestui que vie was living when the rent accrued due:—Held, that the continuance of the life was not to be implied from the mere assertion of title, and an averment in the breach, that, "after the plaintiff became so seised the rent became due, and still is in arrear to the plaintiff"; was insufficient, and that the declaration was bad on general demurrer. *Fryer* v. *Coombs*, 4 P. & D. 120, n.; 11 A. & E. 403.

In covenant for rent by a devisee against the assignee on a lease by the testator, the declaration alleged generally that the testator was seised, but did not say of what estate. On motion in arrest of judgment:—Held, that the ambiguity was cured by the verdict. *Harris* v. *Beavan*, 4 Bing. 640; 1 M. & P. 633; 6 L. J. (o.s.) C. P. 149.

—— **Defence.**]—In an action on a covenant for seven quarters' rent, a plea shewing a surrender before the last four of the seven quarters' rent accrued, is bad on demurrer, because it does not go to the whole breach, and the breach is not entire, but part of it may be proved. *Barnard* v. *Duthy*, 5 Taunt. 27.

In an action for nonpayment of rent, on an indenture by assignee of the lessor against the lessee, the declaration alleged that the lessor was possessed for the remainder of a term of 22 years, commencing from the 25th December, 1797, and that, on the 7th of March, 1811, he, by indenture, demised to the defendant to hold from the 20th of December then last past. Plea, that the lessor was not at the time of making the indenture possessed for the residue of the term as alleged:—Held, that such plea was good on general demurrer, as the averment in the declaration was material and traversable. *Carrick* v. *Blagrave*, 4 Moore, 303; 1 Br. & B. 531; 21 R. R. 710.

If both lessee and lessor sign a lease, the former is estopped to plead nil habuit in tenementis to an action of debt for rent by the lessor. *Wilkins* v. *Wingate*, 6 Term Rep. 62.

In an action for rent on an indenture brought by the assignees of the lessor (a bankrupt), the lessee cannot plead that the lessor nil habuit in

tenementis. *Parker* v. *Manning*, 7 Term Rep. 537.

The plaintiff in 1887 granted a lease of certain premises to the defendant. The premises had belonged to the plaintiff since 1884. In 1885 the plaintiff was adjudicated a bankrupt, and his discharge was granted conditionally upon his paying his creditors 5*s.* in the pound, which had not been paid. The plaintiff sued the defendant for arrears of rent under the lease, and the defendant applied that the trustee in bankruptcy should be joined as a plaintiff:—Held, that the defendant was estopped from setting up the plaintiff's bankruptcy. *Cook* v. *Whellock*, 59 L. J., Q. B. 329; 24 Q. B. D. 658; 62 L. T. 675; 38 W. R. 534—C. A.

Riens in arrere is a good plea to an action of debt for rent. *Warner* v. *Theobald*, Cowp. 588.

If one is sued for rent he cannot, under a plea of never indebted, avail himself of a part payment of money obtained under a distress, or of a judgment obtained against him in a county court for part of the same rent. *Harmer* v. *Bean*, 3 Car. & K. 307.

A declaration alleged a demise to the defendant of a messuage for forty-five years, at a rent payable quarterly, and averred that two years and a quarter's rent was due. Plea, that before that rent became due, it was agreed that the defendant should deliver up the messuage, and that, in consideration thereof, the defendant should be discharged from all liability to pay the rent which should subsequently accrue; that the defendant did deliver up the premises, and that the plaintiff accepted the possession thereof, and that the tenancy, and the defendant's interest in the premises, were thereby then surrendered and extinguished:—Held, after verdict, that the plea did not set up a surrender of the tenancy, but afforded a valid excuse for the nonpayment of the rent. *Gore* v. *Wright*, 3 N. & P. 243; 8 Ad. & E. 118; 1 W. W. & H. 266; 7 L. J., Q. B. 147; 2 Jur. 840.

If a lessor has no title, and the lessee is evicted by title paramount, he may plead that as a defence to an action by the lessor. *Cuthbertson* v. *Irving*, 6 H. & N. 135; 29 L. J., Ex. 485; 6 Jur. (N.S.) 1211; 3 L. T. 335; 8 W. R. 704—Ex. Ch.

Action for 163*l.* 16*s.* for fifty-two weeks' rent on a parol demise for twelve months, from 25th of February, 1839 (Monday), at 3*l.* 3*s.* per week. A plea, as to so much of the rent as accrued due before and on the 27th of July, 1839 (Saturday), of payment and acceptance in satisfaction, is bad, as no weekly rent could have become due on the latter day, and no apportionment of the rent for the fraction of a week was shewn. *Dunn* v. *Di Nuovo*, 3 Man. & G. 105; 3 Scott (N.R.) 487; 10 L. J., C. P. 318.

Semble, in an action for rent it is no answer that the landlord has distrained goods for it to the full value of the rent, if he has sold them for a less sum. If he has sold them at too low a price, the tenant's remedy is by action. *Efford* v. *Burgess*, 2 M. & M. 23.

Furnished Houses.]—*See* post, cols. 1281, et seq.

Suit in Equity.]—Bill may be brought in equity for rent, when the remedy at law is lost or becomes very difficult; and the court will relieve, on the foundation of payment for a length of time. *Benson* v. *Baldwyn*, 1 Atk. 598.

The court will not make an order upon a tenant to pay rent in arrear, though a receiver of the estate has been appointed. *Samuel* v. ——, 1 L. J. (O.S.) Ch. 90.

As to whether a bill in equity, to enforce payment of a rent or annuity, is sustainable. See *Williams* v. *Brown*, C. P. Cooper, 360.

Bill for specific performance of agreement to take lease, and action for rent of occupation, not allowed at the same time. On motion, court will order rent to be paid. *Carrick* v. *Young*, 4 Madd. 437.

Where a landlord has a remedy by distress, either nonpayment of rent or a penalty, equity will not interfere to assist him, unless some fraud be proved. *Doneraile* v. *Charters*, 1 Ridgw. P. C. 135.

Lease of a coal mine to A. reserving a rent; A., the lessee, declares himself a trustee for five persons, to each a fifth: the five partners enter upon work and take the profits of the mine, which afterwards becomes unprofitable, and the lessee insolvent; the cestui que trusts not liable, but for the time during which they took the profits. *Clavering* v. *Westley*, 3 P. W. 402.

In pursuance of an arrangement made on behalf of a company with certain persons to purchase the beneficial interest in a colliery lease agreed to be granted to them for a term of forty years, a lease was granted in March, 1842, to three persons, as trustees for the company, for a period of forty years, at a fixed rent, together with a royalty. The lease contained a stipulation enabling the lessees, at the end of any period of three years from its commencement, to determine the lease by giving twelve months' notice. The company entered into possession in December, 1841, and remained in such possession till November, 1842, when the working proving unprofitable, was abandoned, and never afterwards resumed. In January, 1850, the company was dissolved, and its affairs ordered to be wound up under the provisions of the Winding-up Acts. The lessor became bankrupt in August, 1853. Some time prior to his bankruptcy his interest in the mine became vested in the plaintiff. In May, 1852, the official manager of the company under protest that the lease was not binding on the company gave notice to terminate the lease on the 31st of May following, when one of the triennial periods expired. On the 23rd February, 1853, the plaintiff filed his bill against the official manager, praying a declaration that the company had accepted the lease, and was bound thereby, and that the official manager might be ordered to pay the arrears of the stipulated rent since March, 1842, together with compensation for all breaches of covenant:—Held, that no relief in the nature of specific performance, nor any equitable relief, could be granted either against the persons to whom the demise was made, or against the company in respect of their occupation, the rights of the plaintiff, if any, being legal. *Walters* v. *Northern Coal Mining Co.*, 5 De G. M. & G. 629; 25 L. J., Ch. 633; 2 Jur. (N.S.) 1; 4 W. R. 140.

The case of *Clavering* v. *Westley* (3 P. Wms. 402), so far as it might be an authority for the recovery of rent as an equitable debt, disapproved of. *Ib.*

—— **For Rent accrued before Defendant came into Possession.**]—On application to put plaintiff to his election, leave was given to make a special election to proceed in this court for the two years' rent in question, accrued due before defendant

came into possession, and at law for the rent accrued due in defendant's own time. *Joyce* v *Barker*, Dick. 182.

—— **Rent Payable to two Persons Successively — Action for Account, by Person last Entitled—Parties.**]—A. was entitled to rents up to a certain time, and B. was entitled to them subsequently. B. filed a bill for an account of the rents for the whole period, alleging that he had satisfied all A.'s claims out of his own moneys, but did not make A. a party:—Held, that A. was a necessary party. *Att.-Gen.* v. *Pearson*, 7 Sim. 290.

11. Payment of Rent.

a. Generally.

When Payable.]—The plaintiff and defendant agreed that the plaintiff should let, and the defendant take, premises, subject to the approval by the superior landlord of the lease; that the plaintiff should forthwith apply to the superior landlord for a licence to demise, and for the defendant to carry on a certain trade, and that the defendant, "until the lease should be granted, should hold and occupy the premises at the annual rent of 130*l.*":—Held, that the rent was not payable until the required consent had been obtained. *Brook* v. *Fletcher*, 37 L. T. 100.

Under Protest.]—When money is paid and received as rent under a lease, a mere protest that it is accepted conditionally and without prejudice to the right to insist upon a prior forfeiture cannot countervail the fact of such receipt. *Davenport* v. *Reg.*, 47 L. J., P. C. 8; 3 App. Cas. 115; 37 L. T. 727.

When Good.]—B., having leased his land to the plaintiff at a rent payable quarterly, subsequently mortgaged the land to the defendant, who allowed B. to remain in receipt of the rent. Subsequently to the mortgage, B. applied to the plaintiff, who was not aware of the mortgage, to pay him a year's rent in advance, and the plaintiff did so. After the payment, and before the rent had become due, the defendant gave notice to the plaintiff to pay the rent to him, and the plaintiff refusing to pay it, the defendant distrained for it:—Held, that payment of the rent before it became due was not a good payment as against the mortgagee, and that the plaintiff was still liable to pay him the rent. *De Nicols* v. *Saunders*, 39 L. J., C. P. 297; L. R. 5 C. P. 589; 22 L. T. 661; 18 W. R. 1106.

In Priority.]—The estate of a deceased lessee which was being administered by the court was indebted to the lessor in 210*l.* for rent secured by covenant in the ordinary way:—Held, that the lessor was not entitled, since 38 & 39 Vict. c. 46, to be paid in priority to other creditors. *Sherreff* v. *Hastings*, 47 L. J., Ch. 137; 6 Ch. D. 610; 25 W. R. 842.

Where sequestrators seized, under the writ, the issues and profits of the lands before the second gale of rent became due to the head landlord, but the two gales were due before accounting:—Held, that the landlord was entitled in the first instance to the two gales out of the funds. *Stafford* v. *Stafford*, 7 Ir. Eq. R. 197.

Under sequestration landlord is entitled to be paid the arrears of rent without a reference to master. *Dixon* v. *Smith*, 1 Swanst. 457.

The sheriff of S., having in his hands a sum of 35*l.*, which he had reserved for rent due to the landlord out of moneys levied under a fi. fa. issued against a tenant of the property in dispute in the cause, over which a receiver was appointed, moved that an action brought against him by the plaintiff in the cause for the money might be stayed, on the sheriff paying the 35*l.* into court. The motion was refused with costs. *Trye* v. *Trye*, 20 L. J., Ch. 368; 15 Jur. 809.

A receiver in a legatee's suit advertised furniture, in a leasehold house, for sale. The superior landlord claimed rent, but took no other steps, and the furniture was sold:—Held, that the landlord had no lien on the proceeds of the sale, but must come in with the other creditors. *Sutton, In re, Sutton* v. *Rees*, 32 L. J., Ch. 437; 9 Jur. (N.S.) 456; 11 W. R. 413.

Where bankrupt's goods are sold under commission, landlord can only come in pro ratâ with other creditors for his rent due. *Anon.*, 1 Atk. 102. S. P., *Descharmes, Ex parte, Id.* 103.

Mortgagee, who has paid arrears of rent on bankrupt's estate, unless he has an order to stand in landlord's place, shall not be preferred to the creditors under the commission. *Anon.*, 1 Atk. 103.

An equitable mortgagee of leasehold property must satisfy a distress for rent out of the proceeds of the sale, and can only prove for the deficiency, although occasioned by the payment of the rent. *Cocks, Ex parte*, 3 Deac. & C. 8.

By Sheriff under Executions.]—The 8 Ann. c. 14, s. 1, applies only to a case where there is a subsisting tenancy; and therefore, where the sheriff seizes goods after the tenancy has been determined, he will not be liable to an action for selling the goods upon the land without paying over a year's arrears of rent to the landlord. *Cox* v. *Leigh*, 43 L. J., Q. B. 123; L. R. 9 Q. B. 333; 30 L. T. 494; 22 W. R. 730.

To whom.]—One of several joint-tenants may demand and receive the whole rent due, and give a discharge for it, and such a discharge is good and binding on his companions. *Robinson* v. *Hoffman*, 1 M. & P. 474; 4 Bing. 562; 3 Car. & P. 234; 6 L. J. (O.S.) C. P. 113; 29 R. R. 627.

Extinguishment of Claim.]—On the trial of an ejectment in 1835, between landlord and tenant, a verdict was taken by consent for the plaintiff, it being then agreed that the defendant "is not to be called upon for any rent now due." The defendant had, with another person, given a promissory note to his landlord, to secure the payment of a half-year's rent due at Lady-day, 1834:—Held, that this agreement extinguished the landlord's claim on the note. *Howell* v. *Lewis*, 7 Car. & P. 566.

Effect of Payment and Receipt.]—Submitting to a distress or paying rent is only a primâ facie evidence of a landlord's title as against a tenant. *Cox* v. *Knight*, 18 C. B. 645; 25 L. J., C. P. 314.

Where the only evidence of a tenancy is payment of rent, the person paying is in all cases at liberty to explain the payment and to shew on whose behalf it was received. *Doe* d. *Harvey* v. *Francis*, 2 M. & Rob. 57.

Where payment of rent unexplained would ordinarily imply a yearly tenancy, it is open to

the payer or receiver of such rent to prove the circumstances under which such payment was made, for the purpose of repelling such implication. *Doe* d. *Lord* v. *Crago*, 6 C. B. 90; 17 L. J., C. P. 263; 12 Jur. 705. S. P. *Hurley* v. *Hanrahan*, 15 W. R. 990.

In an action by overseers for use and occupation, and for rent of parish lands, evidence that the defendant and his ancestors had for upwards of a century, up to the last ten years, paid rent for the land as "common land" (he refusing to produce the deeds under which he professed to hold), is sufficient evidence to go to the jury in the absence of any evidence that the payments were made by way of chief rent or rent-charge. *Harden* v. *Hesketh*, 28 L. J., Ex. 137; 4 H. & N. 175; 7 W. R. 186.

The receipt of rent is no waiver of a continuing breach of covenant. *Doe* d. *Batter* or *Baker* v. *Jones*, 5 Ex. 498; 19 L. J., Ex. 405.

In 1635 the Earl of Pembroke became tenant, either at will or from year to year, of six acres and a half of charity lands lying interspersed within his Roehampton estate, for which 6*l.* per annum had ever since been paid. In course of time this estate became split up into several portions, passing into the hands of new purchasers from time to time. From recitals in early conveyances it appeared that the whole estate was treated as subject to this charge of 6*l.* per annum; together with three other perpetual charges of 40*l.*, 10*l.* and 1*l.* per annum. According as parts of the estate were sold off, those parts were exonerated from these charges, until at last the mansion-house and thirty-one acres of the estate, the property of the defendant, alone remained charged therewith. The defendant and his ancestor had paid this 6*l.* per annum for many years. Upon an information by the trustees of the charity for a commission to mark out the boundaries of the six acres and a half:—Held, that although the defendant had for a long series of years paid the 6*l.* to the parish, upon receipts purporting to be for rent of parish land, he was not precluded from saying that he did not hold the land; and that he was at liberty to refer to his title deeds to shew the animus solventis, and to rebut the entries in the parish books, which were relied on to shew that he had by his payments admitted himself to be an occupier of parish land. *Att.-Gen.* v. *Stephens*, 6 De G. M. & G. 111; 25 L. J., Ch. 888; 2 Jur. (N.S.) 51; 4 W. R. 191.

—— **By Mistake.**]—A payment of rent by mistake or misrepresentation to a person not entitled to demand it, does not preclude the tenant from shewing that the person to whom it was paid was not entitled to it. *Rogers* v. *Pitcher*, 1 Marsh. 541; 6 Taunt. 202.

Evidence as to Title.]—The payment of rent by a tenant to an authorised agent, who pays over the rent to his principal, is evidence as against the tenant of the principal's title, although the agent do not disclose his principal's name at the time. *Hitchings* v. *Thompson*, 5 Ex. 50; 19 L. J., Ex. 146.

The plaintiffs were children of L. The tenant paid rents to an agent of the family, who gave a receipt "on account of the family of the late Mrs. L.":—Held, that this was evidence of a joint letting, and of a tenancy to them jointly. *Last* v. *Dinn*, 28 L. J., Ex. 94.

Payment of rent is primâ facie evidence of title in the landlord. *Doe* d. *Clun* v. *Clarke*, Peake, Ad. C. 239.

Authority to Receive.]—B. leased a farm to A. for fourteen years by deed, reserving rent payable quarterly. The lease contained various clauses by which A. and B. agreed to do certain things, and concluded with the following clause: "And the landlord further agrees and orders that K., or his appointed agent, is to receive all rents from the tenant at all times when it becomes due during the term thereby granted, and his receipt to be a full and sufficient discharge from all liability":—Held, that K., having no interest in the rent, the agreement or authority for him to receive it was revocable. *Venning* v. *Bray*, 2 B. & S. 502; 31 L. J., Q. B. 181; 8 Jur. (N.S.) 1039; 6 L. T. 327; 10 W. R. 561.

Tender of Rent.]—The plaintiff tendered rent to the defendants, his landlords, with the words, "Here is your quarter's rent":—Held, that this did not require the landlord to make any admission as to the amount due, as a condition of its receipt, and was therefore a good tender. *Jones* v. *Bridgman*, 39 L. T. 500.

Lessee must Tender.]—A covenant for the payment of rent, at a specified time, when no particular place of payment is mentioned, is analogous to a covenant to pay a sum of money in gross on a day certain, and it is accordingly incumbent on the covenantor to seek out the person to be paid, and pay or tender him the money. *Haldane* v. *Johnson*, 8 Ex. 689; 22 L. J., Ex. 264; 17 Jur. 937.

By advancing Money to a Firm of which Lessor is a Member.]—A tenant having made payments to his landlord, and also advances at his request to a firm of which he was a member, on account (as the tenant alleged) of rent not then due:—Held, that if the advances were made on account of the rent, they were an answer to an action for the rent by the landlord's executors. *Nash* v. *Gray*, 2 F. & F. 391.

b. Salvage Payments.

First Charge on Estate.]—A tenant for life of a leasehold estate purchased a mortgage affecting the inheritance, and assigned same to the plaintiff as a security for moneys advanced. The head rent of the property having fallen into arrear, the plaintiff, at the instance of the tenant for life, paid what was required to preserve the interest from being evicted, and subsequently, upon the accruing of another arrear of head rent, made a further advance for the same purpose:—Held, that the plaintiff, in respect of such payments, was to be regarded as a salvage creditor, and entitled as such to the first charge upon the estate. *Hill* v. *Browne*, Dr. 426; 6 Ir. Eq. R. 403.

A sub-tenant, having redeemed his landlord's interest by advances for head rent, filed a bill for the sale of that interest, and subsequently made further advances for the same purpose:—Held, that these advances were the first charge on the mesne landlord's interest in priority to incumbrancers prior in date, and that the salvagor was entitled to a sale for payment. *Locke* v. *Evans*, 11 Ir. Eq. R. 52.

Mortgage to Person Making—Priority to other Incumbrance.]—A devised fee-farm lands to B., subject to a charge of 1,500*l.* for his

daughter; B. mortgaged the lands in trust for the landlord, and to secure an arrear of rent, part of which had accrued due in the lifetime of A. On a bill filed for sale of the mortgaged lands:—Held, that as so much of the mortgage as was for rent due in the lifetime of the testator, the mortgage was prior to the charge of 1,500*l.*, being for the security of the common fund. *Brice* v. *Williams*, Wall. Lyn. 325.

An incumbrancer agreed to advance a sum of of money to preserve the lands of K. from eviction for nonpayment of rent; and took a security by deed affecting the lands of K. and other lands, for the repayment of the money so to be advanced. She afterwards paid the rent, and redeemed the lands of K.:—Held, that, under the circumstances, she was entitled, as against a person who was an incumbrancer on the lands at the time when they were redeemed, to be paid the sum advanced, in priority; and that, as full effect could not be given to her security by deed, she was remitted to her lien. *Kehoe* v. *Hales*, 5 Ir. Eq. R. 27.

Voluntary Conveyance to Person Making—Right to Repudiate Conveyance and Claim as Incumbrancer.]—A. devised certain freehold lands, held by a lease of lives renewable to C. and G., and directed in what proportions they should pay the head rent; C. suffered a judgment to be entered against him, and allowed an arrear of head rent and renewal fines to accrue in respect of his share, and then by a voluntary deed conveyed the share to G., who paid off the arrears of rent and fines, and entered into possession of C.'s share. On a bill filed by the judgment creditor:—Held, that G. was not entitled to repudiate the conveyance as an absolute sale to him, and to claim as an incumbrancer against the estate the amount of the fines and rents so paid by him, but that he was a purchaser thereof, and a sale was decreed against him. *Barker* v. *Roe*, 1 Longf. & T. 655; 4 Ir. Eq. R. 692.

By Person having no Interest in the Premises.]—A. being lessee of certain lands under a lease containing the ordinary covenants by him as lessee for payment of rent, and a condition of re-entry in case of nonpayment, assigned his interest under lease to B., who covenanted with A. to pay the rent and to keep him indemnified against it. B. mortgaged the premises comprised in the lease to C. by way of subdemise. Arrears of rent became due which the lessor compelled A. to pay under the covenant in the lease. In an action against B. and C., A. sought for a declaration that the sum so paid by him for rent was a salvage payment, and was charged on the premises in priority to C.'s mortgage:—Held, that A. had no interest in the premises authorising him to make a salvage payment, and that therefore he had no lien on the premises for the rent so paid by him. *O'Loughlin* v. *Dwyer*, 13 L. R., Ir. 75.

Priority of Annuities Charged on Lease.]—B. N. having an interest in lands, which he held, subject to head rents, under the see of Kilmore, for terms of years, renewable periodically on the payment of fines, granted underleases at certain annual rents, and subject to fines for renewal; and he covenanted with the sub-lessees to renew the underleases as often as he should obtain renewals from the see of Kilmore, the sub-lessees paying all head rents and renewal fines. The interest in these underleases vested in R., who assigned and conveyed to a trustee his interest in the terms, together with other lands, to secure the payment of annuities which he had granted to E. The trust as to the leases was first to pay the rents and fines, and then the annuities. The interest of B. N. in the leaseholds was mortgaged and sold under a decree of foreclosure, and finally assigned to H., in August, 1814. In September, 1814, the interest of R. in the underleases was assigned to H., as purchaser under a commission of bankruptcy. In 1815 the annuitants filed a bill praying a sale of the lands charged with the annuities, and payment, subject only to the head rents; and afterwards, upon discovery that the leases had expired, a supplemental bill was filed against H., praying that they might be renewed upon reasonable terms. Upon a reference under the decree, the master having found that the rents and fines were paid by H. and the lessees under the see for renewals, his report was in this respect overruled by the court, upon exceptions; and upon a second report, the court below held that the annuities were a charge prior to the fines. In such a case, the covenant does not run with the land, but is personal, and the right under the lease, to deduct the rent and fines, is not merged by the union of the principal and underleases in the same person. *Haig* v. *Homan*, 4 Bligh (N.S.) 380.

12. Set-off Against Rent.

Payment of Ground Rent.]—A payment of ground rent by the occupier, in default of the mesne tenant, will operate as a discharge of the growing rent as well as of the rent actually due. *Carter* v. *Carter*, 5 Bing. 406; 2 M. & P. 723; 7 L. J. (O.S) C. P. 141; 30 R. R. 677.

To an avowry for rent, the tenant may plead payment of a ground rent to the original landlord. *Sapsford* v. *Fletcher*, 4 Term Rep. 511.

To an avowry for rent a plea in bar of payment to a ground landlord or other incumbrancer amounts to a plea of riens in arrere, and should be so pleaded. *Jones* v. *Morris*, 3 Ex. 742; 18 L. J., Ex. 477.

Payment of Rent-charge in Lieu of Tithes—Effect of Agreement for Lease.]—Where in an agreement between defendant and D., under which defendant entered upon D.'s land, D. then being lessee of a part of the great tithes on the land demised, it was agreed that defendant should pay 375*l.* yearly rent, and all rates, taxes and assessments, and also the vicarial tithes:—Held, that defendant, in an action for rent by plaintiff, who had purchased the demised farm from D., was not entitled under 6 & 7 Will. 4, c. 71, s. 80, to set-off a payment made by him to a bishop on account of rent-charge in lieu of tithes, after the lease of the tithes to D. had expired; the agreement contained nothing to shew that the land was demised by D. free of rectorial tithes, although it did contain the stipulation that defendant should pay the vicarial tithes, and although defendant had never paid anything by way of tithes to D. or to plaintiff. *Forbes* v. *Elderfield*, 4 W. R. 15.

Payment of Annuity.]—So, to an avowry for rent, the plaintiff in replevin may plead payment of an annuity, secured out of the lands demised previously to their demise to him, for the arrears

of which the grantee of the annuity threatened to distrain. *Taylor* v. *Zamira*, 2 Marsh. 220; 6 Taunt. 524; 16 R. R. 668.

Payment of other Charges.]—In an action on a covenant for rent, the defendant pleaded that he was under-tenant of parcel of certain premises for the whole of which the plaintiff, his lessor, covenanted to pay rent to the landlord paramount, and shewed that he, the defendant, paid to the landlord paramount, under threat of distress, more rent than he owed to the plaintiff; the plaintiff traversed that any rent was due from himself to the landlord paramount:—Held, that this replication was not supported by proving that the plaintiff assigned his term in the residue of the premises to K., who assigned them to the defendant, who covenanted to pay in discharge of the plaintiff the whole rent reserved to the landlord paramount. *Sturgess* v. *Farrington*, 4 Taunt. 614.

A plaintiff in replevin cannot plead in bar a set-off to an avowry for rent. *Laycock* v. *Tuffnell*, 2 Chit. 531.

If a tenant, with the assent of his landlord, pays interest upon a mortgage charged on the premises demised, it is equivalent to a payment of rent pro tanto. *Dyer* v. *Bowley*, 9 Moore, 196; 2 Bing. 94.

To an avowry of a distress for rent, the plaintiff pleaded that, before the defendant had any interest in the premises they were mortgaged in fee; that the mortgagor remained in possession, and demised to the defendant; that the defendant, the mortgage-money being still due, demised to the plaintiff; that afterwards, the mortgage-money being still due, and interest thereon, and 14*l.* avowed for by the defendant, being also in arrear, the mortgagee gave notice to the plaintiff to pay the 14*l.* to him, instead of the defendant, and threatened, in case of nonpayment, to put the law in force, and was then about to put the law in force, wherefore the plaintiff necessarily paid that sum to the mortgagee, and so the said sum was not in arrear:—Held, that the plea was good, being a plea of payment, and not of nil habuit in tenementis. *Johnson* v. *Jones*, 1 P & D. 651; 9 A & E. 809; 8 L. J., Q. B. 124.

On a bill in equity for an injunction to restrain proceedings at law for rent, on the ground of an agreement under which the landlord was indebted more than the amount of the rent:—Held, that it was a legal set-off. *Townrow* v. *Benson*, 3 Madd. 203.

A. rented land of B., who was trustee of property (a part of which was this land), the rents of which B. was to pay in certain shares: one of those shares belonged to the wife of A.; B. had in his hands a greater amount due to A. in right of his wife than the rent amounted to:—Held, that this could not be set off against the rent without a special agreement to that effect. *Wilson* v. *Davenport*, 5 Car. & P. 531.

Where a tenant of leaseholds who had paid certain rents to one of the persons beneficially entitled thereto, filed a bill against the landlord, claiming to set off such payments and a private debt due from the landlord, against the rent due to the landlord as trustee, a demurrer for want of equity was allowed. *Pratt* v. *Keith*, 33 L. J., Ch. 528; 10 Jur. (N.S.) 305; 10 L. T. 15; 12 W. R. 394; 3 N. R. 264.

To an action for two and a half years' rent, a plea, that, before the premises were demised to the defendant by the plaintiff, the plaintiff conveyed all her interest therein to A.; that the plaintiff, up to the time of the demise, was in possession of the premises; that, after the commencement of the suit, A. gave notice to the defendant, and demanded payment of such portion of the rent reserved as might, on a just apportionment, be found due, and threatened the defendant, in case of nonpayment, to eject him, and put the law in force; that 40*l.* 10*s.* was the sum due on a just apportionment, wherefore the defendant paid the same to A., is bad, as a plea of payment, inasmuch as the alleged payment was not in satisfaction of any charge upon the land or of any debt due from A. *Boodle* v. *Cambell*, 8 Scott (N.R.) 104; 2 D. & L. 66; 7 Man. & G. 386; 13 L. J., C. P. 142; 8 Jur. 475.

In 1840 A. being lessee of a warehouse and cellar, under a demise from B., and also lessee, under C. of other adjoining property, comprising a vault, D. became tenant from year to year to A. of the warehouse and cellar, and the vault, at an annual rent of 185*l.*, made up of 140*l.* for the warehouse and cellar, and 45*l.* for the vault. On the 27th October, 1845, A. became bankrupt, 92*l.* 10*s.* being at that time due as rent from D. to A. His assignees, upon being appointed, elected to take the property held under B., and on 26th of February, 1846, elected not to take the property held under C. At Christmas, 1845, rent to the amount of 114*l.* 7*s.* 6*d.* became due from A. to C., for which amount, on the 19th February, 1846, C. distrained upon the goods in the vault, held by D., who, to relieve himself of that distress, paid that sum to C. An action having subsequently been brought by the assignees of A. against D. to recover the 92*l.* 10*s.*, and also 35*l.* for a quarter's rent, due at Christmas, 1845, for the warehouse and cellar:—Held, that D. was not entitled in such action to avail himself of the payment of 114*l.* 7*s.* 6*d.*, made by him to C. *Graham* v. *Allsopp*, 3 Ex. 186; 18 L. J., Ex. 85.

Possession by Landlord for Part of Term—Mesne Profits.]—The defendant, who held lands from the plaintiff, under a lease for an unexpired term, at a reserved rent of 205*l.* yearly, was evicted for nonpayment of a year's rent due up to the 25th March, 1887. The plaintiff went into possession, and so continued from 23rd of August to 27th September, in the same year, when the defendant paid to the plaintiff the year's rent, and was restored to possession, no account for mesne profits being claimed. This transaction took place at the especial request of the defendant, to enable him to serve an originating notice to fix a fair rent before the 29th September. In a subsequent action by the plaintiff to recover possession for nonpayment of a year's rent, due the 25th March, 1888, the defendant pleaded a set-off of the value of the profits received by the plaintiff while in possession, and which were assessed by the jury at the trial at 34*l.*, and the defendant's counsel called upon the judge to direct a verdict for him, on the grounds—1st, that the rent was suspended during the period the plaintiff was in possession; 2ndly, that the set-off of 34*l.* reduced the arrears below one year's rent. The judge having refused to do so, and directed a verdict for the plaintiff in possession:—Held that this direction was right. *Wilson* v. *Burne*, 24 L. R., Ir. 14—C. A.

Deduction of Rates and Taxes.]—*See* post, M. 6, (cols. 1168, et seq.)

—— **Upon original or improved Rent.**]—A. demised land to B. upon a building lease, at the yearly rent of 60*l.* clear of all rates, assessments, &c., the sewers-rate, land-tax, and landlord's property or income-tax only excepted, with the usual covenants for the payment of rent, &c. B. having by building on the land increased its rateable value to 300*l.* per annum :—Held, that he was only entitled to deduct the sewers-rate and land-tax upon the original rent, and not upon the improved value. *Smith* v. *Humble*, 15 C. B. 321 ; 3 C. L. R. 225.

Covenant that Lessee retain Rent in Satisfaction of Debt due from Lessor—Specific Bequest of Premises by Lessee—Rights of Executors and Specific Legatees.]—By a deed of even date with a lease, the lessor covenanted that the lessee should retain part of each year's rent until satisfaction of a debt due from the lessor to the lessee :—Held, that though the covenant might be pleaded at law as a release pro tanto of the rent, this was only to avoid circuity of action, and the covenant was not for all purposes a release. *Ledger* v. *Stanton*, 2 John. & H. 687 ; 9 W. R. 848.

Therefore, the lessee having specifically bequeathed the premises subject to the rent :—Held, as between the executors and the specific legatees, that specific legatees took subject to the whole rent, and that the benefit of the covenant for reduction of rent went to the executors. *Ib.*

13. Double Rent.

Holding over after Notice.]—In an action for double rent, for holding over after notice, the jury may find for so much as the tenant appears to have overheld, without reference to the sum demanded, so that it is not more than that sum. *Anon.*, Lofft, 275.

Though a demise is for a certain time, a demand of possession and notice in writing are necessary to entitle the landlord to double rent or value ; but such demand may be made above six weeks afterwards, if the landlord has done no act in the meantime to acknowledge the continuation of the tenancy : and if the tenant holds over, he will be entitled to double value from the time of such demand : but if the rent is reserved quarterly, and the demand is made in the middle of a quarter, the landlord cannot recover single rent for the antecedent fraction of such quarter. *Cobb* v. *Stokes*, 8 East, 358 ; 9 R. R. 464. And see *Lake* v. *Smith*, 1 Bos. & P. (N.R.) 174 ; and *Wilkinson* v. *Colley*, 5 Burr. 2694.

11 Geo. 2, c. 19, s. 18, only applies to those cases where the tenant has the power of determining his tenancy by a notice, and where he has actually given a valid notice sufficient to determine such tenancy. *Johnstone* v. *Huddleston*, 7 D. & R. 411 ; 4 B. & C. 922 ; 4 L. J. (O.S.) K. B. 71 ; 28 R. R. 505.

A tenant who, after having given notice to quit, holds over for a year, paying double rent, may quit at the end of such year without fresh notice. *Booth* v. *Macfarlane*, 1 B. & Ad. 904 ; 9 L. J. (O.S.) K. B. 161.

If a landlord gives notice to his tenant to quit at the expiration of the lease, and the tenant holds over, he is liable to double rent. *Messenger* v. *Armstrong*, 1 Term Rep. 53 ; 1 R. R. 148.

When a tenant holds over after the expiration of a notice to quit, the landlord is entitled to recover against him the reasonable damages and costs sustained by him in an action at the suit of a party to whom he had contracted to let the premises, but to whom the tenant's wrongful act had prevented him from delivering possession. *Bramley* v. *Chesterton*, 2 C. B. (N.S.) 592 ; 27 L. J., C. P. 23 ; 3 Jur. (N.S.) 1144 ; 5 W. R. 690.

Notice to Quit on Contingency which happens.]—If a tenant from year to year gives his landlord notice that he will quit upon a contingency, and does not quit when the contingency happens, he is not liable for double rent. *Farrance* v. *Elkington*, 2 Camp. 591 ; 11 R. R. 807.

14. Double Value.

By whom Recoverable.] — The remedy for double value, conferred by 4 Geo. 2, c. 18, s. 1, against a tenant wilfully holding over after the determination of the term, and after demand and notice in writing, is given only to the lessor or landlord, or to the person entitled to the reversion, and not to one to whom the landlord has granted a fresh lease, to commence from the expiration of the former term ; such new lessee having no estate, but a mere interesse termini. *Blatchford* v. *Cole*, 5 C. B. (N.S.) 514 ; 28 L. J., C. P. 140 ; 5 Jur. (N.S.) 412.

One tenant in common may bring an action for the double value of his moiety. *Cutting* v. *Derby*, 2 W. Bl. 1077.

But tenants in common cannot sue jointly for double value for holding over, where there has been no joint demise. *Wilkinson* v. *Hall*, 1 Scott, 675 ; 1 Bing. (N.C.) 713 ; 1 Hodges, 170 ; 6 L. J., C. P. 82.

The administratrix of an executor cannot sue for the double value of lands held over, after notice to quit under a demise from the testator, without taking out administration de bonis non ; even though the tenant has attorned to her. *Tingrey* v. *Brown*, 1 Bos. & P. 310 ; 4 R. R. 805.

In an action for double value the declaration stated that the plaintiffs were seised in their demesne as of freehold in right of the plaintiff, Caroline, during her life, of a messuage held by the defendant as tenant to the plaintiffs for a year, terminable on the 11th of October, 1844, the reversion thereof belonging to the plaintiffs, in right of Caroline. That the plaintiffs, on the 1st of September, gave notice in writing and demanded of the defendant to deliver up possession of the premises to the plaintiffs on the 11th of October, which he refused to do. The defendant became tenant to Mr. H., one of the plaintiffs, for one year from the 11th of October, 1843, to the 11th of October, 1844, of a house, farm, &c., at a certain rent, and occupied the same as tenant to him for that year. The contract for this tenancy was by parol, and was made by the defendant expressly with Mr. H. alone in his own right, and Mrs. H. was no party thereto. A demand and notice in writing for delivering up of the possession by the defendant were made and given by the agent of the plaintiffs. The defendant retained possession of the premises :—Held, that the two plaintiffs were not entitled to recover in this joint form of action, the defendant not being the tenant of the two plaintiffs, and the reversion not being in the two plaintiffs, but in the husband alone, and that neither the averment of the tenancy nor the words, "to the plaintiffs," in the allegation of the tenancy, could be rejected. *Harcourt* v. *Wyman*, 3 Ex. 817 ; 18 L. J., Ex. 453.

Against whom Maintainable.]—Where there was a demise to a wife, and notice to quit given to her, after which, but before the time it expired, she married:—Held, that it was not necessary to give a notice to the husband subsequent to the marriage, in order to support an action for double value. *Lake* v. *Smith*, 1 Bos. & P. (N.R.) 174. And see *Wilkinson* v. *Colley*, 5 Burr. 2694.

An action for double value does not lie against a weekly tenant. The statute being penal, is to be construed strictly. *Lloyd* v. *Rosbee*, 2 Camp. 453; 11 R. R. 764.

A tenant holding over the premises after his term has expired, is not within the penalty imposed by the statute, unless he holds over wilfully and contumaciously, and with a consciousness that he has no right to do so. *Swinfen* v. *Bacon*, 6 H. & N. 184; 30 L. J., Ex. 33; 6 Jur. (N.S.) 1257; 3 L. T. 440; 9 W. R. 105. Affirmed 6 H. & N. 846; 30 L. J., Ex. 368; 7 Jur. (N.S.) 897; 5 L. T. 83; 9 W. R. 740—Ex. Ch.

Where, on the receipt of a notice to quit to two joint-tenants, one of whom only actually occupied the land, the other said "that he had nothing to do with the land":—Held, that this statement was not admissible to shew that a holding over after the expiration of the notice was not wilful on the part of the latter. *Hirst* v. *Horn*, 6 M. & W. 393.

Quære, whether a quarterly tenant, who wilfully holds over after his tenancy is expired, is liable to pay double value to his landlord. *Wilkinson* v. *Hall*, 4 Scott, 301; 3 Bing. (N.C.) 508; 3 Hodges, 56; 6 L. J., C. P. 82.

When Maintainable.]—After a landlord has recovered in ejectment against his tenant, he may maintain an action for double the yearly value of the premises, during the time the tenant held over after the expiration of the landlord's notice to quit. *Soulsby* v. *Neving*, 9 East, 310; 9 R. R. 567.

In an action by a landlord against his tenant for double value under 4 Geo. 2, c. 28, s. 1, he must shew a wilful holding over by the tenant; and it is not enough to shew that the premises were held over by a sub-tenant, without his assent or authority. *Rands* v. *Clark*, 19 W. R. 48.

Sufficiency of Notice and Demand of Possession.]—Notice to quit under the statute may be previously to the expiration of the lease. *Cutting* v. *Derby*, 2 W. Bl. 1075.

A notice to quit lands on a given day, "or at such time as your holding shall expire next after the expiration of half a year from the receipt of this notice," is a sufficient demand of possession, to render the tenant liable for holding over after the determination of the notice. *Hirst* v. *Horn*, 6 M. & W. 393.

A joint authority by mortgagors and mortgagee of premises to a person to be the receiver, agent, and attorney of the mortgagors, to receive the rents until satisfaction of the mortgage, to bring actions in case of nonpayment of rent, to give notices to quit, to bring ejectment in case of non-compliance, &c., as fully as the mortgagors might have done, is a sufficient authority to him to demand possession of the tenants, so as to make them liable in double value for holding over. *Poole* v. *Warren*, 3 N. & P. 693; 8 A. & E. 582; 3 Jur. 23.

An action for double value is not supported by a notice that the landlord requires the tenant to give up possession at twelve at noon, on, &c. (the day when the tenancy was determinable), at which time the landlord will attend to receive the keys and rent; and that in the event of the tenant not so surrendering, the landlord will demand 7*s.* daily rent (a rate more than double the original rate of rent), till he can obtain legal possession. For the requisition to deliver up the premises at noon is premature and insufficient, as a notice to determine the tenancy. *Page* v. *More*, 15 Q. B. 684.

Waiver.]—Acceptance of single rent is a waiver of the double value. *Doe* d. *Cheney* v. *Batten*, Cowp. 243; 9 East, 314, n; 9 R. R. 570, n.

A landlord declared, first, for the double value, and secondly, for use and occupation. The tenant pleaded nil debet to the first, and a tender of the single rent before action to the second count, and paid the money into court, which the plaintiff took out before trial, and still proceeded: the court held, that this was no case for a nonsuit, upon the ground of such acceptance of the single rent being a waiver of the plaintiff's right to proceed for the double value; but that the case ought to have gone to the jury: and that the plaintiff's going on with the action, after taking the single rent out of court, was evidence to shew that he did not mean to waive his claim for the double value, but to make it pro tanto. *Ryal* v. *Rich*, 10 East, 48.

It is not necessary, in order that the tenant may avail himself of a waiver of the double value on the part of the landlord, that such waiver should be specially pleaded. *Rawlinson* v. *Marriott*, 16 L. T. 207.

In what Court.]—An action for double value may be brought in a county court. *Wickham* v. *Lee*, 12 Q. B. 521; 18 L. J., Q. B. 21; 12 Jur. 628.

Estimation of Value.]—An owner of a woollen mill and steam-engine, let a room in the mill, together with a supply of power from the steam-engine by means of a revolving shaft in the room:—Held, in an action against the tenant, for holding over after the expiration of a notice to quit, that, in estimating the double value, the value of the power supplied could not be included. *Robinson* v. *Learoyd*, 7 M. & W. 48; 10 L. J., Ex. 166.

15. By Way of Penalty.

For Ploughing up Pasture Land, &c.]—Upon a covenant not to plough up any ancient meadow, and, if the tenant does, to pay an additional yearly rent per acre:—Held, that the increased rent was not a penalty, but a liquidated satisfaction fixed and agreed upon by the parties; and therefore a court of equity ought not to interpose in an action brought for the recovery of it. *Rolfe* v. *Peterson*, 2 Bro. P. C. 436.

Reservation of 5*l.* per acre during the last twenty years of a term for every acre of meadow thereby demised, which the tenant should plough, dig, ear, break up, or convert into tillage during the last twenty years of the term, and so after that rate for any greater or less quantity than an acre, or less term than a year. The rent is due in the last twenty years if the land is then

ploughed, whether it was first ploughed within the last twenty years or before; and the rent continues payable during the twenty years, though the land is again laid down to permanent grass. *Birch* v. *Stephenson*, 3 Taunt. 469; 12 R. R. 679. And see *Howell* v. *Richards*, 11 East, 633; 11 R. R. 287.

In an action of covenant by lessor against lessee, on a lease reserving an increased rent for every acre of certain lands converted into tillage; the jury having given damages for the actual injury sustained instead of the increased rent, the court granted the plaintiff a new trial, although it was urged that the verdict was consistent with justice, the judge having expressly directed the jury to find damages to the amount of the increased rent; and it was granted without payment of costs. *Farrant* v. *Olmius*, 3 B. & Ald. 692.

A lease granted by virtue of a power, enabling a tenant for life to make leases without impeachment of waste, contained a proviso, that the tenant should pay a further rent of 10*l.* per acre for ploughing up pasture land, or for managing the farm contrary to the covenants. In an action to recover the penalty, a motion in arrest of judgment, on the ground that this amounted to a licence to commit waste, was disallowed. *Bringloe* v. *Goodson*, 8 Scott, 71; 5 Bing. (N.C.) 738; 1 Arn. 322.

Action on an indenture, whereby the tenant covenanted to pay the rent of 50*l.* half-yearly, and, over and above the reserved rent, the further yearly rent of 5*l.* for every acre of the demised premises which the defendant should covert into tillage, over and above one-third part thereof. Breach assigned for over-tillage, whereby the defendant became liable to pay 75*l.* additional rent. Pleas, first, that the plaintiff, with a full knowledge of the supposed breaches of covenant, accepted and received from the defendant 25*l.* as and for all the rent due in respect of the premises, up to and inclusive, &c. (covering the time alleged in the breach), without demanding or requiring the payment of such penalty or additional rent, and thereby then and there waived, gave up, and dispensed with his right to receive or recover any nomine pœnæ, or penalty, or such additional rent; and, secondly, that the plaintiff, with a full knowledge, waived, gave up, and dispensed with all claim or right on his part to receive, recover, or to be paid such penalty, nomine pœnæ, or additional rent:—Held, that both pleas were insufficient. *Denton* v. *Richmond*, 1 C. & M. 734; 3 Tyr. 630; 2 L. J., Ex. 269.

A lease contained covenants by the lessee to pay an increased rent of 20*l.* for every acre which he should plough up over and above one-third part of the demised lands; and also that, in case he should plough up one-third, or greater or less part, he should lay down the same with clover or grass seeds. The lessee ploughed more than one-third, paid the increased rent for it, and then laid it down in pasture:—Held, that upon the construction of both the covenants taken together, the increased rent ceased to accrue from the time that the ploughed land had been restored to pasture. *Domville* v. *Forde*, Ir. R. 7 C. L. 534.

A declaration on an indenture stated, that the plaintiff demised to the defendant a farm for ninety-nine years, at a yearly rent of 100*l.*; and also yielding and paying unto the plaintiff, upon the days of payment of the yearly rent first reserved, over and above the same rent, a further yearly rent or sum, according to the rate of 20*l.* the acre, of any grazing or mowing land which the defendant should cause to be ploughed or used in tillage without the consent of the plaintiff; and also yielding and paying unto the plaintiff, upon the days of payment of the yearly rent first named, over and above the rent so reserved, according to the rate of 20*l.* the acre of any of the land which the defendant should under-let, or upon which he should sow potatoes, or from which he should take more than three crops of corn or grain in any one course of tillage, or from which should be taken a second or other crop of wheat without making a clean summer fallow, or from which should be taken a third crop in any one course of tillage, without seeding down the same. "The several eventual or contingent rents, if any such should become due, to be additional to the first-mentioned rent, and to be paid and payable half-yearly, by equal portions, and the first payment to become due and be made at that day of payment of the first-mentioned rent which should first or next happen after such eventual or contingent rent should be incurred, and to continue payable from thenceforth during all the residue of the term created." A breach, that the defendant, in three successive years and in one course of tillage, to wit, 1843, 1844, and 1845, took three successive crops of corn, to wit, of oats, and did not seed down, whereby he became liable to pay a certain other yearly rent of 125*l.*; and although one half-yearly payment of the rent had become due—viz., on the 25th March, 1845, yet the defendant had not paid the same. Another breach, that although two other half-yearly payments of the rent had become due—viz., on the 29th September, 1845, and the 25th March, 1846, yet defendant had not paid the same. Upon the production of the lease at the trial, it appeared, that in addition to the reddendum as set out in the declaration, it contained the following:—"And also yielding and paying unto plaintiff, upon the days for payment of the rent first reserved, over and above the same rent, the further yearly rent or sum of 20*l.* the acre of land which should be mowed, unless the defendant should once at least in every three years bring thereon sufficient manure:—Held, that the variance could not be taken advantage of on a plea of non est factum. *Bowers* v. *Nixon*, 13 Jur. 334—Ex. Ch. *S. C.*, in court below, 12 Q. B. 558, n.; 18 L. J., Q. B. 35.

Held, also, that the defendant was liable to the contingent rent reserved in the third branch of the reddendum for taking three successive crops of oats without seeding down. *Ib.*

In a subsequent action to recover the half-yearly payments due on the 29th September, 1846, and the 25th March, 1847, the declaration was as before:—Held, that the sums reserved in the third clause of the reddendum were payable as rent annually during the residue of the term, and not as a penalty on the occurrence of every breach of the covenant. *Ib.* *See also* post, cols. 1184, 1185.

—— **Burning Land.**]—Where a lessee covenanted not to burn any part of the demised premises, under a penalty of 10*l.* per acre, to be recovered as the additional rent, for every acre so burned:—Held, that he was not entitled to burn upon payment of the specified sum as liquidated damages, and that the jurisdiction of equity to grant an injunction to restrain the

lessee from burning was not ousted by the imposition of the penalty. *French* v. *Macale*, 2 Dr. & War. 269; 1 Con. & L. 459; 4 Ir. Eq. R. 568.

—— **Using Land as Race-course.**]—In a lease of land, the lessee, in addition to a reserved rent, covenanted to pay a penal rent for pasture land broken up, or "used or converted to any other use than for meadow land":—Quære, whether using the land as a race-course and ground for training horses was a breach of the covenant: at all events, the question is one for a jury, and not determinable by the court on demurrer. *Aldridge* v. *Howard*, 5 Scott (N.R.) 623; 4 Man. & G. 921.

For Breach of other Farming Covenants.]—A lease contained a stipulation, that, for every acre, and so on in proportion for a less quantity of the land which the lessee should suffer to be occupied by any other person without the consent of the landlord, an additional rent should be paid. The tenant undertook to use, occupy, dress, and manure the land according to the custom of the country. The tenant, without the consent of the landlord, suffered other persons to use small portions of the land for the purpose of raising a potato crop. It was proved to be the custom of the country for farmers to pursue that course:—Held, that the landlord was entitled to the additional rent, this being an occupation by other persons. *Greenslade* v. *Tapscot*, 1 C. M. & R. 55; 4 Tyr. 566; 3 L. J., Ex. 328.

A farm and lands were demised to a tenant at a yearly rent, and also under and subject to certain yearly payments in case the tenant should not crop, manure and manage the farm in manner therein specified and covenanted; and also, in case the tenant, in the last three years of the term, should sow more than seventy acres of clover in one year, the additional rent of 10*l.* an acre, for every acre above seventy acres, for the remainder of the term:—Held, that the additional rents were in the nature of liquidated damages, and not of penalties. *Jones* v. *Green*, 3 Y. & J. 298.

A lessee covenanted not to do a certain act, "under the penalty of double the yearly rent herein reserved, same to be recovered by distress or otherwise, the same as the said yearly rent":—Held, to be a case of liquidated damages, and not of penalty. *Gerrard* v. *O'Reilly*, 3 Dr. & War. 414; 2 Con. & L. 165.

Covenant not to use as Public-house.]—A lease contained a covenant that a house, to be built immediately adjoining the house in which the lessor lived, should be built fit for a private family, under a penalty of 10*l.* yearly additional rent, unless the lessor should convert his house to any public use:—Held, the 10*l.* a year rent was a penalty, and that the lessor was not restricted to suing for such rent, but was entitled to an injunction to restrain the tenant's converting the house into a public-house. *Bray* v. *Fogarty*, Ir. R. 4 Eq. 544; 18 W. R. 1151.

For any Breach.]—A tenant agreed, in case of breach of all or any of the conditions contained in the contract, to pay an additional or penal rent, to be recovered by distress or otherwise as the reserved rent was recoverable by law as between landlord and tenant:—Held, that the additional rent was not a penalty. *Wright* v. *Tracey*, Ir. R. 7 C. L. 134.

16. Recovery Back by Tenant.

If A., who is tenant for life, subject to forfeiture, with remainder over to B., leases to C. for a term, and afterwards, apprehending that he has forfeited, acquiesces in B.'s claiming and receiving the rent from C.; his executor may, on shewing that he acquiesced under a false apprehension, recover from C. the amount of the rent erroneously paid to B. *Williams* v. *Bartholomew*, 1 Bos. & P. 326; 4 R. R. 81.

Where a tenant pur autre vie pays rent by mistake, after the life has dropped, he may recover back the rent, as money had and received, such action not being brought for the purpose of trying the title to the land. *Barber* v. *Brown*, 1 C. B. (N.S.) 121; 26 L. J., C. P. 41; 3 Jur. (N.S.) 18; 5 W. R. 79.

I. ACTIONS FOR USE AND OCCUPATION.

1. When Maintainable.

a. Express or Implied Contract.

At Common Law.]—Debt for use and occupation lies at common law, and is not defeated by proof of a demise (not under seal) reserving a certain rent, though 11 Geo. 2, c. 19, s. 14, is confined to "an action upon the case." *Gibbon* or *Gibson* v. *Kirk*, 1 Q. B. 850; 1 G. & D. 252; 10 L. J., K. B. 297; 6 Jur. 99.

Ineffectual Agreement to Demise.]—If there is an agreement by deed to demise a house, by words not amounting to an actual demise, the party may maintain an action for use and occupation. *Elliott* v. *Rogers*, 4 Esp. 59.

When under Agreement.]—A. agreed with B. to take a lease of B.'s iron ore at R. for forty years, at a certain rent, engaging to work the several veins of ironstone, limestone, &c., in certain stipulated proportions; and B. agreed to grant such lease:—Held, that, by this agreement, B. took, not a mere licence, but a right constituting a hereditament, in respect of which A. might sue him for use and occupation. *Jones* v. *Reynolds*, 4 A. & E. 805; 6 N. & M. 441.

A. having mortgaged a piece of land to the plaintiff, a railway company afterwards occupied it by laying rails upon it, and being subsequently called upon by the plaintiff for compensation, negotiated with him in respect thereof. The plaintiff had never been in possession of the land, but gave notice of the mortgage to the company, and brought an action for use and occupation. The judge directed the jury that the plaintiff was in a condition to waive the trespass in respect of the occupation of the land by the company, and to bring an action for use and occupation:—Held, that there was evidence of the company having held the land on the terms of paying for it. *Turner* v. *Cameron's, &c., Ry.*, 5 Ex. 932; 20 L. J., Ex. 71.

A. entered into an agreement in writing, with B., to take premises at a yearly rent, the premises to be put into repair by B., and the rent not to be payable until the repairs were completed. A. by his tenant occupied the premises for six months, and then quitted, the stipulated repairs not having been done:—Held, that B. was entitled to maintain an action as upon an implied agreement to pay so much as the

occupation might be reasonably worth. *Smith* v. *Eldridge*, 15 C. B. 236 ; 2 C. L. R. 855.

Receipt of Rent after Termination of Tenancy —Ignorance of Landlord.]—The last life in a lease died in New Zealand on 21st July, 1864. A gale of rent due the following September was paid and received in ignorance of death. A rumour of the death reached the lessee in May, 1865, when it was at once communicated to the lessor. In August, the lessee wrote a letter to the lessor, enclosing the May gale of rent and saying that he had written to New Zealand for intelligence, and this rent the lessor received. Authentic information was received in December, 1865, when possession was given up :—Held, that the lessee was liable to an action for use and occupation at full value of lands from 21st July, 1864, when the life actually dropped, the receipt of the old rent in ignorance of fact not amounting to a new tenancy at the old rent. *Hurley* v. *Hanrahan*, 15 W. R. 990.

When Contract will not be implied.]—Copyhold lands were demised to the plaintiffs, in trust, for F. for life, but the plaintiffs were never admitted to the copyhold. At the time of the death of the testator the lands were in possession of the defendant, to whom F., with the assent of one of the plaintiffs, afterwards re-let them in her own name. The plaintiffs then gave notice to the defendant to pay the rent to them :—Held, that an action for use and occupation would not lie by the plaintiffs against the defendant, because no contract could be implied between them, there having been an existing contract between the defendant and F., and the occupation having been by permission of F. *Churchward* v. *Ford*, 2 H. & N. 446 ; 26 L. J., Ex. 354 ; 5 W. R. 831.

A. purchased lands from B. under a contract of sale not in writing, went into possession, and under such contract remained in possession for several years without paying rent :—Held, that B. could not maintain an action for use and occupation against A., as the facts rebutted the implied contract to pay rent for the lands. *Corrigan* v. *Woods*, Ir. R. 1 C. L. 73 ; 15 W. R. 318.

Necessity of Actual Occupation.]—Where there has been an actual enjoyment, an action for use and occupation lies in respect of incorporeal hereditaments. *Bird* v. *Higginson*, 4 N. & M. 505 ; 1 H. & W. 61 ; 2 A. & E. 696 ; 4 L. J., K. B. 124. Affirmed 6 A. & E. 824—Ex. Ch.

After a recovery of possession of the premises by ejectment, the plaintiff may maintain use and occupation for the rent to the time of the demise, but not after. *Doe* d. *Batten* v. *Cheney*, Cowp. 246.

A. and B. being entitled to copyhold premises in shares, B. demised the whole to the defendant in his own name by a lease in writing (not under seal) for one year, at a rent payable half-yearly ; and B. agreed for himself, his heirs, executors, and assigns, with the defendant, that he should peaceably hold the premises. Before the first half-year's rent became due, B. surrendered his interest to A., of which the defendant had notice, and afterwards paid that rent to an agent employed by A. and B. In an action for use and occupation by A. to recover the last half-year's rent :—Held, that the occupation of the defendant having become in point of law an occupation by the permission of A., as soon as his interest accrued, the action was maintainable. *Standen* v. *Christmas*, 10 Q. B. 135 ; 16 L. J., Q. B. 265 ; 11 Jur. 694.

The action does not lie where there has not been an actual entry by the lessee. *Lowe* v. *Ross*, 5 Ex. 553 ; 19 L. J., Ex. 318.

A plaintiff alleged by his statement of claim that he was owner in fee of premises which he had, on the 26th September, 1859, leased to M. for thirty-one years from the 25th December then next, at a yearly rent of 105*l*., payable quarterly. The statement then set forth the covenants in the lease to pay rent, repairs, and the condition for re-entry for breach of covenant ; and alleged that in 1870 the defendant took possession of and had since occupied the premises, and that subsequently he had become assignee of the lease, and had paid rent to the plaintiff in accordance with the terms of the lease from 1870 to March, 1874. The statement alleged breaches of the various covenants, and the plaintiff claimed possession of the premises, 157*l*. 10*s*. for arrears of rent to the 29th September, 1875, or for use and occupation, damages for breaches of the covenants in the lease. and mesne profits from the 29th September, 1875, to the date of recovery of possession. The defendant in his statement of defence denied that he was assignee of the lease, or that it ever became vested in him, or that he had broken the covenants in the lease. He admitted that the lease had been avoided, and that the plaintiff was entitled to possession of the premises ; he also admitted that he was in possession up to the 20th September, 1875, but alleged that he ceased to have possession from that date, and he paid 25*l*. into court to answer the plaintiff's claim in respect of mesne profits : —Held, that the facts as set out in the pleadings did not support the claim made by the plaintiff upon the defendant for use and occupation of the premises up to the 29th September, 1875, and that the plaintiff was not entitled to sign judgment for the amount he claimed in respect of such use and occupation. *Hanmer* (*Lord*) v. *Flight*, 36 L. T. 279—C. A.

A. entered on, and enjoyed for a time, a shooting belonging to B., in the expectation that a lease would be executed. They could not come to terms, no lease was signed, and at the end of six weeks A. left, and refused to pay any rent : —Held, that, although there was no agreement, yet A. was liable in an action for use and occupation, inasmuch as he had enjoyed the beneficial occupation of the premises. *Dawes* v. *Dowling*, 31 L. T. 65 ; 22 W. R. 770.

An action may be maintained for use and occupation, if a party holds premises under a contract or an agreement, and actual occupation is not necessary. *Pinero* v. *Judson*, 3 M. & P. 497 ; 6 Bing. 206 ; 8 L. J. (o.s.) C. P. 19 ; 31 R. R. 388.

But a tenant who agrees to take furnished lodgings, but does not enter, is not liable for use and occupation. *Edge* v. *Strafford*, 1 C. & J. 391 ; 1 Tyr. 293 ; 9 L. J. (o.s.) Ex. 101.

See also cases, post, cols. 962, et seq.

Between Lessee and Under-lessee.]—A. being tenant of B. of a house, sub-let it to C., and afterwards B. told A. that he had no objection to accepting C. as tenant, but that he would not exonerate A. from the rent :—Held, that as B. still held A. liable for the rent, A. might suc C. for the rent, as due from C. to him. *Dawson* v. *Lamb*, 3 Car. & K. 269.

Where a party entitled to a term in land demises the land to another at a weekly rent for the whole of such term, and it is the intention of the two to create the relation of landlord and tenant, use and occupation may be brought for the whole of such term, although the lessee has given a week's notice to quit before the expiration of the term, and has quitted accordingly. *Pollock* v. *Stacey*, 9 Q. B. 1033; 16 L. J., Q. B. 132; 11 Jur. 267.

What sufficient Evidence of, to go to Jury.]—A lease of premises from the plaintiff to P., containing the usual words "signed, sealed and delivered," was executed by both parties, pursuant to a previous agreement to let, in which the rent was stated to be 55*l.*, and by which it was agreed that P. should pay 100*l.* for the plaintiff's goodwill and fixtures, and that the lease should not be delivered, but remain in the plaintiff's possession until the whole of the 100*l.* was paid. P. paid 50*l.* and entered into possession, and carried on his business, the plaintiff keeping possession of the lease. P. became bankrupt without paying the remaining 55*l.*, the lease remaining with the plaintiff. The defendant became assignee in bankruptcy:—Held (the defendant having accepted the tenancy), that the evidence warranted the jury in finding that there had been no delivery of the deed so as to operate as a lease, and that until the payment of the remaining 55*l.* only a tenancy from year to year existed, and, therefore, that the defendant was liable for rent in an action for use and occupation. *Gudgen* v. *Besset*, 6 El. & Bl. 986; 26 L. J., Q. B. 36; 3 Jur. (N.S.) 212; 5 W. R. 47.

The defendant and his predecessors in estate had paid to the plaintiffs and their predecessors, overseers of the poor of a township, an annual sum of 6*l.* 14*s.* 8*d.*, expressed to be for rent for common lands. It was admitted that the defendant was in possession of the lands out of which the rent issued, but they were not identified, and no evidence was given of their extent or value. The defendant would not produce his deeds:— Held, that there was evidence on which a jury might find for the plaintiff on a count for use and occupation. *Harden* v. *Hesketh*, 4 H. & N. 175; 28 L. J., Ex. 137; 7 W. R. 186.

The defendant agreed to rent a house, the landlord to put it in repair before the tenancy should commence. While the men employed by the landlord were at work, the defendant went on the premises and gave them some directions as to the colour of the staircase:—Held, no evidence of an entry such as would support an action for use and occupation. *Towne* v. *D'Heinrich*, 13 C. B. 892; 1 C. L. R. 335; 22 L. J., C. P. 219; 17 Jur. 1102; 1 W. R. 370.

Evidence of occupation and payment of rent is sufficient evidence of tenancy. *Jenkins* v. *Hill*, 2 W. R. 268.

After Notice to Quit.]—Notice to quit was given, and it expired at Lady Day, 1840; the tenant held on till Lady Day, 1841; but since the former period there had been no payment of rent, nor any other overt act to shew that a new tenancy was created. The landlord distrained for rent due at Lady Day, 1841:—Held, that the distress was not justifiable. The landlord ought to have sued for use and occupation. *Alford* v. *Vickery*, Car. & M. 280.

b. After Change in Title.

By Grantee of Annuity.]—An action for use and occupation may be maintained by a grantee of an annuity, after a recovery in ejectment against a tenant who was in possession under a demise from year to year, for all rent in his hands at the time of notice by the grantee, and down to the day of the demise in the ejectment, but not afterwards. *Birch* v. *Wright*, 1 Term Rep. 378; 1 R. R. 228.

By Assignee of Equity of Redemption.]—Premises came into the defendant's possession through J. S., who afterwards mortgaged to W. S., and assigned the equity of redemption to the plaintiff:—Held, that he could only recover rent from the time when he acquired the legal estate from W. S. *Cobb* v. *Carpenter*, 2 Camp. 13, n.

By Trustees.]—An action for use and occupation is maintainable without attornment, under 4 & 5 Anne, c. 16, ss. 9, 10, by the trustees of one whose title the tenant had notice of before he paid over his rent to his original landlord, though the tenant had no notice of the legal title being in the plaintiffs on the record. *Lumley* v. *Hodgson*, 16 East, 99; 14 R. R. 315.

Agreement for Lease by Husband—Refusal of Wife to execute.]—Where a house was devised to a trustee, in trust for a devisee, for her sole and absolute use, and she afterwards married B., who let part of it, under a written agreement signed by himself only, to the defendant, as a yearly tenant, and afterwards granted a lease for years of the whole of the house to the plaintiff, which the wife refused to execute, although she was named therein; and the defendant had notice of the lease, and was required to pay any rent that might subsequently accrue to the plaintiff:—Held, that the defendant was liable to the plaintiff, and that he could not impeach his title, as he must be taken to stand in the same situation as B., whose title as landlord the defendant had acknowledged, by occupying and enjoying the premises under him. *Rennie* v. *Robinson*, 7 Moore, 539; 1 Bing. 147; 1 L. J., (O.S) C. P. 30; 25 R. R. 604.

Person occupying in place of original Tenant.]—Where premises had been let to B. for a term determinable by a notice to quit, and, pending such term, C. applied to A., the landlord, for leave to become the tenant instead of B., and, upon A.'s consenting, agreed to stand in B.'s place, and offered to pay rent:—Held, that (though B.'s term had not been determined either by a notice to quit, or a surrender in writing) A. might maintain an action for use and occupation against C., and that the latter could not set up B.'s title in defence to that action. *Phipps* v. *Sculthorpe*, 1 B. & Ald. 50; 18 R. R. 426. But see also *Hyde* v. *Moakes*, 5 Car. & P. 42.

Estoppel.]—The plaintiff came into occupation under one who had paid rent upon a distress by the defendant:—Held, that, after proof of this fact, the plaintiff was estopped from disputing the defendant's title to the rent, notwithstanding the defendant inadvertently put in evidence a document which shewed that the plaintiff's predecessor occupied under a lease to which the defendant was in law a stranger. *Cooper* v.

Blandy, 1 Bing. (N.C.) 45 ; 4 M. & Scott, 562 ; 3 L. J., C. P. 274.

Where the defendant has come in under the plaintiff he cannot shew that his title has expired, unless he solemnly renounced the plaintiff's title at the time, and commenced a fresh holding under another person. *Balls* v. *Westwood*, 2 Camp. 11.

Other Cases.]—The father of the plaintiff died seised of a copyhold tenement of a manor, in which there was a custom for widowhood ; his widow occupied after his death, and the defendant having married her daughter, remained in possession after her death :—Held, that the plaintiff might maintain an action for use and occupation against the defendant. *Hellier* v. *Silleox*, 19 L. J., Q. B. 295 ; 14 Jur. 573. See *Blundell* v. *Drummond*, 14 Jur. 573, n.

By indenture of lease, dated the 26th June, 1810, between A. (the father of the plaintiff) and B. (the father of the defendant), reciting a former lease of the 27th July, 1810, between S. and M. his wife, and A., which recited that M. was entitled to a moiety of lands in West Fen, and two-thirds for life, or for some other estate of freehold, and that A. was entitled to the other moiety and the other third part respectively, or some other share of the same lands, for some estate of freehold, and by which S. and M. his wife demised the moiety and two-third parts respectively of M. to A., for forty years, from the 5th of April, 1801 ; A. demised to B. the lands of which M. was, by the recital in the lease of 1801, said to be entitled to two-thirds, and himself, A., to one-third (of the lands in West Fen), for the remainder of the term of forty years, except the last ten days. A. died in 1813, and B. in 1818, leaving the plaintiff and the defendant their respective representatives. The defendant continued in the occupation of the lands in West Fen to the time of the trial, he and his father having regularly paid rent to the plaintiff and his father to Lady Day, 1841, when the lease of 1801 expired :—Held, that the recital in the lease of 1801 was primâ facie evidence that A. was entitled to one-third of the lands in West Fen in fee, and that the plaintiff had a right to treat the defendant as a tenant at sufferance of such undivided third part, for the period during which he held on after the expiration of the lease, and to sue him for use and occupation in respect thereof. *Bayley* v. *Bradley*, 5 C. B. 396 ; 16 L. J., C. P. 206.

A. being in possession of premises under a lease from two trustees, for a term which had expired, a new lease was granted for a further term, but was executed by one of the trustees only. A. paid the rent to both trustees, until one of them died ; and for the rent due after his death the other trustee brought an action for use and occupation against A. :—Held, that he might maintain the action in his own right, and was not bound to sue as surviving trustee. *Wheatley* v. *Boyd*, 7 Ex. 20 ; 21 L. J., Ex. 39.

c. Proof of Written Contract.

Production.]—Where premises have been demised by an agreement in writing, but not on stamped paper, the plaintiff is bound to give the writing in evidence ; and if not stamped at the trial, he will be nonsuited, and will not be allowed to go for use and occupation generally. *Brewer* v. *Palmer*, 3 Esp. 213.

Unless the evidence given by the plaintiff in support of his case does not disclose the existence of such an agreement. *Fry* v. *Chapman*, 5 D. P. C. 265.

A defendant cannot shew, by the cross-examination of the plaintiff's witnesses, that the premises are held under a written agreement, but if it afterwards appears by the evidence of the defendant's witnesses that the premises are so held, the plaintiff is not bound to put in the written agreement. *Marston* v. *Dean*, 7 Car. & P. 13.

In an action for rent of land verbally let on the same terms as the former tenant's lease, such lease must be produced, properly stamped. *Turner* v. *Power*, 7 B. & C. 625 ; M. & M. 131 ; 6 L. J. (O.S.) K. B. 122.

A witness for the plaintiff having stated that he had never heard of an agreement in writing respecting the board and lodging, the agreement was put into his hands, and he was asked by the defendant whether he had seen an agreement respecting the subject-matter of the action ; he replied, "Never before I came into court" :—Held, that the defendant, if he wished the agreement read, must put it in as his own evidence. *Keys* v. *Harwood*, 2 C. B. 905 ; 15 L. J., C. P. 207.

One of the plaintiff's witnesses, on cross-examination, said that he had heard from the plaintiff's attorney that there was an agreement in writing :—Held, no evidence of the existence of an agreement, so as to render its production by the plaintiff necessary. *Watson* v. *King*, 3 C. B. 608.

—— **Memorandum—Unaccepted Proposal.**]—Where, on the letting of land to a tenant, a memorandum was drawn up, the terms of which were, that he should on a future day bring a surety and sign the agreement, neither of which he ever did :—Held, that the memorandum was a mere unaccepted proposal, and need not be produced, but that the terms of the letting might be proved by parol evidence. *Doe* d. *Bingham* v. *Cartwright*, 3 B. & Ald. 326 ; 22 R. R. 413.

—— **Unstamped Agreement.**]—Where a witness deposed that the settled draft of a lease was the final agreement between the parties, for one of whom he acted as agent :—Held, that an unstamped memorandum, written afterwards by himself, but not signed by anybody, was admissible as a mere proposal, to shew that the settled draft was not the final agreement between the parties. *Hawkins* v. *Warre*, 5 D. & R. 512.

A company, of which the plaintiff and the defendant were directors, occupied a house belonging to the plaintiff. A draft agreement, prepared by the plaintiff's attorney, was submitted to the solicitors of the company, and by them approved and returned ; and, at a subsequent meeting of the directors, a resolution was made empowering the solicitors to sign the agreement on behalf of the company. The agreement, however, was never executed. In an action for use and occupation the plaintiff offered the draft in evidence, not as an agreement binding per se (it being neither dated, stamped, nor signed), but to show that the occupation was to be by the other directors, exclusive of himself :—Held, that the draft was inadmissible for want of a stamp, inasmuch as it could only be relied on as proof of the special agreement, the plaintiff's position precluding him from maintaining an action against

a co-director upon an implied contract. *Chadwick* v. *Clarke*, 1 C. B. 700.

After the plaintiff has proved by witnesses a case of implied or oral contract, he cannot be nonsuited by the defendant's producing an unstamped written instrument, purporting to contain the terms of contract. *Feilder* v. *Ray*, 3 M. & P. 659; 6 Bing. 332; 4 Car. & P. 61; 8 L. J. (O.S.) C. P. 65; 31 R. R. 429.

Where a proposal was made in writing by A. to let a piece of land to B. on certain terms contained in a written agreement between B. and C., and A. afterwards agreed by parol that B. should have the lands upon the terms proposed:—Held, in an action for a breach of the agreement, that the original proposal was receivable without a stamp. *Drant* v. *Brown*, 5 D. & R. 582; 3 B. & C. 665; 3 L. J. (O.S.) K. B. 111.

Parol Evidence.]—Parol evidence as to the party to whom a demise has been made is not admissible where the agreement for the demise was in writing. *Rex* v. *Rawdon*, 3 M. & Ry. 426; 8 B. & C. 708; 7 L. J. (O.S.) K. B. 84.

Where a party holds land under a written agreement, parol evidence cannot be received of the fact under whom he came into possession. *Doe* v. *Harvey*, 8 Bing. 239; 1 M. & Scott, 374; 1 L. J., C. P. 9.

Parol evidence of the fact of tenancy is admissible, although the tenant hold under a written agreement. *Jenkins* v. *Hill*, 2 W. R. 268.

In an action by landlord against tenant, a witness, refreshing his memory from a memorandum, proved a parol agreement as to the terms of the tenancy; and that the plaintiff at the same time drew up a memorandum, which was read over and assented to by the defendant, but not seen or signed by him:—Held, that the parol evidence was admissible. *Tyrwhitt* v. *Lambert*, 3 P. & D. 676; 10 A. & E. 470. See also *Preston* v. *Merceau*, 2 W. Bl. 1249.

d. Amount of Rent.

Reference to Void Lease.]—Recourse may be had to the original agreement, though void under the Statute of Frauds, to calculate the amount of the rent due on such agreement. *De Medina* v. *Polson*, Holt N. P. 47.

How Assessed.]—A. took a farm under an agreement from B. that A. should have the exclusive right of sporting over the manor in which it was situate, and should also occupy certain glebe land within the parish; A. entered into possession, but did not sign the agreement, and it appeared that B. had no power of conferring the right of sporting, nor could he procure the glebe land:—Held, that evidence was admissible to shew the annual value of the land without such right, which might be ascertained by the jury, independently of the amount of the rent reserved by the agreement. *Tomlinson* v. *Day*, 5 Moore, 558; 2 Br. & B. 680; 23 R. R. 541.

A tenant of premises at 47*l.* a year received notice to quit; and the landlord agreed with another party for a holding, to commence on the expiration of the current term, at 80*l.* a year. Before the term expired, the new tenant, by consent of all parties, was admitted in place of the outgoing tenant; and the rent was paid at the rate of 47*l.* to the end of the term. Disputes arising on the new agreement, it was abandoned; but the new tenant continued to occupy:—Held, that it was a question for the jury what rent was fairly payable for the continual holding, no necessary inference arising under the circumstances from the former holding at 47*l.* *Thetford Corporation* v. *Tyler*, 8 Q. B. 95; 15 L. J., Q. B. 33; 10 Jur. 68.

Where a tenancy is continued beyond the time for which it was originally taken, and nothing is arranged respecting the amount to be paid on the new holding, the new holding is not of necessity to be on the same terms as the former; but the jury may give the landlord a larger sum for the continued occupation, if there are circumstances to shew that such increased rent was expected by him in the event of holding over, and that the understanding was not repudiated by the tenant. *Elgar* v. *Watson*, Car. & M. 494.

A. proposed to B., owner of a warehouse, that A. should occupy it as a packer, and pay B. 75*l.* a year, and as much more as half the profits came to, and a written agreement was to be drawn up between them for a term of five years. A. was let into possession provisionally, and with a view to the intended agreement. When the agreement was drawn up, A. refused to sign it; A. had occupied the warehouse for ten weeks. It was found by the jury that A. was let into possession without any agreement, and provisionally with a view to an intended agreement:—Held, that A. was liable to pay B. a reasonable sum for the time he occupied the warehouse. *Coggan* v. *Warwicker*, 3 Car. & K. 40.

When there has been no Occupation.]—The assignees of an insolvent tenant agreed to pay the landlord 7*l.* for the last quarter's rent:—Held, that the sum could not be recovered, there having been no use and occupation. *Clarke* v. *Webb*, 1 C. M. & R. 29; 4 Tyr. 673; 3 L. J., Ex. 300.

e. Proof of Occupation.

Necessity of Actual Occupation.]—*See* ante, cols. 955, 956.

Generally.]—Where a tenant by a written agreement has agreed to take premises from a future day, it is not enough to put in the agreement, but evidence must be also given of some occupation under it. *Woolley* v. *Watling*, 7 Car. & P. 610.

If a down is let, by an instrument not under seal, for the purpose of digging copper ore, an action for use and occupation may be maintained, if the defendant has ever taken possession; and if he has once taken possession, he is liable to all subsequent rent until the determination of the tenancy, whether he has continued to work the minerals or not; but if the defendant merely caused holes to be dug on the down, and had them filled up immediately, with a view merely to ascertain what sort of bargain he was about to make, or had made, that would not be a taking of possession. *Jones* v. *Reynolds*, 7 Car. & P. 335.

A party who had agreed to rent a house, sent in a woman to clean the house, and workmen to paper one of the rooms:—Held, to be sufficient evidence of occupation. *Smith* v. *Towart*, 2 Man. & G. 841; 3 Scott (N.R.) 172.

Although an assignment by a termor of his goods, estate and effects to trustees for the benefit of his creditors, is sufficient to vest the term in the trustees, unless disclaimed, and they do not disclaim, an action for use and occupation cannot be maintained against them without proof that they have actually occupied. *How* v.

Kennett, 3 A. & E. 659 ; 5 N. & M. 1 ; 1 H. & W. 391 ; 4 L. J., K. B. 220.

Where a lease of premises for a term of years expired at Midsummer, 1821, and the tenant refused to give up possession at that time, and insisted that he was entitled to a notice to quit, and continued in possession until Christmas following, and paid rent to that time, when he tendered the keys of the premises to his landlord, which the latter refused to accept :—Held, that such continuing in possession by the tenant did not amount to a holding over by him, but was conclusive evidence of a tenancy from year to year, which entitled the landlord to maintain an action to recover the amount of a quarter's rent, which became due at Lady-day, 1822. *Bishop* v. *Howard*, 3 D. & R. 293 ; 2 B. & C. 100 ; 1 L. J. (O.S.) K. B. 243 ; 26 R. R. 291. *But see* 2 Esp. 717 ; 5 R. R. 769.

The putting up of a board for the purpose of letting houses, by a person who built them, and agreed to become tenant of them from a certain time, is sufficient to enable the person for whom they were erected to recover rent on a count for use and occupation. *Sullivan* v. *Jones*, 3 Car. & P. 579.

Notice to quit was given, and it expired at Lady-day, 1840 ; the tenant held on till Lady-day, 1841, but since the former period there had been no payment of rent, nor any other overt act to shew that a new tenancy was created. The landlord distrained for rent due at Lady-day, 1841 :—Held, that the distress was not justifiable. The landlord ought to have sued for use and occupation. *Alford* v. *Vicery*, Car. & M. 280.

When a tenancy from year to year has been determined by a regular notice to quit, the mere accidental detention of the key by the tenant (who has quitted the premises and removed his goods) for two days beyond the expiration of the term, does not amount to any evidence of use and occupation, so as to render him liable for another quarter. *Gray* v. *Bompas*, 11 C. B. (N.S.) 520 ; 5 L. T. 841.

Joint.]—A. let premises to four persons, B., C., D. and E., for a year certain, ending at Midsummer, 1839, with a proviso that, if a month at least before the termination of the year, a request was sent to him to that effect, A. would grant them a lease for seven, fourteen, or twenty-one years. The lessees were directors of a joint-stock bank, and occupied the premises for the purpose of its business. B. ceased to be a director in January, and C. in March, 1839. On the 31st May, the solicitor of the directors applied to A. to renew the tenancy for another year to the then directors ; but no agreement to that effect was finally executed. On the 20th June, the solicitor applied for a renewal of the agreement for a quarter of a year ; to which A., on the 23rd, replied, "that he should consider of it." Nothing further passed between the parties ; but at the Michaelmas following, the premises were delivered up to A. :—Held, that the four original lessees were liable to A. for the rent of the quarter from Midsummer to Michaelmas. *Christy* v. *Tancred*, 7 M. & W. 127 ; 10 L. J., Ex. 228 ; 4 Jur. 1064.

Where premises are let for a certain term to A. and B., and A. holds over after the expiration of the term, with B.'s assent, both are liable for rent, for so long as A. continues actually to occupy, but no longer. *Christy* v. *Tancred*, 9 M. & W. 438 ; 11 L. J., Ex. 109.

A. and B. entered into an agreement to take premises of C., from a day certain, at a yearly rent. The agreement was not signed by C. In an action for use and occupation, B. suffered judgment by default, and the evidence shewed only an entry by A. :—Held, that this entry by A. was evidence of a parol demise to A. and B. upon the terms of the agreement ; and that his entry was therefore the entry of both, and justified a verdict for C. *Glen* v. *Dungey*, 4 Ex. 61 ; 18 L. J., Ex. 359.

Under-tenancy.]—If A. agrees to let lands to B., who permits C. to occupy them, A. may recover the rent in an action against B. for use and occupation. *Bull* v. *Sibbs*, 8 Term Rep. 327.

The defendant took premises of the plaintiff for nine months, at a rent certain, with the option, at the end of that time, of taking a lease for seven, or fourteen, or twenty-one years. Before the expiration of the nine months, the defendant let the premises to a company for six months, who actually occupied them for that period :—Held, that, at the end of a year from the expiration of the nine months, the defendant was liable to the plaintiff for a year's rent. *Waring* v. *King*, 8 M. & W. 571 ; 11 L. J., Ex. 49.

A lessee of a term underlet the premises, and his under-tenant held over for a portion of a year after the expiration of the term against the will of the lessee, so that he could not give up possession to his lessor. During such holding over, the lessee distrained upon the under-tenant for rent previously due :—Held, that the lessee was liable for the period of the under-tenant's holding over, but not for a whole year's rent. *Ibbs* v. *Richardson*, 1 P. & D. 618 ; 9 A. & E. 849 ; 8 L. J., Q. B. 126 ; 3 Jur. 102.

Where a defendant, in expectation of a lease, by indenture, which he had agreed to take from the plaintiff, procured attornments from some of the tenants, and received rent from others :—Held, liable for use and occupation. *Neale* v. *Swind* or *Sweeney*, 2 C. & J. 377 ; 2 Tyr. 464 ; 1 L. J., Ex. 118.

If several persons rent premises to be used as a Jewish synagogue, the seats in which are let out by an officer appointed annually, who receives the rents, and applies them, partly in the payment of the rent for the premises, and partly for general purposes connected with the Jewish religion, the lessees may maintain an action for the rent due from an occupier of a seat. *Israel* v. *Simmons*, 2 Stark. 356.

A. let premises to B. for a term which expired at Lady-day, 1858. B. had underlet them for the whole term to C., who continued in possession ; and B. afterwards sued him for the half-year's rent accruing at Michaelmas, 1858. The only evidence to shew that B. still continued tenant of the premises to A. was that, after action brought, he paid to A., and A. accepted, the half-year's rent which would have been due from him, assuming his tenancy to have been still subsisting :—Held, that there was evidence for the jury that B.'s tenancy under A. continued, and consequently that the action was maintainable. *Lery* v. *Lewis*, 6 C. B. (N.S.) 706 ; 28 L. J., C. P. 304 ; 5 Jur. (N.S.) 1408. Affirmed, 9 C. B. (N.S.) 872 ; 30 L. J., C. P. 141 ; 7 Jur. (N.S.) 759 ; 9 W. R. 388—Ex. Ch.

By Acknowledgments and Admissions.]—Suffering judgment by default, in an action for use and occupation, amounts to an admission that

the defendant held a house of the plaintiff, who need not shew that it was his house; and it lies on the defendant to prove that he did not occupy the particular house to which the attention of the jury has been directed. *David* v. *Holdship*, 1 Chit. 644, n.

If the occupier of a house submits to a distress for rent, stated in the notice of distress to be due from him as tenant to the distrainer, this is an acknowledgment of the tenancy. *Panton* v. *Jones*, 3 Camp. 372; 14 R. R. 757.

Payment of rent is a sufficient recognition of the title of landlord to support an action for use and occupation, although it appears upon the evidence on the part of the plaintiff that the defendant originally came in under another person, or that the plaintiff has only an equitable estate. *Dolby* v. *Iles*, 11 A. & E. 335; 3 P. & D. 287; 9 L. J., Q. B. 51; 4 Jur. 432.

A. applied to B. (the proprietor of a house with cellars, which he was in the habit of letting) telling him that he wanted cellar room to do a pipe of wine; but adding, that he did not know but very shortly he might want a good deal of room; B., upon this, said that he had better put it into his (B.'s) own cellar; which he did:—Held, that B. was entitled to detain the wine till a reasonable and proper sum had been paid him for rent. *Gray* v. *Chamberlain*, 4 Car. & P. 260.

Parochial trustees, under the authority of a local act, built a workhouse on lands belonging to charity trustees in the parish, and in 1821 disputes arose between the two sets of trustees, as to whether any rent was payable therefor, and the question was brought before the Master of the Rolls by an amicable suit in 1821; who decreed that a certain rent should be paid by the parochial trustees, which was accordingly paid till 1833:—Held, that use and occupation might be maintained for rent in arrear from 1833, as the decision of the Master of the Rolls was binding upon the parties; and that the payment of rent under the circumstances was an estoppel on the parochial trustees. *Allison* v. *Stark*, 1 P. & D. 183; 9 A. & E. 255; 8 L. J., M. C. 13.

A judgment obtained by A. in an action for use and occupation against B. and C. is no evidence to charge B. in a subsequent action brought by A. against him alone, for the use and occupation of the same premises for a subsequent period. *Christy* v. *Tancred*, 9 M. & W. 438; 11 L. J., Ex. 109.

The proprietors of Drury Lane Theatre, constituted a corporation, in 1836 leased the counters of the saloon of the theatre, and the privilege of selling fruit, to Mrs. C. for seven years. She died in 1837, and her son soon after applied to the committee of the theatre to become tenant on the same terms as in the lease, and they accepted him. He occupied to January, 1843, and paid rent to the latter part of 1841:—Held, that it was a question for the jury, whether the son had occupied as assignee of the lease to his mother, or upon a fresh taking upon the same terms as the lease, and, if the latter, he was liable. *Drury Lane Co.* v. *Chapman*, 1 Car. & K. 14.

2. By and against whom Maintainable.

Auctioneers.]—Where lands were let by auction, subject to conditions of sale, and a memorandum of the terms was signed by the auctioneer and the tenant, and underneath there was a signature of approval by the owner, and a direction to pay the rent into the hands of the auctioneer; in an action for use and occupation brought by the auctioneer against the tenant, in which a verdict had been found for the plaintiff, the court granted a new trial, upon the ground that the case had been left as an entire question of fact, without the attention of the jury having been called to the legal effect of the memorandum. *Evans* v. *Evans*, 3 A. & E. 132; 1 H. & W. 239.

In an action for the hire of land let by the plaintiff to the defendant, it appeared that, by permission of a corporation and a committee of freemen, races were held annually on a common, the fee of which was in the corporation, and on which the freemen had a right of depasturing cattle, and a committee, under whose management the races were, erected a temporary grand stand, and caused the land adjoining to it and part of the racecourse to be let by public auction for the erection of booths, stalls, &c. In 1864, the plaintiff, who was employed by the rate committee, issued handbills announcing that "the ground for booths, stalls, &c. will be let by auction by Mr. J. F., on, &c." The conditions for sale were headed "Conditions for letting standings for booths, &c. on the common during the races. By Mr. J. F." At the auction the defendant was declared the taker of one of the lots, and he took possession of and occupied it during the races:—Held, that there was evidence of a contract by the defendant with the plaintiff personally, and that an action for use and occupation was maintainable. *Fisher* v. *Marsh*, 6 B. & S. 411; 34 L. J., Q. B. 177; 11 Jur. (N.S.) 795; 12 L. T. 604; 13 W. R. 834.

Bankrupts or Assignees.]—A tenant from year to year of a house at a yearly rent became a bankrupt in the middle of the year, and his assignees entered and kept possession for the remainder of the year:—Held, that the lessor could not maintain an action for use and occupation against the assignees, for the bankrupt's occupation as well as their own, without proving their special instance and request for the bankrupt to occupy, during the time that elapsed before the bankruptcy. *Naish* v. *Tatlock*, 2 H. Bl. 320; 3 R. R. 384.

Where a lessee agreed to pay, and paid in pursuance of such agreement, an additional rent in consideration of improvements executed by his landlord and the lessee afterwards became a bankrupt:—Held, that an action for use and occupation against the assignees was not maintainable for the increased rent, as the assignees held the premises under the lease; and that the lessor's remedy was against the lessee. *Lambert* v. *Norris*, 2 M. & W. 333; 6 L. J., Ex. 109.

Action for use and occupation. Plea, that before the action the plaintiff became bankrupt, that assignees were appointed, and that the debt sued for became due to the plaintiff before his bankruptcy. Replication, that the plaintiff, as trustee of A., permitted the defendant to use the premises, and that before bankruptcy he had no beneficial interest therein, and only sued as trustee:—Held, that the plaintiff was not bound by his replication to prove a declaration of trust from A. under the 7th section of the Statute of Frauds, but that it was sufficient for him to negative the title of his assignees by any other proof that he was not beneficially interested in the subject-matter of the action. *Houghton* v. *Kœnig*, 18 C. B. 235; 25 L. J., C. P. 218.

Cestui que Trusts.]—Where A. is seised in trust for B. and C., neither B. nor C. can maintain use and occupation in his own name against the tenant as principal, treating A. as his agent. *Morgell* v. *Paul*, 2 M. & Ry. 303.

The receiver of an estate, in which plaintiff had an equitable interest, under a settlement vesting it in trustees, let the defendant into possession of the premises under an agreement with himself in writing, in which he described himself as agreeing, "on behalf of the estate" to let for a term of years. The plaintiff declining to sanction any other than a yearly letting, a correspondence ensued between him and the defendant in which the latter intimated that, as he could not get a lease, he should leave as soon as he could, and he did leave before he had been six months in possession :—Held, that he was not liable to the plaintiff, either in trespass, or use and occupation ; and semble, that he was not liable at all. *Sloper* v. *Saunders*, 29 L. J., Ex. 275.

Corporations.]—A corporation aggregate may sue for use and occupation where the tenant has held premises under them and paid rent. *Stafford Corporation* v. *Till*, 4 Bing. 75 ; 12 Moore, 260 ; 5 L. J. (o.s.) C. P. 77 ; 29 R. R. 511.

Where any corporation has actually used and occupied land, for a corporate purpose, by permission of the owner, it is liable for use and occupation, though there is no contract under seal for such occupation. *Lowe* v. *L. & N. W. Ry.*, 18 Q. B. 632 ; 21 L. J., Q. B. 361 ; 17 Jur. 375.

Although a corporation may be liable for use and occupation of premises, it can only be so for the period of actual occupation ; and a continuous occupation for several years will not render the corporation tenants from year to year. *Finlay* v. *Bristol & Exeter Ry.*, 17 Ex. 409 ; 7 Railw. Cas. 449 ; 21 L. J., Ex. 117.

A railway company hired rooms from December 16th, 1846, for one year, but occupied them till December 16th, 1848, previous to which time they removed their furniture and effects, left the keys in the doors, and paid the rent up to this day, but gave no notice to quit :—Held, that the company was not liable in an action for use and occupation for rent subsequently to December 16th, 1848. *Ib.*

Executors and Administrators.]—One of two executors of a deceased tenant of a term of years entered into the demised premises and occupied them :—Held, that such entry did not enure as the entry of the two executors, so as to make them both liable in an action for use and occupation—so as to make them severally liable de bonis propriis. *Nation* v. *Tozer*, 1 C. M. & R. 172 ; 4 Tyr. 561 ; 3 L. J., Ex. 234.

A lessee of a term for years underleased for a term longer than his own, the under-lessee covenanting to pay rent to the lessee :—Held, that the executor of the lessee might sue the under-lessee for rent accruing during the continuance of the lessee's term. *Baker* v. *Gosling*, 1 Bing. (N.C.) 19 ; 3 L. J., C. P. 292.

The plaintiff declared against A. and B. as executors, for use and occupation of a messuage held of him by them as executors under a demise to the testator, and that in consideration of the premises, they as executors promised to pay. Plea by A., that B. never was executor, nor ever administered :—Held, that the declaration was good in substance, and that the plea was bad, as setting up a personal discharge, of which B. only could avail himself. *Atkins* v. *Humphrey*, 2 C. B. 654 ; 3 D. & L. 612 ; 15 L. J., C. P. 120.

In an action for use and occupation against an executor he is personally liable, and not in his representative capacity. *Nixon* v. *Quinn*, Ir. R. 2 C. L. 247.

Husband and Wife.]—An action for the use and occupation of a house is not maintainable against the husband alone, if his wife held under a yearly tenancy before marriage, the rent being payable half-yearly, where part of the rent was due from the wife dum sola, and the remainder accrued after the coverture. *Richardson* v. *Hall*, 3 Moore, 307 ; 1 Br. & B. 50.

A. having an equitable title to a house under an agreement for a lease, permitted his mistress to occupy it, and it was agreed between them that she should take up bills of exchange which he had accepted in part payment of the purchase-money, and that the lease should be assigned to her. She continued in possession, but did not take up the bills, and afterwards married the defendant, who occupied the house :—Held, that A. could not recover against him in an action for use and occupation. *Keating* v. *Bulkley*, 2 Stark. 419.

Mortgagees.]—On the execution of an agreement for a lease, the party to whom the lease was to be granted entered into possession, and the lessor at the same time made an assignment of the premises for ninety-nine years, by way of mortgage, and then became bankrupt :—Held, that the mortgagee could maintain an action for use and occupation in respect of an occupation after the execution of the mortgage to him, and notice of that mortgage to the tenant. *Rawson* v. *Eicke*, 2 N. & P. 423 ; 7 A. & E. 451 ; W. W. & D. 675 ; 7 L. J., Q. B. 17.

The fact of the mortgagee of the premises having given the tenant notice to pay the rent to him may be given in evidence under the general issue, if the rent sought to be recovered accrued due after the notice ; but if the rent accrued due before the notice, this defence must be specially pleaded. *Waddilove* v. *Barnett*, 4 D. P. C. 347 ; 2 Scott, 763 ; 2 Bing. (N.C.) 538 ; 1 Hodges, 395 ; 5 L. J., C. P. 145.

To an action for use and occupation, a plea, that the premises had been mortgaged to A. to secure the repayment of 200*l.* and interest in six months ; that before the defendant began to occupy, the six months had elapsed without repayment of the 200*l.*, which remained due ; that, until the commencement of the action, the mortgagor continued the control and management of the premises ; that, before the action, the defendant was required by notice to pay to the assignee of the mortgagee the amount sought to be recovered ; and that, from the time of the giving the notice, the defendant was liable to pay the same to such assignee :—Held, that the plea was no answer. *Wilton* v. *Dunn*, 17 Q. B. 294 ; 21 L. J., Q. B. 60 ; 15 Jur. 1104.

Semble, that if payment had actually been made under a claim by the mortgagee, such payment might have been pleaded as a defence. *Ib.*

Tenants in Common.]—Tenants in common may join in suing for use and occupation, a tenant holding under them. *Last* v. *Dinn*, 28 L. J., Ex. 94.

Tenant in Common against Co-tenant.]—Where one tenant in common has by lease demised his interest to his co-tenant in common, if the tenant in common, who was lessee, continues in occupation as tenant at sufferance after the expiration of the lease, he will be liable in an action for use and occupation at the suit of his co-tenant in common who was lessor. *Leigh* v. *Dickeson*, 53 L. J., Q. B. 120 ; 12 Q. B. D. 194.

Lessee from Year to Year who has Assigned his Interest.]—A., a tenant from year to year under a parol demise, assigned all his interest to B. The lessor did not accept B. as tenant, and, on default being made in payment of the rent, sued A. for use and occupation :—Held, that he was liable in that form of action. *Shine* v. *Dillon*, Ir. R. 1 C. L. 277 ; 15 W. R. 847.

3. Pleadings.

Claim.]—The plaintiff may declare generally for the use and occupation of divers messuages, lands, and tenements, without specifying where they are situate. *King* v. *Fraser*, 6 East, 348 ; 2 Smith, 462.

In an action by a surviving owner, it is not sufficient to allege that the defendant held the premises by the sufferance and permission of the surviving owner only, where they were in fact held under two jointly. *Israel* v. *Simmons*, 2 Stark. 356.

A defendant took possession of premises under a demise for three years, from Christmas ; he continued to occupy until the 27th July, when he quitted the premises, having paid rent up to the previous Midsummer :—Held, that the plaintiff was not entitled to a count on the demise, and also a count for use and occupation, but must elect. *Arden* v. *Pullen*, 1 D. (N.S.) 612 ; 9 M. & W. 430 ; 11 L. J., Ex. 382.

It is not now necessary to put the claim in the old form of use and occupation. *Metropolitan Ry.* v. *Defries*, 2 Q. B. D. 189 ; 36 L. T. 150 ; 25 W. R. 271.

Defence.]—Nil habuit in tenementis is no plea. *Curtis* v. *Spitty*, 1 Bing. (N.C.) 15 ; 4 M. & Scott, 554 ; 4 L. J., C. P. 236. S. P., *Lewis* v. *Willis*, 1 Wils. 314.

In an action for use and occupation of lodgings by A., the defendant's wife, at his request, the defendant cannot plead that A. was not his wife, as such plea would amount to the general issue, as well as tender an immaterial issue. *Sinclair* v. *Hervey*, 2 Chit. 642.

A plea, that the plaintiff, before action, took and detained, as a distress for the rent, goods of value sufficient to satisfy the same, is bad, for not shewing that the rent was satisfied. *Lear* v. *Edmonds*, 1 B. & Ald. 157 ; 2 Chit. 301 ; 18 R. R. 448.

Under the plea of never indebted, the defendant may shew that A. had recovered judgment in ejectment for the premises, and that he had attorned and paid the rent subsequently accruing due to A., to avoid being turned out of possession. *Newport* v. *Harley*, 2 D. & L. 921 ; 14 L. J., Q. B. 242 ; 10 Jur. 333.

But, with respect to rent previously due, he cannot, under never indebted, set up as a defence that he has paid it to A. *Ib.*

J. Termination of the Contract.

1. Notice to Quit.

a. When Necessary.

Generally.]—A notice to quit must be given previously to bringing ejectment, whenever there is an existing tenancy from year to year. *Doe* d. *Hollingsworth* v. *Stennett*, 2 Esp. 717 ; 5 R. R. 769. *Doe* d. *Martin* v. *Watts*, 7 Term Rep. 83 ; 2 Esp. 501 ; 4 R. R. 387. *Doe* d. *Moore* v. *Lawder*, 1 Stark. 308. *Doe* d. *Warner* v. *Brown*, 8 East, 166 ; 9 R. R. 397.

Where the term of a lease is to end on a precise day, there is no occasion for a notice to quit previously to bringing an action. *Cobb* v. *Stokes*, 8 East, 358 ; 9 R. R. 464. S. P., *Messenger* v. *Armstrong*, 1 Term Rep. 54 ; 1 R. R. 148 ; and *Right* d. *Flower* v. *Darby*, 1 Term Rep. 162 ; 1 R. R. 169.

Where J., who was tenant at will to W., died, and the defendant, who was heir-at-law to J., entered into possession, and claimed the land as his own :—Held, that the devisees of W. might bring an ejectment against the defendant, without giving him notice to quit or demanding possession. *Doe* d. *Burgess* v. *Thompson*, 1 N. & P. 215 ; 5 A. & E. 532 ; 6 L. J., K. B. 57.

A notice to quit is unnecessary when, on demand of possession, the party refuses to give up possession, claiming the property as his own. *Doe* d. *Landsell* v. *Gower*, 17 Q. B. 589 ; 21 L. J., Q. B. 57 ; 16 Jur. 100.

Holding under Agreement for Lease—Not executed.]—A tenant holding under an agreement for a lease for seven years, which was never executed, is not entitled to a notice to quit at the end of the seven years. *Doe* d. *Tilt* v. *Stratton*, 4 Bing. 446 ; 1 M. & P. 183 ; 3 Car. & P. 164 ; 6 L. J. (O.S.) C. P. 50.

Where a party occupies under an agreement for a lease during the whole term for which the lease was to be granted, a notice to quit is not necessary at the end of such term, as the agreement is evidence of the expiration of the tenancy, as well as of the other terms of the holding. *Ib.*

Under Void Lease.]—Under an agreement to let for a longer term than three years, though void as a lease for three years, under 8 & 9 Vict. c. 106. s. 3, the tenant holds from year to year, subject to the terms of the agreement, and is bound to leave at the expiration of the three years, without any notice to quit. *Tress* v. *Savage*, 4 El. & Bl. 36 ; 2 C. L. R. 1315 ; 23 L. J., Q. B. 339 ; 18 Jur. 680 ; 2 W. R. 564.

A remainderman received rent from the lessee of a void lease, and having given notice to quit, conveyed the property by virtue of a power to A :—Held, that in ejectment the purchaser might take advantage of the notice given by the remainderman. *Doe* d. *Egremont* (*Earl*) v. *Hellings*, 6 Jur. 821.

After the death of the tenant for life, the remainderman sent his servant to the different tenants for the culm to be brought home. Culm was accordingly sent twice at intervals and received :—Held, that, even assuming the lease granted by the tenant for life to be invalid, the remainderman had adopted the tenant so far that the latter was entitled to a notice to quit before ejectment could be maintained. *Doe* d. *Symmons* v. *Morse*, 9 L. J. (O.S.) K. B. 77 ; 1 B. & Ad. 365.

Liberty to reside whilst Services Rendered.]—A. being owner of a farm, let it for seven years to B., and by a written agreement of the same date it was agreed, that A. should manage the farm for B., B. allowing A. 12*s.* per week; "and allowing him and his family to reside and have the use of the dwelling-house and furniture therein, free of rent"; and this agreement was to be put an end to by three months' notice, or three months' wages:—Held, that no notice to quit was necessary, if the service was put an end to. *Doe* d. *Hughes* v. *Derry*, 9 Car. & P. 494.

Tenancy between Co-partners.]—So, if by the terms of a deed of co-partnership, a house is to be used and occupied by the co-partners during the co-partnership, it is not necessary, after a dissolution of partnership, to give a notice to quit previously to bringing an ejectment against a co-partner. *Doe* d. *Waithman* v. *Miles*, 1 Stark. 181; 4 Camp. 373; 16 R. R. 805.

If A. lets part of a house to a firm, consisting of himself and B., for the carrying on of the business of the firm, and the partnership of A. and B. is dissolved, A. may bring an ejectment against B., and recover possession of the part of the house thus let, without giving B. a notice to quit. *Doe* d. *Colnaghi* v. *Bluck*, 8 Car. & P. 464.

Purchaser in Possession before Completion—Tenancy at Will.]—Where under a contract of purchase by which the vendee was let into possession immediately and was to pay 5*l.* per cent. interest on the purchase-money, if the contract were not completed within three months, until its completion, and it was not completed within that time and he continued in possession, but failed to pay the interest:—Held, that only a tenancy at will existed between the parties, and consequently that no notice to quit was necessary before bringing an ejectment. *Doe* d. *Tomes* v. *Chamberlaine*, 5 M. & W. 14; 9 L. J., Ex. 38.

Holding under a Power.]—Lands were settled with a power to lease. A., the tenant for life under the settlement, made, in May, 1807, a lease which was not a good execution of the power, and received rent in conformity with the terms of the lease, by which the rent was payable on Lady-day, Midsummer, Michaelmas, and Christmas days. B., a succeeding tenant for life, also received rent in conformity with the terms, and afterwards, in conjunction with C., remainderman in tail expectant upon B.'s estate for life, settled the land to such uses as C. should appoint, and, in default of appointment, to C. for life, remainder to a trustee for C. for C.'s life, remainder to the right heirs of C. C. received rent before B.'s death, according to the terms of the lease; and, after B.'s death, gave notice to the lessee, on 21st March, 1838, to quit "on 29th September next, or at the expiration of the current year of your tenancy." On 19th of February, 1839, C. appointed to N. in fee:—Held, that, as between C. and the lessee, the notice was good, and determined the tenancy; and that N., at the expiration of the notice, might evict the lessee; for that, if N. held under the creator of the power of B., no notice to quit was necessary as against N., and if N. held under the appointer, C., he might take advantage of the notice at the expiration. *Doe* d. *Egremont (Earl)* v. *Forwood*, 3 Q. B. 627; 11 L. J., Q. B. 321.

Title founded on Judgment previous to Tenancy.]—Where a tenant came into possession of premises in 1816:—Held, that the lessor of the plaintiff in ejectment, who claimed under an elegit and inquisition issued in 1818, but founded on a judgment recovered prior to 1816, need not give a notice previous to bringing the ejectment. *Doe* d. *Putland* v. *Hilder*, 2 B. & Ald. 782; 21 R. R. 488.

Disclaimer of Title.]—A notice is not necessary, where the tenant does an act which amounts to a disavowal of the title of the lessor. *Doe* d. *Grubb* v. *Grubb*, 10 B. & C. 816; 8 L. J. (O.S.) K. B. 321. *Doe* d. *Williams* v. *Pasquali*, 1 Peake, 259; 3 R. R. 688. *Doe* d. *Jefferies* v. *Whittick*, Gow, 195; 21 R. R. 828. *Doe* d. *Clun* v. *Clarke*, Peake Ad. C. 239.

Nor where the possession of the tenant is adverse. *Doe* d. *Foster* v. *Williams*, Cowp. 622. S.P., *Doe* d. *Cheeser* v. *Creed*, 2 M. & P. 648. *S. C.*, nom. *Doe* d. *Davis* v. *Creed*, 5 Bing. 327; 7 L. J. (O.S.) C. P. 138.

—— **What is.**]—But refusal to pay rent to the devisee under a will, which is contested, is not such a disavowal. *Doe* d. *Grubb* v. *Grubb*, supra.

"I have no rent for you, because A. has ordered me to pay none," is evidence of a disclaimer of tenancy. *Doe* d. *Whitehead* v. *Pittman*, 2 N. & M. 672.

The defendant held premises under a tenant for life, on whose death possession was claimed, and rent demanded by the heir-at-law of the devisor; whereupon the defendant wrote to the attorney of the heir-at-law, stating that he held as tenant to S. (the husband of the tenant for life), in right of his wife; that he had never considered the claimant as the landlord of the house; that he should be ready to pay the arrears to any person who should be proved to be heir-at-law; but that he must decline taking upon himself to decide upon the claim made on him, without more satisfactory proof in a legal manner:—Held, that this letter amounted to a disclaimer of the title of the heir-at-law, and that he might maintain ejectment against the tenant without giving him a previous notice to quit. *Doe* d. *Culvert* v. *Frowd*, 1 M. & P. 480; 4 Bing. 557; 29 R. R. 624.

So, where the tenant has attorned to some other person, or answered an application for rent, by saying that his connection as tenant with the party applying has ceased. *Doe* d. *Grubb* v. *Grubb*, 10 B. & C. 816; 8 L. J. (O.S.) K. B. 321.

A tenant from year to year, who had agreed to buy his landlord's estate, having remained in possession for several years without paying either rent or interest on the purchase-money, the agent of the lessor applied to him to give up possession; to which he answered "that he had bought the property, and would keep it, and had a friend who was ready to give him the money for it":—Held, that this was no disclaimer; because it was not a claim to hold the estate on a ground necessarily inconsistent with the continuance of the tenancy from year to year. *Doe* d. *Gray* v. *Stanion*, 1 M. & W. 695; 2 Gale, 154; 5 L. J., Ex. 253.

B. had concurred, with other members of his family, in letting land to C., as tenant from year to year, and it was agreed that the rent should be paid to D., as agent for the family. B., to

whom alone the land really belonged, demanded rent of C., who said, "You are not my landlord." B. then demanded possession, which C. refused to give up:—Held, that if the jury was satisfied that the fair meaning of this was, that C. asserted that B. and himself were not in the relation of landlord and tenant, this was a disclaimer, and that C. was not entitled to notice to quit. *Doe* d. *Burnett* v. *Long*, 9 Car. & P. 773.

The defendant held premises as tenant to H., with an agreement for a lease for seven years, or for the lease for lives under which H. held the property. The attorney for the lessors of the plaintiff, who was assignee of H.'s interest in the premises, under an impression that the seven years had expired, went to demand possession; when the defendant said, "I hold on a lease for lives, and as long as they live I will not give up possession; you know I have an agreement." The attorney then demanded a quarter's rent, which was due, but which the defendant refused to pay, saying, "I hold under H., and I was directed by him to pay to K. (the superior landlord), and I'll do so; how do I know he may not come and make a demand on me?"—Held, that this did not amount to a disclaimer of the title of the lessors of the plaintiff. *Doe* d. *Williams* v. *Cooper*, 1 Scott (N.R.) 36; 1 Man. & G. 135; 9 L. J., C. P. 229. See *Doe* d. *Lewis* v. *Cawdor* (*Lord*), 1 C. M. & R. 398; 4 Tyr. 852; 3 L. J., Ex. 239.

Where upon a question as to the right of possession on a particular day, one party entitles himself to such possession by a tenancy for years under the other, an acknowledgment made after action brought, of an attornment to a stranger, taking place before such day, is sufficient evidence of a disclaimer to rebut his title as tenant. *Doe* d. *Mee* v. *Litherland*, 6 N. & M. 313; 4 A. & E. 784; 6 L. J., K. B. 267.

The defendant had for several years occupied a cottage as tenant from week to week to M. After his death, the defendant continued to pay his rent weekly to certain persons to whom M. had devised the premises. The devise being discovered to be void by reason of the Mortmain Act, the heir-at-law of M., by his agent, demanded the rent, whereupon the defendant said he had received notice from the other party, and would not pay any more rent until he knew who was the right owner:—Held, that this did not amount to a disclaimer or a repudiation of the title of the heir-at-law, so as to entitle him to eject the defendant without any notice to quit. *Jones* v. *Mills*, 10 C. B. (N.S.) 788; 31 L. J., C. P. 66; 8 Jur. (N.S.) 387.

—— **How Waived.**]—In an ejectment by a landlord against his tenant, the landlord relied on a disclaimer. It was proved that the tenant disclaimed in March, 1833; in November, 1833, the landlord put in a distress for rent:—Held, a waiver of the disclaimer. *Doe* d. *David* v. *Williams*, 7 Car. & P. 322.

—— **What amounts to a Surrender only.**]—Executrices of tenant from year to year signed the following instrument:—"We do hereby renounce and disclaim, and also surrender and yield up to the lessor, all right, title, interest, use, trust, term and terms of years whatsoever, and possession of that messuage called B.":—Held, a surrender, and not a disclaimer. *Doe* d. *Wyatt* v. *Stagg*, 5 Bing. (N.C.) 564; 7 Scott, 690; 9 L. J., C. P. 73.

—— **Effect of Parol Disclaimer on Lease.**]—A lease for a term of years by deed is not forfeited by a parol disclaimer of the lessor's title by the lessee. *Doe* d. *Graves* v. *Wells*, 10 A. & E. 427; 2 P. & D. 396; 8 L. J., Q. B. 265; 3 Jur. 820.

Mortgages.]—It is not necessary for a mortgagee to give a notice, previously to bringing an ejectment, to a tenant who claims under a lease from the mortgagor, granted after the mortgage without the privity of the mortgagee. *Keech* d. *Warne* v. *Hall*, 1 Dougl. 21.

Nor where the tenant was let into possession after the original mortgage was made, but before an assignment of it for the purpose of bringing ejectment. *Thunder* d. *Weaver* v. *Belcher*, 3 East, 449. But see *Birch* v. *Wright*, 1 Term Rep. 378; 1 R. R. 223.

A notice was sent by mortgagees to the occupier of the premises mortgaged, demanding payment of rent to them instead of the mortgagor, and threatening distress upon non-payment. There was no evidence of a previous tenancy between the occupier and the mortgagor, and it appeared that the occupier never paid any rent before or after the receipt of the notice, nor did anything to shew his assent to the notice:—Held, that this notice was not sufficient to create a tenancy between the mortgagees and the occupier, so as to require a notice to quit before ejectment could be brought by the mortgagees. *Biner* v. *Walters*, 20 L. T. 326; 17 W. R. 649.

A notice by the assignees of a mortgagee to the tenant in possession, of the transfer of the mortgage to them, and requiring him to pay them the future rents, operates as a demise from year to year, and the assignees cannot enter upon such tenant without giving him a regular notice to quit. *Browne* v. *Storey*, 9 L. J., C. P. 225; 1 Man. & G. 117; 1 Sc. (N.R.) 9.

A lessee for years mortgaged his estate, and his term having become forfeited, the superior landlord recovered the premises by ejectment, and granted a new lease to the mortgagee, who, having received the possession of the premises from the mortgagor, returned the key of the house to him, saying, "Go on as before; pay me the money you owe me, and then you shall have a lease":—Held, that this did not create a tenancy from year to year, and that upon nonpayment of the money due, and no rent having been paid, the mortgagee was entitled to maintain an ejectment without six months' notice to quit. *Doe* d. *Rogers* v. *Pullen*, 3 Scott, 271; 2 Bing. (N.C.) 749; 2 Hodges, 39; 5 L. J., C. P. 229.

A mortgage deed contained a covenant, that, if the principal remained unpaid on a given day, the mortgagee might enter; and that, if not paid within a certain number of days from the day fixed for payment he might sell without the concurrence of the mortgagor:—Held, that the mortgagee might maintain ejectment against the mortgagor, although he remained in possession, without giving him notice to quit or demanding possession. *Doe* d. *Fisher* v. *Giles*, 2 M. & P. 749; 5 Bing. 421; 7 L. J. (O.S.) C. P. 134; 30 R. R. 686.

A notice to quit was signed by the mortgagee after the mortgage of the reversion. A clause in the mortgage deed provided that if the interest was duly paid by the mortgagor, the principal was not to be called in by the mortgagee until a period after the date of the notice. There was also a covenant for quiet enjoyment:—Held, that

notwithstanding this clause the signature of the mortgagee to the notice was sufficient. *Burton* v. *Dickenson*, 17 L. T. 246.

Personal Representatives.]—When a tenant from year to year dies, his personal representatives have the same interest in the land which he had, and are therefore entitled to the same notice to quit. *Doe* d. *Shore* v. *Porter*, 3 Term Rep. 13; 1 R. R. 626. S. P., *Parker* d. *Walker* v. *Constable*, 3 Wils. 24. And see *Mackay* v. *Mackreth*, 3 Term Rep. 13, n.; *Gulliver* d. *Tasker* v. *Burr*, 1 W. Bl. 596.

A tenant from year to year died, and a regular notice to quit was served on the widow, who remained in possession:—Held, that the landlord might recover in ejectment, unless it was shewn that some other person, and not the widow, was the executor or administrator of the tenant; and that it was not incumbent on the landlord to shew that the widow was either executrix or administratrix. *Rees* v. *Perrot*, 5 Car. & P. 230.

b. Length of Notice.

What sufficient.]—Half-a-year's notice must be given to a tenant at will, or his executor, to quit, or ejectment does not lie. Six months' notice is not sufficient. *Parker* d. *Walker* v. *Constable*, 3 Wils. 25.

Where rent is reserved quarterly, it does not dispense with the necessity of six months' notice to quit. *Shirley* v. *Newman*, 1 Esp. 266; 5 R. R. 737.

But if a quarter's notice is given to the lessor, and the rent paid up to the time when the tenant should quit, and the lessor neither assents nor dissents, it will be taken as a waiver of the regular notice, and an acquiescence on his part. *Ib.*

A month's notice is not sufficient. *Gulliver* d. *Tasker* v. *Burr*, 1 W. Bl. 596.

A written agreement for the letting of premises expressed the tenancy to be "for a year certain, and so on from year to year until a half-year's notice should be given by or to either party, at a yearly rent of 50*l.* payable quarterly, the first payment to be on the 25th of March next." The agreement was dated the 20th of December, 1872, and specified no date for the commencement of the term:—Held, that a notice to quit given by the landlord on the 24th of June, 1874, was a good notice. *Sandill* v. *Franklin*, 44 L. J., C. P. 216; L. R. 10 C. P. 377; 32 L. T. 309; 23 W. R. 473.

A notice to quit at Old Michaelmas, though given half a year before New Michaelmas, at which time the tenancy expired, is bad. *Doe* d. *Spicer* v. *Lea*, 11 East, 312.

A lease for one year and so on from year to year until the tenancy thereby created shall be determined as thereinafter mentioned, with a proviso that it shall be lawful for either of the parties to determine the tenancy by three months' notice, creates a tenancy for two years certain, and cannot be terminated by a three months' notice to quit at the end of the first year. *Doe* d. *Chatburn* v. *Green*, 1 P. & D. 454; 9 A. & E. 658; 2 W. W. & H. 122; 8 L. J., Q. B. 100.

A notice on the 28th of September to quit on the ensuing 25th of March is a sufficient half-year's notice. *Roe* d. *Durant* v. *Doe*, 6 Bing. 574; 4 M. & P. 391; 8 L. J. (O.S.) C. P. 227; 31 R. R. 499. S. P., *Doe* d. *Harrop* v. *Green*, 4 Esp. 198.

A notice given on the 26th of September to quit at the end of six calendar months is good to determine a holding, commencing on the 25th of March. *Howard* v. *Wemsley*, 6 Esp. 53; 9 R. R. 806.

So, though the word "calendar" had been omitted, or the notice had expressed half a year. *Ib.*

A tenancy commenced on the 12th of May, 1840, by a lease for one year only, at a certain rent; the tenant remained in possession till 1841, without any fresh agreement. An increased rent was to commence on the 12th of May. 1842:—Held, that the tenancy was determined in 1843 by a notice to quit, given after the payment of the increased rent existing on the 12th of May, 1843. *Doe* d. *Monck* v. *Geekie*, 5 Q. B. 841; 1 Car. & K. 307; 13 L. J., Q. B. 239; 8 Jur. 360.

B. being possessed of a term, made an underlease for fourteen years and a half from the 25th December, 1831, which was assigned to the defendant, and expired on the 24th June, 1846. The defendant continued in possession, and paid rent to the plaintiff, who had become assignee of the original term:—Held, that a notice given on the 24th December, 1846, to quit on the 24th June next was valid. *Doe* d. *Buddle* v. *Lines*, 11 Q. B. 402; 17 L. J., Q. B. 108; 12 Jur. 80.

A demise for "a term of three years determinable on a six months' previous notice to quit, otherwise to continue from year to year until the term shall cease by notice to quit at the usual times," is a demise for three years certain, determinable only at the end of that period by six months' previous notice, and if not determined, a subsisting tenancy from year to year. *Jones* v. *Nixon*, 1 H. & C. 48; 31 L. J., Ex. 505; 8 Jur. (N.S.) 648; 5 L. T. 330.

Weekly Tenancy.]—A week's notice is necessary and sufficient to determine a weekly tenancy. *Harvey* v. *Copeland*, 30 L. R., Ir. 412.

A weekly tenancy commencing on Thursday, held to be duly determined by written notice on Thursday, 5th November, to quit and deliver up possession on or before Friday, the 13th November. *Ib.*

In the case of an ordinary weekly tenancy, a week's notice to quit is not implied as part of the contract, unless there is a usage to that effect, but, in the absence of such usage, a weekly tenant who enters on a fresh week may be bound to continue until the expiration of that week, or pay the week's rent. *Huffell* v. *Armitstead*, 7 Car. & P. 56.

A tenancy from week to week can only be determined by a week's notice. *Jones* v. *Mills*, 10 C. B. (N.S.) 788; 31 L. J., C. P. 66; 8 Jur. (N.S.) 387.

A notice to a weekly tenant, whose tenancy commenced on a Wednesday, to quit on Friday, provided his tenancy commenced on a Friday or otherwise, at the end of his tenancy, next after one week from the date of the notice, is sufficient. *Doe* d. *Campbell* v. *Scott*, 4 M. & P. 20; 6 Bing. 362; 8 L. J. (O.S.) C. P. 110; 31 R. R. 438.

Agreement for a demise for a year, the rent to be paid weekly, and to have a month's warning, if no default was made in payment of the rent; but which agreement the lessor afterwards refused to execute, and the tenant paid his rent weekly:—Held, that he was entitled to a month's notice to quit, although the agreement was not executed, and although, if he had been a weekly tenant, a week's notice would have been sufficient. *Doe* d. *Peacock* v. *Raffan*, 6 Esp. 4.

Monthly Tenancy.]—In all cases the notice to quit must have reference to the terms of the letting; therefore, in ejectment for a house, where the defendant had taken the house by the month:—Held, that a month's notice to quit was sufficient to entitle the plaintiff to recover. *Doe* d. *Parry* v. *Hazell*, 1 Esp. 94; 5 R. R. 722.

By agreement in writing the defendant became a monthly tenant to the plaintiffs (a firm of brewers), from the 1st July, 1869, of certain licensed premises, at a monthly rent, payable on the first day of each month, over and above all taxes, &c.; and by another agreement in writing of the same date and made between the defendant, the plaintiffs, and A., reciting that the defendant had become a monthly tenant of the premises, and that the plaintiffs had, at the defendant's request, agreed to transfer the beer and spirit licences attached to the premises to A., in whose name the defendant proposed to carry on the business, in consideration of the sum of 60*l*., it was agreed that the plaintiffs should hold the licences as security for the said sum, and that the defendant and A. should deal exclusively with the plaintiffs and would keep up the said licences. The plaintiffs, on the 25th September, 1884, served notice to quit on the 1st November then next. In an ejectment on the notice to quit:—Held, that the tenancy was monthly, and determined under the contract by the month's notice given. *Beamish* v. *Cox*, 16 L. R., Ir. 270. Affirmed, 16 L. R., Ir. 458—C. A.

Tenancy from Year to Year.]—A notice to quit, served on the 26th of October, 1870, to determine a tenancy from year to year, which commenced on the 1st of May, 1869, required the tenant to give up possession on the 1st of May, 1871, "provided the tenancy originally commenced on the 1st of May, or otherwise at the end of the year of the tenancy which should expire next after the end of half a year from the date of the notice"; and, in January, 1872, the plaintiff brought an ejectment for the lands, claiming title from the 2nd of May, 1871:—Held, that the notice was effectual to determine the tenancy on the 1st of November, 1871. *Ashtown* (*Lord*) v. *Larke*, Ir. R. 6 C. L. 270.

To determine a tenancy from year to year commencing on the 25th of March, the landlord served, previously to the 25th of March, 1872, i.e. six months before the last gale day of the calendar year, a notice to quit and deliver up possession on the 29th of September, 1872, but by the notice informed the tenant that he did not require the possession on that day unless the tenancy then commenced:—Held, that the notice did not determine the tenancy until the 25th of March, 1873, and that an ejectment brought before that day could not be sustained. *Ferguson* v. *Daly*, Ir. R. 8 C. L. 216.

A tenancy from year to year may be determined at the end of the first year by a six months' notice to quit. *Doe* d. *Hogg* v. *Taylor*, 1 Jur. 960.

An agreement in writing "to let from year to year, and for so long as the lessor has power to let," creates only a tenancy from year to year, which is terminable by a legal six months' notice to quit, though the power of the lessor to let the premises has not come to an end. *Wood* v. *Beard*, 46 L. J., Q. B. 100; 2 Q. B. D. 30; 35 L. T. 866.

A tenancy from year to year, so long as both parties please, is determinable at the end of the first year, unless, in the creation of the tenancy, the parties introduce provisions shewing that they contemplated a tenancy for two years at least. *Doe* d. *Clarke* v. *Smarridge*, 7 Q. B. 257; 14 L. J., Q. B. 327; 9 Jur. 781.

—— **Customary Six Months.**]—A six months' notice to determine a yearly tenancy commencing on one of the ordinary feast-days, means a customary six months, that is, from one of the usual quarter-days to the quarter-day next but one following, though such six months should exceed or fall short of the number of days which constitute half a year. Consequently, a notice served on the 26th of March, to quit on the 29th of September then next, is not a valid notice. *Morgan* v. *Davies*, 3 C. P. D. 260; 26 W. R. 816.

In a lease for a yearly tenancy determinable on the 13th of May, in any succeeding year, it was expressly provided that six calendar months' notice to quit should be given by either side. In that part of the country (county of Durham), it was admittedly the custom for tenants of small holdings to pay rent on the 22nd of November and 13th of May in each year; and notice to quit given after the 13th but before the 22nd of November was commonly accepted as a full six months' notice, expiring on 13th May following. On 21st November, 1895, a notice to quit on 13th May, 1896, having been served on the tenant under the lease:—Held, that, notwithstanding the custom, the notice was invalid, it not being a six calendar months' notice as required by the terms of the lease. *Travers* v. *Mason*, 45 W. R. 77.

Under the Agricultural Holdings Act, 1875.]—A yearly tenancy which by express agreement of the parties is determinable on six months' notice to quit is not within the Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92), s. 51, which provides that "Where a half-year's notice, expiring with the year of tenancy, is by law necessary and sufficient for determination of a tenancy from year to year, a year's notice so expiring shall by virtue of this act be necessary and sufficient for the same." *Wilkinson* v. *Calvert*, 47 L. J., C. P. 679; 3 C. P. D. 360; 38 L. T. 813; 26 W. R. 829.

—— **Half-year's Notice and Six Months' Notice, Distinction between.**]—A tenancy under a written agreement from year to year "until six months' notice shall have been given . . . in the usual way to determine the tenancy," is not one "where a half-year's notice . . . is by law necessary" within the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 33, which therefore does not apply so as to render a year's notice necessary for the determination of the tenancy. *Barlow* v. *Teal*, 54 L. J., Q. B. 564; 15 Q. B. D. 501; 54 L. T. 63; 34 W. R. 54; 50 J. P. 100—C. A.

When Tenant may allege Insufficiency of.]—If notice to quit at Midsummer is given to a tenant holding from Michaelmas, he may insist on the insufficiency of the notice at the trial, though he did not make any objection at the time when it was served. *Oakapple* d. *Green* v. *Copous*, 4 Term Rep. 361.

Statute of Frauds.]—A tenant held under a demise from the 26th day of March, for one year

then next ensuing, and fully to be completed and ended, and so from year to year, for so long as the landlord and tenant should respectively please. The tenant, after having held more than one year, gave a parol notice to the landlord less than six months before the 25th day of March, that he would quit on that day, and the landlord accepted and assented to the notice:—Held, that the tenancy was not thereby determined, there not having been either a sufficient notice to quit, nor a surrender in writing or by operation of law, within the Statute of Frauds. *Johnstone* v. *Huddlestone*, 7 D. & R. 411; 4 B. & C. 922; 4 L. J. (o.s.) K. B. 71; 28 R. R. 505.

c. By whom to be Given.

Joint Lessors.]—Where joint lessors are partners in trade, a notice to quit in the names of all signed by one only is valid. *Doe* d. *Elliott* v. *Hulme*, 2 M. & Ry. 483; 6 L. J. (o.s.) K. B. 345.

So a notice to quit, given by a person authorised by one of several lessors, joint-tenants, determines the tenancy as to all. *Doe* d. *Kindersley* v. *Hughes*, 7 M. & W. 139; 10 L. J., Ex. 185.

A notice to quit by joint-tenants to a tenant from year to year must be signed by all the joint-tenants at the time it is served, if it is given by one of them: but if such notice is given by an agent on behalf of the joint-tenants, it is sufficient if his authority is subsequently recognised by all of them. *Goodtitle* d. *King* v. *Woodward*, 3 B. & Ald. 689. S. P., *Doe* d. *Jolliffe* v. *Sybourn*, 2 Esp. 677.

So, where there are three joint trustees of an estate, a notice to quit or discontinue the possession given by two is bad, even though given in the names of the three, and the third trustee afterwards adopts it and joins in the ejectment. *Right* d. *Fisher* v. *Cuthell*, 5 East, 491; 2 Marsh. 83: 5 Esp. 149; 7 R. R. 752.

But if four joint-tenants jointly demise from year to year, such of them as give notice to quit may recover their several shares in ejectment. *Doe* d. *Whayman* v. *Chaplin*, 3 Taunt. 120; 12 R. R. 615.

A., a brewer, demised a public-house to B., under an agreement that he should hold for one year certain, and that, after the expiration of that time, either party might put an end to the tenancy, by giving three months' notice to quit, the rent to be payable quarterly; the agreement contained no clause of re-entry: B. took possession, and paid rent to A., who at first gave him a receipt in his own name, and afterwards in the joint names of himself and two partners, who were interested with him in the brewery; after B. had been in possession for three years, A. gave him a notice to quit in his own name alone:—Held, in ejectment, that A. might recover on his own demise, although the latter receipts for rent were given in the names of himself and partners, and that no clause of re-entry was necessary in the agreement. *Doe* d. *Green* v. *Baker*, 2 Moore, 189; 8 Taunt. 241; 19 R. R. 502.

Four trustees were joint landlords of a house under a deed of trust; and notice to quit was served upon the tenant but signed by three of them only:—Held, that the notice was sufficient to put an end to the connection between all the parties as landlord and tenant. *Alford* v. *Vickery*, Car. & M. 280. See *Doe* d. *Kindersley* v. *Hughes*, 7 M. & W. 139; 10 L. J., Ex. 185.

Assignees of Lessor.]—Notice by I. K. (the original lessor) and V. C. K. as tenants in common (assignees of the original lessor) is a sufficient compliance with a proviso empowering I. K. "upon three months' notice of his intention to resume for building purposes any portion of the demised premises . . . to enter into such possession." Semble, that this is a condition running with the reversion. *Kennedy* v. *Liddy*, 15 W. R. 431. *S. C.* in H. L. on other point; L. R. 5 H. L. 134; 20 W. R. 150.

Rector and Churchwardens.]—Notice to quit to a tenant of lands, originally devised to the rector and churchwardens of a parish, and their successors in trust, signed by the rector and churchwardens, requiring him to deliver up the premises to the rector and churchwardens for the time being, is ill. *Doe* d. *Brooks* v. *Fairclough*, 6 M. & S. 40.

Two out of Three Commissioners.]—A lease, dated October, 1825, to which the king was a party, was granted by the commissioners of his majesty's woods and forests, containing a clause that, if the commissioners for the time being should, at any time during the term, be minded or desirous to determine the demise, and of such their mind and desire should cause "one calendar month's notice to be given under their hands" to be given to the lessee, the lease at the expiration of such notice, should cease, determine, and be absolutely void:—Held, that the lease was determined by a notice signed by two only out of three commissioners, by virtue of 10 Geo. 4, c. 50, s. 92. *Coombes* v. *Dutton*, 5 M. & W. 469; 8 L. J., Ex. 278.

Joint Lessees.]—A notice to quit signed by one of several joint-tenants on behalf of the others, is sufficient to determine a tenancy from year to year as to all. *Doe* d. *Aslin* v. *Summersett*, 1 B. & Ad. 135; 8 L. J. (o.s.) K. B. 369.

Agent.]—A notice to quit given by a general agent in his own name is valid. Aliter, if given by an agent holding a special or limited authority. *Jones* v. *Phipps*, 9 B. & S. 761; 37 L. J., Q. B. 198; L. R. 3 Q. B. 303; 18 L. T. 813; 16 W. R. 1044.

In October, 1863, the trustees of G.'s marriage settlement purchased a farm, G. furnishing a portion of the purchase-money. From the time of the purchase G. assumed the entire control over the farm, and had for twenty-six years been allowed by the trustees to have the entire management of all the other settled estates. At the time of the purchase the defendant was yearly tenant of the farm to the vendor. G. negotiated with him as to the terms and continuance of the holding, and he treated with and considered G. as the legal owner:—Held, that G. had authority from the trustees to give the defendant notice to quit, and that a notice given in his own name, not purporting to be given as agent of the trustees, was valid. *Ib.*

A notice to quit must be such that the tenant may safely act on it at the time of receiving it; therefore a notice by an unauthorised agent cannot be made good by an adoption of it by the principal after the proper time for giving it. *Doe* d. *Lyster* v. *Goldwin*, 1 G. & D. 463; 2 Q. B. 143; 10 L. J., Q. B. 275. S. P., *Doe* d. *Mann* v. *Walters*, 10 B. & C. 626; 5 M. & Ry. 357; 8 L. J. (o.s.) K. B. 297.

A notice to quit given by an agent in the names of A. and B., and also several other parties, is valid as a notice from A. and B. only. *Doe* d. *Bailey* v. *Foster*, 3 C. B. 215; 15 L. J., C. P. 263.

A notice to quit given by an agent of the landlord to receive rents is not sufficient, without a recognition by the landlord; the bringing of an action founded on the notice is not of itself a recognition. *Doe* d. *Rhodes* v. *Robinson*, 3 Bing. (N.C.) 677; 4 Scott, 396; 3 Hodges, 84; 6 L. J., C. P. 235; 1 Jur. 356.

An agent to receive rents and let premises has authority to determine a tenancy. In ejectment a person defending as landlord is bound by the same estoppel as the tenant in possession. *Doe* d. *Manvers* (*Earl*) v. *Mizen*, 2 M. & Rob. 56.

In ejectment by a corporation against a tenant from year to year, a notice to quit given by the steward of the corporation is sufficient without evidence that he had an authority under seal from the corporation for the purpose. *Doe* d. *Rochester* (*Dean*) v. *Pierce*, 2 Camp. 96; 11 R. R. 673. And see *Doe* d. *Plymouth Corporation* v. *Fillis*, 2 Chit. 170.

An agent, being authorised in writing to manage lands in the name and on behalf of their owner, to perform, in his name, certain specified duties relating to them, which would require the agent's personal attendance, and also, in his name, to sign, serve, and give notices and other documents necessary to be served upon or given to the tenants for the purpose of carrying into effect such management, served a notice to quit signed by him in his own name, but purporting to be served by him as such agent, and on behalf of the landlord:—Held, a sufficient notice to determine a yearly tenancy. *Erne* (*Earl*) v. *Armstrong*, Ir. R. 6 C. L. 279; 20 W. R. 370.

Receiver.]—A receiver appointed by the Court of Chancery, with a general authority to let the lands to tenants from year to year, has also authority to determine such tenancies by a regular notice to quit. *Doe* d. *Marsack* v. *Read*, 12 East, 57.

Infants.]—Notice to quit must be given by an infant, who becomes entitled to the reversion of an estate leased from year to year, before he can eject the tenant. *Maddon* d. *Baker* v. *White*, 2 Term Rep. 159; 1 R. R. 453.

Where an ejectment has been brought on the demise of an infant, which has been compromised, and the tenant in possession has attorned to the infant; though the lessor of the plaintiff, on his coming of age, does not accept rent, or do any act to confirm the tenancy, yet, as the former ejectment was brought at his suit and for his benefit, he will not be allowed to consider the tenant as a trespasser, and bring a new ejectment without giving notice to quit. *Doe* d. *Miller* v. *Noden*, 2 Esp. 530.

Mortgagor.]—A notice to quit signed by the mortgagor is sufficient to determine a tenancy created before the mortgage, when the tenant knew previously to the service of the notice that the mortgagor had a general authority from the mortgagee to determine tenancies. *Stackpoole* v. *Parkinson*, Ir. R. 8 C. L. 561.

A notice to quit signed by a mortgagor, who had a general authority from the mortgagee to determine tenancies, is sufficient to determine a tenancy created before the mortgage, although the notice does not purport on the face of it to be on behalf of the mortgagee. *Ib.*

A mortgagor remaining in possession after the day of default has passed, receiving the rents and giving receipts in his own name, cannot, by notice to quit signed by himself only, determine a tenancy which existed at the time of the execution of the mortgage. *Miles* v. *Murphy*, Ir. R. 5 C. L. 382.

A mortgage deed containing a power authorising the mortgagor to grant leases of any part of the mortgage premises that might be "out of lease," provided that the counterpart should be delivered to the mortgagee, does not enable the mortgagor to determine pre-existing tenancies. *Ib.*

Mortgagee.]—A notice to a tenant to quit was signed by the mortgagee after the mortgage of the reversion. A clause in the mortgage deed provided that if the interest was duly paid by the mortgagor the principal was not to be called in by the mortgagee until a period after the date of the notice. There was also a covenant for quiet enjoyment:—Held, that notwithstanding this clause the signature of the mortgagee to the notice was sufficient. *Burton* v. *Dickenson*, 17 L. T. 246.

d. To whom to be Given.

Tenants in Common.]—Where two tenants hold premises in common, notice to quit to one of them is sufficient to determine the tenancy. *Doe* d. *Macartney* (*Lord*) v. *Crick*, 5 Esp. 196; 8 R. R. 848.

At least it is evidence that the notice reached the other tenant, who lived elsewhere. *Doe* d. *Bradford* (*Lord*) v. *Watkins*, 7 East, 551; 3 Smith, 517; 8 R. R. 670.

Tenant who has Underlet.]—If, upon notice to quit given to a tenant he gives notice to his under-tenants to quit at the same time, and upon the expiration of the notice he quits so much as is occupied by himself, but his under-tenants refuse to quit, an ejectment may still be maintained against him for so much as his under-tenants have not given up. *Roe* v. *Wiggs*, 2 Bos. & P. (N.R.) 330.

A tenant from year to year underlet part of the premises, and then gave up to his landlord the part remaining in his own possession, without either receiving a regular notice to quit the whole, or giving notice to quit to his sub-lessee, or even surrendering that part in the name of the whole (supposing that anything short of a regular notice to quit from the landlord to his immediate tenant would, after such sub-letting, have determined the tenancy in the whole); yet the landlord cannot entitle himself to recover against the sub-lessee (there being no privity of contract between them), upon giving half a year's notice to quit in his own name, and not in the name of his first lessee: for, as to the part so underlet the original tenancy still continued undetermined. *Pleasant* d. *Hayton* v. *Benson*, 14 East, 234; 12 R. R. 507.

Party in Possession.]—Where A. had been tenant of certain premises, and upon his leaving them B. took possession:—Held, that in the absence of any evidence to the contrary, it might be presumed that he came in as assignee of A., although he never paid rent, and that notice to quit was rightly given to B. *Doe* d. *Morris* v. *Williams*, 6 B. & C. 41; 9 D. & R. 30; 30 R. R. 244.

Collector of Rents.]—A notice to quit given to a mere collector of rents is not good. *Pearse* v. *Boulter*, 2 F. & F. 133.

Service on Lessor's Representatives—Surrender by Operation of Law.]—Certain customary freeholds were demised by a lease of the 15th June, 1877, to two lessees, for twenty-one years from Christmas, 1876, at a rental of 130*l*. The lease was determinable at the expiration of the fourteenth year, on the lessor or lessee's giving to the other of them, "or his or their representatives or assigns," a written notice of such intention. The lessor died in December, 1877, having devised and bequeathed his customary freeholds and leaseholds to trustees in trust for his wife M. during her widowhood, and then to other beneficiaries. On the 21st December, 1889, one of the two lessees gave notice to M. of his intention to quit and yield up possession of the leasehold premises at Christmas, 1890. On the 13th August, 1890, M., purporting to act under the provisions of the Settled Estates Act, granted a lease of the same premises to one of the two original lessees for seven years from Christmas, 1890, at the reduced rent of 100*l*. The licence of the lord of the manor for this lease was not obtained. In an action by the trustees and beneficiaries of the original lessor against the two lessees:—Held, (1) that the notice of the 21st December, 1889, not having been served on the lessor's representatives or assigns, was not a good notice; and (2) that the old lease was not surrendered by operation of law, inasmuch as it was voidable if not void. *Easton* v. *Penny*, 67 L. T. 290; 41 W. R. 72.

e. Form and Validity of.

Written or Parol.]—A parol notice to quit by a tenant under a parol lease is sufficient. *Timmins* v. *Rawlinson*, 3 Burr. 1603; 1 W. Bl. 533. S. P., *Doe* d. *Macartney* (*Lord*) v. *Crick*, 5 Esp. 196; 8 R. R. 848.

Though given by a person acting as steward of a corporation. *Roe* d. *Rochester* (*Dean*) v. *Pierce*, 2 Camp. 96; 11 R. R. 673. See *Smith* v. *Birmingham Gas Co.*, 1 A. & E. 526; 3 N. & M. 771; 3 L. J., K. B. 165.

Direction and Address.]—It is not necessary that a notice to quit should be directed to the tenant in possession, if proved to have been delivered to him at the proper time. *Doe* d. *Matthewson* v. *Wrightman*, 4 Esp. 5; 6 R. R. 834.

And if a notice to quit is directed to the tenant by a wrong christian name, and he keeps it and does not send it back, it is a waiver of the misdirection, and the lessor may recover on it if there was no other tenant of the name. *Doe* v. *Spiller*, 6 Esp. 70; 9 R. R. 810.

Signature—Formal Surrender.]—A lease contained a clause enabling the tenant "to surrender and deliver up the premises" at the end of every three years, "he first giving six calendar months' previous notice of his intention to surrender said premises." A notice was delivered at the proper time signifying such intention, but bearing no signature. When the time in the notice had expired the tenant tendered possession, which was not accepted. The tenant thereupon left, leaving a caretaker in possession:—Held, that the notice did not require signature; that no formal surrender by deed or otherwise was necessary, the words in the clause referring to the surrender of possession merely, and that, therefore, the tenancy was determined. *Carleton* v. *Herbert*, 14 W. R. 772—Ir. Ex. C.

The Court will give a Reasonable Construction to.]—A notice dated 27th and served on the 28th September, requiring a tenant to quit "at Lady-day next, or at the end of his current year," must be understood to mean a six months' and not a two days' notice to quit. *Doe* d. *Huntingtower* (*Lord*) v. *Culliford*, 4 D. & R. 249.

For the court will look to the intention of the parties, and where general language is used, which is open to doubt, they will intend if possible that the notice has a sensible meaning, and construe it accordingly; and in this case a two days' notice could not have been intended, because that would be no notice whatever. *Ib.*

Certainty of.]—A notice to quit, "or I shall insist upon double rent," is sufficiently certain to support an ejectment. *Doe* d. *Matthews* v. *Jackson*, 1 Dougl. 175.

A notice to quit at the end of the current year of tenancy, "on failure whereof, I shall require you to pay me double former rent or value for so long as you detain possession," is an unqualified notice, and does not give the tenant an option. *Doe* d. *Lyster* v. *Goldwin*, 1 G. & D. 463; 2 Q. B. 143; 10 L. J., Q. B. 275.

A notice to quit must be such as the tenant may act upon with safety; that is, one which is in fact, and which the tenant has reason to believe to be, binding on the landlord. *Jones* v. *Phipps*, 9 B. & S. 761; 37 L. J., Q. B. 198; L. R. 3 Q. B. 303; 18 L. T. 813; 16 W. R. 1044.

A notice to determine a tenancy, although imperfectly expressed, is a good and valid notice if accepted as such at the time by the landlord. *General Assurance Co.* v. *Worsley*, 64 L. J., Q. B. 253; 15 R. 328; 72 L. T. 358.

Notice was given to a tenant from year to year, holding from Martinmas to Martinmas, to quit "on the 13th day of May next, or upon such other day or time as the current year for which you now hold will expire." The notice was dated and served on 21st October:—Held, bad. *Doe* d. *Richmond Corporation* v. *Morphett*, 7 Q. B. 577; 14 L. J., Q. B. 345; 9 Jur. 776.

By an agreement for a lease of five years it was provided that the tenancy might be determined "after the expiration of the term of three years out of the term of five years" by six months' notice in writing, expiring at the corresponding quarter-day at which the tenancy commenced. The tenant entered into possession on the 29th September, 1885, and on the 23rd March, 1888, gave notice to the landlord in the following terms:—"Kindly take notice that I intend to surrender to you the tenancy of this house on or before the 29th September, 1888":—Held, that the notice to quit was equivocal in its terms, and therefore bad. *Gardner* v. *Ingram*, 61 L. T. 729; 54 J. P. 311.

A tenant wrote to his landlord, from whom he had taken a house on a lease determinable at the end of seven or fourteen years, "I have just been looking at my lease, and I see that my first seven years will be determined on 25th December, 1894. I have been making inquiries for some time past, and I find that I am paying too high a rent, and considerably higher than any of the adjoining houses are able to let for now. I

understand that the rent is 50*l.* too high, and I shall not be able to stop unless some reduction is made. I give you an early intimation of this, so that you may have ample time to consider what course you would like to adopt" :—Held, that the letter constituted a good and sufficient notice to determine the lease. *Bury* v. *Thompson*, 64 L. J., Q. B. 500 ; [1895] 1 Q. B. 696 ; 14 R. 299 ; 72 L. T. 187 ; 43 W. R. 338 ; 59 J. P. 228—C. A.

Where a tenant is entitled to six months' notice, a notice to quit "at the expiration of the present year's tenancy" is sufficient, although it does not appear on the face of it that it was given six months before the period therein specified for quitting. *Doe* d. *Gorst* v. *Timothy*, 2 Car. & K. 351.

Where a tenancy began on the 11th October, a notice served in June, 1840, requiring the tenant to quit "on the 11th of October now next ensuing, or such other day or time as your tenancy may expire," is a three months' notice to quit in October, 1840, and not a six months' notice to quit in October, 1841. *Mills* v. *Goff*, 14 M. & W. 72 ; 14 L. J., Ex. 249.

As regards Time.]—Notice to quit at the end and expiration of "the current year of your tenancy, which shall expire next after the end of one half-year from the date hereof," was held sufficient. *Doe* d. *Phillips* v. *Butler*, 2 Esp. 589 ; 5 R. R. 756.

A notice to quit on the anniversary of the day "at," or "on," or "from," or "on and from" which the tenancy commenced is good. *Sidebotham* v. *Holland*, 64 L. J., Q. B. 200 ; [1895] 1 Q. B. 378 ; 14 R. 135 ; 72 L. T. 62 ; 43 W. R. 228—C. A.

A notice delivered to a tenant at Michaelmas, 1795, to quit "at Lady-day, which will be in the year 1795," was a good notice to quit on Lady-day, 1796. *Doe* d. *Bedford* (*Duke*) v. *Knightley*, 7 Term Rep. 63 ; 1 Chit. 11 ; 4 R. R. 375.

A notice to quit on one of two days, as an Old or New Lady-day, is good, if served six months before the day on which the tenancy commenced. *Doe* d. *Matthewson* v. *Wrightman*, 4 Esp. 5 ; 6 R. R. 834.

A notice to quit on Lady-day is a good termination of a holding either from Lady-day old or Lady-day new style. *Denn* d. *Willan* v. *Walker*, Peake Ad. C. 194.

If a tenant from year to year holds from Old Michaelmas, a notice to quit at Michaelmas generally is good. *Doe* d. *Hinde* v. *Vince*, 2 Camp. 256. S. P., *Doe* v. *Brookes*, 2 Camp. 257, n. But see *Doe* d. *Spicer* v. *Lea*, 11 East, 312.

A notice to quit on St. Michaelmas-day is primâ facie a notice to quit at New Michaelmas ; but, if the holding is from Michaelmas, it will be a sufficient notice to quit at that time. *Doe* d. *Willis* v. *Perrin*, 9 Car. & P. 467.

But a notice to quit at Michaelmas generally will be held to mean Old Michaelmas, if the custom of the country is to hold from that time. *Furley* d. *Canterbury* v. *Wood*, 1 Esp. 198.

Varying from Proviso in Lease.]—An indenture of lease contained a clause, that if the lessee should be desirous to put an end to the term at the end of the first fourteen years, and should leave or give six calendar months' notice in writing, immediately preceding the end of the first fourteen years, then the demise should cease and determine. The lease commenced at Michaelmas, and in November of the fourteenth year of the term the lessee gave notice, in writing, that he should deliver up the premises on the 24th June next, agreeably to the covenants of the lease. The jury found that the lessor understood the notice to be to give up at the end of the fourteen years :—Held, that it was bad, as it varied from the proviso in the lease. *Cadby* v. *Martinez*, 3 P. & D. 386 ; 11 A. & E. 720 ; 9 L. J., Q. B. 281.

Parol Evidence to explain Intention.]—Where on a written agreement to demise from the following "Lady-day," a notice to quit "on the 6th April" was given :—Held, good, parol evidence being adduced to shew that by "Lady-day" the parties meant "Old Lady-day." *Denn* d. *Peters* v. *Hopkinson*, 3 D. & R. 507.

Part only of Premises.]—A notice to quit a part only of premises leased together is bad. *Doe* d. *Rodd* v. *Archer*, 14 East, 245 ; 12 R. R. 509.

Where a farm was leased for twenty-one years at a rent of 180*l.* per annum, consisting, as described in the lease, of the Town Barton, and its several parcels described by name, at the rent of 83*l.*, other closes named, at other rents of 5*l.*, 5*l.* and 1*l.* ; the Shippen Barton, and its several parcels, described by name, at 86*l.* ; with a power reserved to either party to determine the lease at the end of fourteen years, on giving two years' previous notice :—Held, that a notice by the landlord to his tenant to quit "Town Barton, &c. agreeably to the terms of the covenant between us, on the expiration of the fourteenth year of your term," given in due time, was sufficient. *Ib.*

A defendant leased about twenty acres of land for five years, at a yearly rent from the owner in fee-simple, under a memorandum of agreement, and immediately afterwards sub-let about six acres, part of the premises, to another person, on a yearly tenancy. At the conclusion of the term the defendant continued in possession of the whole, and during the first year after the term expired the lessor conveyed to the plaintiff the six acres which the defendant had sub-let, and agreed with the plaintiff, but without the consent of the defendant, as to the amount of rent to be apportioned to this part of the premises out of the rent which the defendant paid. Although notice of the conveyance and agreed apportionment of rent was afterwards given to the defendant, he never recognised the plaintiff as his landlord, but continued to pay rent for the whole premises to his lessor, who handed over the agreed portion to the plaintiff. The plaintiff gave the defendant notice to quit the sub-let premises six months before the expiration of a year's tenancy ; and the defendant forwarded this notice, with a further notice to quit from himself, to his sub-tenant. At the end of the year the sub-tenant gave up possession of his premises to the plaintiff, but the defendant wrote to the latter claiming to hold the same as tenant to the original lessor, and requiring possession. The defendant then did certain acts upon the premises which had been in his sub-tenant's occupation for which the plaintiff brought an action of trespass :—Held, that his notice to the defendant to quit part only of the premises demised to him was invalid ; that his passing on the notice to his tenant did not preclude his disputing it ; and that the action could

not be maintained. *Prince* v. *Evans*, 29 L. T. 835.

Notice pursuant to Proviso referring to Part —Right to Recover Possession of the Whole.]—The lessor may, under a proviso in a lease empowering him "upon three months' notice of his intention to resume for building purposes any portion of the demised premises . . . to enter into such possession," resume possession of the entire premises. *Kennedy* v. *Liddy*, 15 W. R. 431.

The fact that the sum per acre to be allowed as rebate of rent in such case exceeds the rent per acre originally reserved, will not be considered as evidence of a contrary intention. *Ib.*

Actual re-entry is not necessary under such a proviso, as the tenancy is determined by the notice. *Ib.*

Description of Premises.]—A misdescription of the premises is not fatal, if they are otherwise sufficiently designated, so that the party to whom the notice has been given has not been misled. *Doe* d. *Cox* v. *Roe*, 4 Esp. 185 ; 6 R. R. 850.

Where a house, lands, and tithes are held under a parol demise at a joint rent, a notice to quit "the houses, lands, and premises, with the appurtenances," includes the tithes, and is sufficient to put an end to the tenancy. *Doe* d. *Morgan* v. *Church*, 3 Camp. 71.

In ejectment to recover a farm at H., the notice to quit described the premises to be at D., which was a distinct parish ; but as it did not appear that the tenant was misled by the notice :—Held, that it was sufficient. *Doe* d. *Armstrong* v. *Wilkinson*, 4 P. & D. 323 ; 12 A. & E. 743 ; 1 Arn. & H. 39.

Additional Clause in—Increase of Rent.]—The defendant was tenant to the plaintiff from year to year of a shop and premises : the plaintiff gave the defendant a written notice to quit, which contained the following clause : "And I hereby further give you notice that should you retain possession of the premises after the day before mentioned the annual rental of the premises now held by you from me will be 160*l.*, payable quarterly, in advance" :—Held, that the notice to quit being otherwise sufficient, it was not rendered invalid by the additional clause. *Ahearn* v. *Bellman*, 48 L. J., Ex. 681 ; 4 Ex. D. 201 ; 40 L. T. 711 ; 27 W. R. 928—C. A.

f. Expiration of.

i. *In Ordinary Cases.*

Generally.]—In the case of a tenancy from year to year, there must be a half-year's notice to quit, ending at the expiration of the year. *Right* d. *Flower* v. *Darby*, 1 Term Rep. 159 ; 1 R. R. 169. And see *Doe* d. *Puddicombe* v. *Harris*, 1 Term Rep. 161, n.

If premises are taken "for twelve months certain, and six months' notice to quit afterwards," the tenancy may be determined by a six months' notice to quit, expiring at the end of the first year. *Thompson* v. *Maberly*, 2 Camp. 573.

Where premises are let from year to year upon an agreement that either party may determine the tenancy by a quarter's notice, the notice must expire at the period of the year when the tenancy commenced. *Doe* d. *Pitcher* v. *Donovan*, 1 Taunt. 555 ; 2 Camp. 78.

So, where premises are taken under an agreement, by which the tenant is always to quit at three months' notice, the notice must expire either at the same time of the year the tenancy commenced, or at any other corresponding quarter-day. *Kemp* v. *Derrett*, 3 Camp. 510 ; 14 R. R. 820.

A party took possession of premises on the 1st August, and at the Michaelmas following paid the half-quarter's rent, and continued afterwards to pay quarterly on the usual feast-days :—Held, that a notice to quit at Michaelmas was sufficient, and that although the landlord had at first given a notice, expiring within the half-quarter, it was not necessarily presumable thence that the tenancy was from year to year, commencing with the half-quarter. *Savage* v. *Stapleton*, 3 Car. & P. 275.

The defendant went into possession of certain premises under an agreement for three years by which he agreed to pay a yearly rent of 50*l.*, such rent to commence as from May 9, 1891, and the first half-quarter was to become due and payable on June 24, and after that on the usual quarter-days. At the end of the three years he stayed on, and continued to pay the rent quarterly as before. On September 28, 1896, notice to quit was served on him for March 25, 1897 :—Held, that the notice to quit was bad, as the tenancy did not commence on March 25. *Simmons* v. *Underwood*, 76 L. T. 777.

Where A. agreed to let B. premises for three years from Michaelmas, 1845, with a power for B., six months previous to the end of the term of three years, by a notice to that effect, to renew the tenancy for a further term of three years, and B. entered and paid rent, and gave notice of his desire to renew, but no further lease was granted :—Held, that a tenancy from year to year was granted, determinable during the three years by a notice to quit, but expiring at the end of that period by effluxion of time, when A. might recover in ejectment without giving any notice to quit. *Doe* d. *Devenish* v. *Moffat*, 15 Q. B. 257 ; 19 L. J., Q. B. 438 ; 14 Jur. 935.

By a written agreement the tenancy was to be "from year to year from Michaelmas next, at the yearly sum of 35*l.*, payable half-yearly, at Lady-day and Michaelmas, except the last half-year, which portion of the rent shall be paid on or before the 1st of August in that year, the tenant to dress the lands in the due course of husbandry, and to allow the landlord or incoming tenant in the last year to enter on the 1st of May to make fallows, the tenant to be allowed the use of barns for stacking and threshing the crops of the last year, until the 1st of May after the tenancy" :—Held, that the agreement did not create a tenancy for more than a year, and that notice to quit might be given, expiring at the end of the first year. *Doe* d. *Plumer* v. *Nainby*, 10 Q. B. 473 ; 16 L. J., Q. B. 303 ; 11 Jur. 308.

On 20th May, 1824, A. agreed to let to B. certain rooms. B. agreed to pay 61*l.* a year as rent, by quarterly payments, and it was stipulated that the tenancy should be determinable on three months' notice on either side. On 20th August, B. served A. with a written notice to quit on 20th November. Two months after the expiration of the notice, B. agreed to give up the keys, but soon after refused on the ground that the notice was bad :—Held, first, that the agreement created a tenancy for a year certain, and that, therefore, the notice ought to have ended with the current year, unless there was a custom to

the contrary, and, secondly, that B. agreeing to give up the keys was no acquiescence in the notice. *Brown* v. *Burtinshaw*, 7 D. & R. 603.

Demise for one year and six months certain from August 13th, at a rent payable at the usual quarter-days; three calendar months' notice to be given on either side before determination of the tenancy. The tenant continued to occupy beyond the year and six months:—Held, that a three months' notice to quit, expiring on 13th August, was proper, and not a notice expiring at the end of a year from the termination of the year and six months. *Doe* d. *Robinson* v. *Dobell*, 1 Q. B. 806; 10 L. J., Q. B. 242.

Premises were let from 19th April, 1841, at the yearly rent of 42*l.*, payable quarterly, the first payment of 7*l.* 13*s.* 6*d.* to be made on 24th June, 1841, being the proportion down to that date; the tenant to hold and enjoy at that rent until one of the parties should give the other six calendar months' notice to quit; the tenant to leave the premises in as good a condition as at the date of the agreement:—Held, that notice might be given to quit at the expiration of any six months after 24th June, and that a notice on 24th June for 25th December, 1841, was good. *Doe* d. *King* v. *Grafton*, 18 Q. B. 496; 21 L. J., Q. B. 276; 16 Jur. 833.

A person entered as tenant under a written agreement on the 7th of May, 1850, but paid no rent:—Held, that a six months' notice to quit, expiring on the 7th of May, 1851, was a good notice. *Doe* d. *Cornwall* v. *Matthews*, 11 C. B. 675.

An agreement to give six months' notice to quit means, primâ facie, six lunar months, and cannot be explained to mean calendar months by evidence of the usage of a particular estate. *Rogers* v. *Hull Dock Co.*, 34 L. J., Ch. 165; 11 L. T. 42; 12 W. R. 1101.

A. held premises of B. as tenant for a year, and so on from year to year, so long as C. should live, the tenancy commencing at Christmas, after the death of A. (C. being also dead). A.'s widow, by agreement with the landlord, continued to occupy the premises at the same rent, nothing being said about the commencement of her tenancy:—Held, that there was evidence enough to warrant the jury in assuming that the widow's tenancy was a mere continuation of the original tenancy of A., and therefore properly determined by a notice to expire at Christmas. *Humphreys* v. *Franks*, 18 C. B. 323.

W. agreed to let to H. a house quarterly, at a yearly rent, to be paid quarterly; a quarter's notice to be given on either side. H. occupied for more than a year:—Held, that the agreement shewed that, though a notice might have been given to quit within the year, both parties intended the tenancy to endure for more than a year, and, therefore, such tenancy having in fact lasted a year, it was a yearly hiring conferring a settlement. *Hastings Union* v. *St. James's, Clerkenwell*, 6 B. & S. 914; 35 L. J., M. C. 65; L. R. 1 Q. B. 38; 11 Jur. (N.S.) 977; 13 L. T. 362; 14 W. R. 175.

Under-mining Lease.]—An agreement for a mining lease contained the following clause: The lessees to be at liberty at any time hereafter to determine this agreement, or the lease agreed to be granted, and to abandon the ironworks on giving to the lessor six months' notice in writing of their intention so to do. The lessees entered and paid rent under the agreement, but no lease was executed:—Held, that this being a mining lease, and looking at the whole contract and the surrounding circumstances, the lessees were entitled to determine the tenancy at any time by six months' notice, expiring six months after the delivery of the notice, without regard to the time of the commencement of the tenancy. *Bridges* v. *Potts*, 17 C. B. (N.S.) 314; 33 L. J., C. P. 338; 10 Jur. (N.S.) 1049; 11 L. T. 373.

Under Void Agreement for a Lease.]—A tenant held premises under a void agreement for a term of five years and a half from Michaelmas, 1823; before the expiration of the five years and a half, the parties entered into a negotiation for a future lease for seven, fourteen, or twenty-one years, at an increased rent, in consideration of the landlord laying out money in improvements: no lease was ever executed, but the tenant continued in the occupation of the premises, paying the increased rent from Michaelmas, 1828, down to 1835:—Held, that a notice given at Lady-day, to quit at Michaelmas, the period at which the tenancy originally commenced, was valid. *Berrey* v. *Lindley*, 4 Scott (N.R.) 61; 3 Man. & G. 498; 11 L. J., C. P. 27; 5 Jur. 1061.

Under Void Lease.]—If a landlord leases for seven years by parol, and agrees that the tenant shall enter at Lady-day and quit at Candlemas, though the lease is void by the Statute of Frauds as to the duration of the term, the tenant holds under the terms of the lease in other respects; and therefore the landlord can only put an end to the tenancy at Candlemas. *Doe* d. *Rigge* v. *Bell*, 5 Term Rep. 471; 2 R. R. 642.

Where a remainderman creates a new tenancy with a tenant in possession under a void lease granted by a tenant for life, and receives rent on the days of payment mentioned in the lease, a notice to quit must expire on the day of entry under the original demise. *Roe* d. *Jordan* v. *Ward*, 1 H. Bl. 97; 2 R. R. 728. S. P., *Doe* d. *Collins* v. *Weller*, 7 Term Rep. 478; 4 R. R. 496.

Holding over after.]—When a person, who held as tenant from year to year, has been permitted to remain undisturbed in possession after the expiration of a notice to quit, the question whether there is a subsisting tenancy from year to year is one of fact for a jury. *Vance* v. *Vance*, Ir. R. 5 C. L. 363.

Custom to continue in Possession.]—A tenant from year to year of a stone quarry in Yorkshire received from his landlord six months' notice to quit. The tenant claimed the right, under an alleged custom of the district, to be allowed to continue in possession a reasonable time after the expiration of the notice, to enable him to get the stone which he had "bared." At the expiration of the notice, the landlord brought ejectment against the tenant, who thereupon filed a bill to restrain the action, and setting up the custom as against the landlord:—Held, that the evidence failed to prove the existence of the custom as alleged; and that, even if it had existed, the proper remedy of the tenant would have been at law. *Vint* v. *Constable*, 25 L. T. 324.

ii. *Different Times of Entry.*

Which is principal Subject of Holding.]—Where a house and land are let together to be entered upon at different times, and it does not appear from the terms of the demise from what

time the whole is to be taken as let together: it is a question of fact for the jury which is the principal and which the accessorial subject of demise, in order for the judge to decide whether the notice to quit the whole was given in time. *Doe* d. *Heapy* v. *Howard*, 11 East, 498; 11 R. R. 255.

A tenant held a house and land from year to year, the land from the 2nd February, and the house from 1st May. On 1st August, 1842, a notice to quit the whole on the 2nd February next was served on the tenant:—Held, a good notice to determine the tenancy on 2nd February. *Doe* d. *Davenport* v. *Rhodes*, 11 M. & W. 602; 1 D. & L. 293; 12 L. J., Ex. 382.

Under an agreement of demise, dated in January, of a dwelling-house, and other buildings for the purpose of carrying on a manufacture, together with certain meadow, pasture, and bleaching grounds, watercourses, &c. for a term of twenty-five years, to commence as to the meadow ground from the 25th of December last; as to the pasture, from the 25th of March next; and as to the housing, mills, and all the rest of the premises, from the 1st of May; reserving the first year's rent on the day of Pentecost, and the other half-year's rent at Martinmas:—Held, that the substantial subject of demise being the house and buildings for the purpose of the manufacture, which were to be entered on the 1st of May, that was the substantial time of entry to which a notice to quit ought to refer, and not to the 25th of December, when the incoming tenant had liberty of entering on the meadow, which was merely accessory to the other and principal subject of the demise; and consequently that a notice to quit served on the 28th of September (which would have been sufficient with reference even to the 25th of March, the day of entry on the pasture ground, the 29th of September being the correspondent half-yearly day of holding to the 25th of March), to quit at the expiration of the current year of holding, was sufficient. *Doe* d. *Bradford* (*Lord*) v. *Watkins*, 7 East, 551; 3 Smith, 517; 8 R. R. 670.

Land and buildings were held by a yearly tenant, the land from 2nd February to 2nd February, the buildings from 1st May to 1st May. The landlord, on 22nd October, 1833, served the tenant with a notice to quit the land and buildings at the expiration of half a year from the delivery of this notice, or at such other time or times as your present year's holding of or in the said premises, or any part or parts thereof respectively, shall expire, after the expiration of half a year from the delivery of this notice":—Held, that, as to the lands, the notice was to be considered a notice to quit on 2nd February, 1835, and that the landlord might recover both land and buildings after that day in ejectment. *Doe* d. *Williams* v. *Smith*, 5 A. & E. 350; 6 N. & M. 829; 2 H. & W. 176; 5 L. J., K.B. 216.

A tenant held a house and land from year to year, the land from 2nd February, the house, &c. from the 1st May. On the 16th February, 1838, a notice to quit was served on him, requiring him to quit and deliver up the farm at the end of his present year's holding:—Held, that this was a good notice to determine the tenancy of 1839; it not being shewn, on the part of the tenant, that the land was not the principal subject of the holding. *Doe* d. *Kindersley* v. *Hughes*, 7 M. & W. 139; 10 L. J., Ex. 185.

Where a tenant held a farm, as to the arable lands from Candlemas, and as to the buildings and pastures from May-day, and the rent was payable at Michaelmas and Lady-day, a notice to quit given six months from Lady-day, but not six months before Candlemas, was insufficient. *Doe* d. *Grey De Wilton* (*Lord*) v. ——, 2 East, 384.

But where, under an agreement by a tenant of a farm "to enter on the tillage land at Candlemas, and on the house and all other the premises at Lady-day following, and that when he left the farm he should quit the farm according to the times of entry as aforesaid," and the rent was reserved half-yearly at Michaelmas and Lady-day:—Held, that a notice to quit delivered half a year before Lady-day, but less than half a year before Candlemas, was good; the taking being in substance from Lady-day, with a privilege for the incoming tenant to enter on the arable land at Candlemas for the sake of ploughing, &c. *Doe* d. *Strickland* v. *Spence*, 6 East, 120; 2 Smith, 255; 8 R. R. 422.

So, an agreement to take a farm, the arable land from Old Candlemas, the pasture from Old Lady-day, and the meadow from Old May-day, paying rent half-yearly at Old Michaelmas and Lady-day, is substantially a taking of the whole from Old Lady-day, and a notice to quit delivered before Old Michaelmas is sufficient to determine the tenancy. *Doe* d. *Daggett* v. *Snowden*, 2 W. Bl. 1224.

g. Service.

With whom Left—Wife.]—If a notice to quit is served on the tenant's wife at the house, accompanied by a statement, that the paper delivered is "a notice of discharge," it is sufficient. *Smith* v. *Clark*, 9 D. P. C. 202; 1 W. P. C. 44. S. P., *Pulteney* v. *Shelton*, 5 Ves. 261, n.

—— **Widow.**]—A tenant from year to year died intestate, and, no administration being taken out, his widow continued in possession and paid the rent; the landlord served a notice to quit on her, and, on its expiration, he, with her assent, entered into an agreement with a new tenant for letting the premises, in pursuance of which the new tenant entered and paid rent; subsequently a son of the deceased tenant took out administration to him, and brought an ejectment as administrator to recover possession:—Held, that the service of the notice to quit on the widow, the person in possession, was sufficient, in the absence of a legal personal representative of the deceased tenant, to determine the tenancy which had been in him, and was effectual for such determination even as against the legal personal representative subsequently raised, and that therefore the plaintiff was not entitled to recover possession. *Sweeny* v. *Sweeny*, Ir. R. 10 C. L. 375.

—— **Daughter.**]—A. was tenant to the plaintiff from year to year. Age had made him imbecile and unable to manage his farm or any business, but his sons and daughter jointly transacted all his affairs. A notice to quit was delivered to the daughter at A.'s house upon the farm, but she was not told what it was, nor that it was for A., nor to deliver it to him. After the notice had lain in the house for some time the daughter burned it. The sons knew of the service of the notice. The jury found that it never reached A.'s hands, and that the fact of its receipt by

the daughter had not been made known to him. At the trial the judge held that the service of the notice was sufficient:—Held, that the delivery to the daughter constituted legal service on A. *Tanham* v. *Nicholson*, L. R. 5 H. L. 561; Ir. R. 6 C. L. 188.

T. lived in a house where his two sons and his daughter also resided. T. was imbecile. The house was managed by his daughter, the farming business by his two sons. A notice to quit, addressed to the father, was served at the house by delivery to the daughter. She put it on the dresser in the kitchen, and afterwards burnt it. One of the sons knew of its existence, but was not shewn to have known its exact terms, though he was aware of its nature:—Held, that this was a service sufficient to entitle the landlord to maintain ejectment against the father. *Liddy* v. *Kennedy*, L. R. 5 H. L. 134; 20 W. R. 150.

—— **Servant.**]—The mere leaving of a notice to quit at the tenant's house with a servant, without further proof of its having been explained to the servant, or that it came to the tenant's hands, is not sufficient. *Doe* d. *Buross* v. *Lucas*, 5 Esp. 153; 8 R. R. 842.

Delivery of a notice to quit to the servant is sufficient, though the tenant might not have been informed of it till within the half-year after its expiration, especially as the servant might have been called, but was not. *Doe* d. *Neville* v. *Dunbar*, M. & M. 10.

A notice to quit served upon Thomas Mitchell, the servant of John Mitchell, instead of upon John Mitchell, although the latter afterwards acknowledged having seen the notice, and referred to the mistake, is not sufficient. *Doe* v. *Mitchell*, 1 Jur. 795.

The service of a notice to quit made at the house of the tenant upon a person whose duty it would be to deliver the notice to the tenant, is sufficient to sustain ejectment, although in fact the notice was never delivered to the tenant. *Tanham* v. *Nicholson*, L. R. 5 H. L. 561; Ir. R. 6 C. L. 188.

The presumption in such a case is that it did reach the tenant himself. *Ib.*

In such a case the question is not whether the servant performed his duty in delivering it to his master, but whether the servant was to be considered as the agent of the master to receive the notice. If he was, the service of the notice will effectually bind the master. *Ib.*

The fact that the agent who received the notice destroyed it would liberate entirely the person who delivered the notice, but would not liberate the person whose agent had received and destroyed it. *Ib.*

When there has been service of notice to quit left at the tenant's house with a servant of the tenant, such a fact is more than presumptive evidence of a service on the tenant. The landlord's right would otherwise be controlled by something to which the landlord was an utter stranger. *Ib.*

But even if only presumptive evidence of the service be adduced, the evidence to rebut it must be proof of the fact that the notice did not come to the knowledge of the tenant at all. *Ib.*

Service of notice upon a servant living at the house of one of several lessees, the servant "promising to give it to him on his return home in a few days," was good service upon that lessee. *Liddy* v. *Kennedy*, L. R. 5 H. L. 134; 20 W. R. 150.

—— **Officers of Corporation.**]—An ejectment against the plaintiffs pro tempore of a corporation, cannot be maintained by proving payment of rent for the premises, by the annual predecessors of the defendants, in the same office for several years before, and service of the notice to quit on the defendants, the existing bailiffs; for the payment of such rent by the bailiffs in succession is merely evidence of a tenancy in the corporation. But, at any rate, such tenancy may be determined by a notice to the corporation to quit, served on its officers. *Doe* d. *Carlisle* (*Earl*) v. *Woodman*, 8 East, 227; 9 R. R. 422.

—— **Tenant not to be found—Delivery at Premises.**]—A lease of premises for twenty-one years contained a proviso that it should be lawful for the landlord or his assigns to put an end to the demise at the end of the first fourteen years by delivering to the tenant or his assigns six calendar months' previous notice in writing of his intention to do so. In an action by the assignee of the reversion to recover possession of the premises on the ground that the demise had been duly determined by notice under the proviso, it appeared that the lessee had disappeared some years previously, after having mortgaged the premises by way of under-lease, that his address could not be found, and that written notice to determine the tenancy directed to him had been sent to his last known address, and had also been delivered to the mortgagee and to the occupier of the premises:—Held, that the action could not be maintained, as there had been no service of the notice on the lessee, and as he had not assigned the premises no other service would satisfy the terms of the proviso. *Hogg* v. *Brooks*, 15 Q. B. D. 256; 50 J. P. 118—C. A.

When—On Sunday.]—A notice to quit is good, though given on Sunday. *Sangster* v. *Noy*, 16 L. T. 157.

—— **Ejectment pending.**]—A notice to quit was served during the pendency of an ejectment for nonpayment of rent, in which judgment was subsequently entered and an habere executed; an order for restitution having been afterwards obtained by the tenant, an ejectment on the title was then brought, founded upon the notice to quit:—Held, that the notice to quit was not effectual to determine the tenancy. *Hall* v. *Flanagan*, Ir. R. 11 C. L. 470.

Evidence as to.]—A notice to quit is sufficiently served upon a tenant if it can be shewn that it came to his hands before the six months previously to the expiration of his year of holding, though the notice had been served only by having been put under the door of the tenant's house. *Alford* v. *Vickery*, Car. & M. 280.

The regular service of a notice to quit held to have been properly inferred from the circumstance of the tenant's speaking about "the notice to quit which he had received," and engaging a valuer to value his rights as an outgoing tenant. *Doe* d. *Simpson* v. *Hall*, 5 Man. & G. 795.

Where the tenant of an estate holden by the year has a dwelling-house at another place, the delivery of a notice to quit to his servant at the dwelling-house is strong presumptive evidence that the master received the notice. *Jones* d. *Griffiths* v. *Marsh*, 4 Term Rep. 464; 2 R. R. 441.

h. Waiver of.

Accepting or Distraining for Rent.]—If a landlord receives rent accrued due after the expiration of a notice to quit, it is a waiver of that notice. *Goodright* d. *Charter* v. *Cordwent*, 6 Term Rep. 219 ; 3 R. R. 161.

So if he distrains for such rent. *Zouch* d. *Ward* v. *Willingale*, 1 H. Bl. 311 ; 2 R. R. 770. See *Jenner* v. *Clegg*, 1 M. & Rob. 213.

But the mere acceptance of rent by a landlord, for occupation subsequently to the time when the tenant ought to have quitted according to the notice given him for that purpose, is not of itself a waiver on the part of the landlord of such notice, but matter of evidence only, to be left to the jury under the circumstances of the case. *Doe* d. *Cheney* v. *Batten*, Cowp. 243 ; 9 East, 314, n. ; 9 R. R. 570, n.

The receipt by an authorised agent of rent due at Michaelmas, is primâ facie a waiver of a notice to quit at Midsummer. *Doe* d. *Ash* v. *Calvert*, 2 Camp. 387 ; 11 R. R. 745.

But where rent is usually paid to a banker, if the banker, without any special authority, receives rent accruing after the expiration of a notice to quit, the notice is not thereby waived. *Ib.*

The demand and acceptance of rent due subsequent to a notice to determine a tenancy of chattels is a waiver of the notice. *Keith, Prowse & Co.* v. *National Telephone Co.*, 63 L. J., Ch. 373 ; [1894] 2 Ch. 147 ; 8 R. 776 ; 70 L. T. 276 ; 42 W. R. 380 ; 58 J. P. 573.

New Term on Expiration.]—Semble, where a term in chattels has expired and rent has been subsequently accepted, a tenancy from year to year is created, and the tenant is entitled to six months' notice to determine the tenancy whatever may have been the length of notice required during the continuance of the original tenancy. *Ib.*

Demanding Rent.]—Though payment and acceptance of rent accruing after the expiration of a notice to quit amount to a waiver of the notice, a demand of such rent does not necessarily operate as a waiver ; and it is a question for the jury, and not for the court, whether, under the circumstances of the case, the notice has been waived. *Blyth* v. *Dennett*, 13 C. B. 178 ; 22 L. J., C. P. 79.

Accepting New Tenant.]—If, at the end of a year, when the tenancy is from year to year, the landlord accepts another person as tenant in the room of the former tenant, without any surrender in writing, such acceptance will be a dispensation of any notice to quit. *Sparrow* v. *Hawkes*, 2 Esp. 505.

Second Notice.]—A landlord gave a notice to quit different parts of a farm at different times, which the tenant neglected to do in part, in consequence of which the landlord commenced an ejectment ; and before the last period mentioned in the notice was expired, the landlord, fearing that the witness, by whom he was to prove the notice, would die, gave another notice to quit at the respective times in the following year, but continued to proceed with his ejectment :—Held, the second notice was no waiver of the first. *Doe* d. *Williams* v. *Humphreys*, 2 East, 237.

And a second notice, delivered to a tenant after the expiration of a former notice, to quit on a subsequent day, or to pay double rent, is no waiver of such first notice or of the double rent which has accrued under it. *Messenger* v. *Armstrong*, 1 Term Rep. 53 ; 1 R. R. 148.

If, after the expiration of a notice to quit, the landlord gives the tenant a fresh notice, that, unless he quits in fourteen days, he will be required to pay double value, the second notice is no waiver of the first. *Doe* d. *Digby* v. *Steel*, 3 Camp. 117 ; 13 R. R. 768.

A tenant from year to year, believing that his tenancy determined at Midsummer, gave a written notice to quit at that period, which the landlord accepted and made no objection to. The tenant having afterwards discovered that his tenancy expired at Christmas, gave his landlord another notice accordingly, and on possession being demanded at Midsummer, refused to quit the premises :—Held, that the tenancy was not determined by the notice, inasmuch as it was not good as a notice to quit, and could not operate as a surrender by note in writing within the Statute of Frauds, the first being to take effect in futuro. *Doe* d. *Murrell* v. *Milward*, 3 M. & W. 328 ; 1 H. & H. 79 ; 7 L. J., Ex. 57.

But a second notice to the defendant to quit at Michaelmas, 1811, is a waiver as to him of a former notice given to the original lessee, from whom he claims by assignment, to quit at Michaelmas, 1810. *Doe* d. *Brierly* v. *Palmer*, 16 East, 53 ; 14 R. R. 284.

Detention of Key by Tenant.]—Where a tenancy from year to year has been determined by a regular notice to quit, the mere accidental detention of the key by the tenant (who has quitted the premises and removed his goods), for two days beyond the expiration of the term, does not amount to any evidence of use and occupation, so as to render him liable for another quarter. *Gray* v. *Bompas*, 11 C. B. (N.S.) 520 ; 5 L. T. 841.

Continuance of Possession of Tenant.]—In an action for rent of coal the issue being whether or not the defendants, having given notice to quit, had afterwards waived the notice, and continued the tenancy ; it was proved that, after the time fixed by the notice had expired, they continued for two months, working out certain portions of the coal, which, however, as they contended, it was usual for a tenant to take away on abandoning such a work :—Held, that it was for the jury to decide, on this issue, whether or not the defendants, in remaining for the two months, intended to waive the notice and continue the tenancy. *Jones* v. *Shears*, 4 A. & E. 832 ; 6 N. & M. 428 ; 2 H. & W. 43 ; 5 L. J., K. B. 153.

No continuance of the tenancy is necessarily implied, from the mere fact of a tenant's continuing in possession after the expiration of a notice to quit given by such tenant. *Ib.*

A yearly tenancy was determined in September, 1877, by notice to quit, and possession was demanded in November, 1877 ; but the former tenant continued in possession until the present action. After the expiration of the notice to quit, the landlord never accepted rent, though tendered. He told the former tenant that he was a trespasser, and frequently demanded possession, but without success. In an action to recover possession, founded on the notice to

quit :—Held, that a verdict was properly directed for the landlord. *Cusack* v. *Farrell*, 18 L. R., Ir. 494. Affirmed, 20 L. R., Ir. 56—C. A.

Conditional Promise to Re-let.]—Where a tenant gave his landlord notice to quit at Michaelmas, 1835, and subsequently made an offer to remain another year, to which the agent of his landlord replied, that "H. (the landlord) has directed me to inform you that he could only consent to accept your offer of 420*l.* for the farm from Michaelmas next to Michaelmas, 1836, subject to the existing covenants, provided I could not find a tenant at the rent it appeared to be worth by the 1st of August ;" and the tenant then assented to these terms :—Held, that if the above amounted to a substantive agreement at all, it was an implied condition on the part of the tenant to allow any one wishing to take the farm to go over the land, and the tenant having refused to do so, the agreement fell to the ground, and the notice to quit at Michaelmas, 1835, remained good. *Doe* d. *Hertford* (*Marquis*) v. *Hunt*, 2 Gale, 102 ; 1 M. & W. 690 ; 5 L. J., Ex. 241.

Promise not to eject.]—A landlord of premises about to sell them, gave his tenant notice to quit on the 11th October, 1806, but promised him not to turn him out unless they were sold ; and not being sold till February, 1807, the tenant refused on demand to deliver up possession ; and on ejectment brought, held, that the promise (which was performed) was no waiver of the notice, nor operated as a licence to be on the premises otherwise than subject to the landlord's right of acting on such notice, if necessary ; and therefore, that the tenant not having delivered up possession on demand after a sale, was a trespasser from the expiration of the notice to quit. *Whiteacre* d. *Boult* v. *Symonds*, 10 East, 13 ; 10 R. R. 224.

Authority to Tenant to pay Charge—Admission.]—An authority from a landlord to his tenant to pay a charge upon the estate, in respect of a period subsequent to the expiration of the notice to quit is not a waiver of the notice, nor is it an admission that the person to whom it is addressed is filling the character of tenant at that period, because the tenant would be liable to answer for the amount in an action for mesne profits. *Doe* d. *Bath* v. *Scott*, 6 L. J. (O.S.) K. B. 110.

Verbal Acquiescence.]—A verbal acquiescence by a landlord on receiving from a tenant from year to year a notice to quit, determining within the six months, is not sufficient. *Bessell* v. *Landsberg*, 7 Q. B. 638 ; 14 L. J., Q. B. 355 ; 9 Jur. 576.

Effect of.]—By a notice to quit given to a tenant from year to year his tenancy is determined on the expiration of the current year, and a waiver of the notice creates a new tenancy, taking effect on the expiration of the old one. *Tayleur* v. *Wildin*, 37 L. J., Ex. 173 ; L. R. 3 Ex. 303 ; 18 L. T. 655 ; 16 W. R. 1018.

Abandonment of.]—A notice to quit which is, during its currency, abandoned by the consent of both parties, and not acted on, does not per se put an end to a tenancy from year to year. *Inchiquin* (*Lord*) v. *Lyons*, 20 L. R., Ir. 474—C. A.

i. Effect in Evidence.

As to the Fact of a Tenancy.]—A notice by the owner of premises, requiring a tenant in possession "to leave the premises he then rented of the owner at Lady Day next," is not conclusive evidence of a demise from a testator to the party in possession. *Doe* d. *Wilcockson* v. *Lynch*, 2 Chit. 683. And see *Bishop* v. *Howard*, 3 D. & R. 293 ; 2 B. & C. 100 ; 1 L. J. (O.S.) K. B. 243 ; 26 R. R. 291.

A notice desiring the tenant to "quit the premises which you hold under me, your term therein having long since expired," does not recognise a subsisting tenancy from year to year subsequent to the term, but is a mere demand of possession. *Doe* d. *Godsell* v. *Inglis*, 3 Taunt. 54.

As to the Commencement of the Tenancy.]—A notice to quit is not primâ facie evidence of the period of the year when the tenancy commenced. *Doe* d. *Ash* v. *Calvert*, 2 Camp. 387 ; 11 R. R. 745.

A notice was given on the 22nd March, by a landlord to his tenant, to quit at the expiration of the current year ; a declaration in ejectment, laying the demise on the 1st November, was on the 16th January following served upon the tenant, who at the time made no objection to the notice to quit, but said he should go out as soon as he could fit himself :—Held, to be primâ facie evidence that the tenancy commenced at Michaelmas, and was determined before the day of the demise. *Doe* d. *Baker* v. *Wombwell*, 2 Camp. 559.

So, if the notice to quit is served personally on the tenant in possession, and he makes no objection to it, it is primâ facie evidence to be left to the jury, that the tenancy commenced at the season of the year when the notice to quit expires. *Doe* d. *Clarges* v. *Forster*, 13 East, 405 ; 12 R. R. 383. S. P., *Thomas* d. *Jones* v. *Thomas*, 2 Camp. 647.

Where a tenant, on being applied to respecting the commencement of his holding, informs the party that it begins on a certain day, and notice to quit on that day is given at a subsequent time, he will be bound by the information he so gave, and not be permitted to shew, that in fact it began at a different time. *Doe* d. *Eyre* v. *Lambly*, 2 Esp. 635 ; 5 R. R. 758.

If a tenant disputes the time when his tenancy commences, and that his notice to quit does not correspond with it, it is incumbent on him, and not on the lessor, to shew the true time of the commencement of the tenancy. *Doe* d. *Matthewson* v. *Wrightman*, 4 Esp. 5 ; 6 R. R. 834.

As to Performance of Covenants.]—A tenant is not absolved from the performance of the covenants of his lease by a notice to quit ; such notice ought rather to be regarded as a notice to be more vigilant in the performance of the covenant. *Gregory* v. *Wilson*, 9 Hare, 683 ; 16 Jur. 304.

As to a Surrender of the Tenancy.]—Receipts for rent received by a landlord from a third party are evidence of a surrender by operation of law, putting an end to the liability of a former tenant. *Laurence* v. *Faux*, 2 F. & F. 435.

j. Proof of.

Generally.]—A notice to quit, in writing signed by the party giving it, and attested by a witness, before 17 & 18 Vict. c. 125, s. 26, which renders it unnecessary to call the attesting witness in such a case, must have been proved by calling that witness, or his absence must have been accounted for; proof that it was served on the tenant, that he read it, and did not object to it, was not sufficient. *Doe* d. *Sykes* v. *Durnford*, 2 M. & S. 62.

Where it was the usual course of practice in an attorney's office for the clerks to serve notices to quit on tenants, and to indorse on duplicates of such notice the fact and time of such service: and, on one occasion, the attorney himself prepared a notice to quit to serve on a tenant, took it out with him, together with two others prepared at the same time, and returned to his office in the evening, having indorsed on the duplicate of each notice a memorandum of his having delivered it to the tenant: and two of them were proved to have been delivered by him on that occasion:—Held, on the trial of an ejectment, after the attorney's death, that the indorsement so made by him was admissible to prove the service of the third notice. *Doe* d. *Patteshall* v. *Turford*, 3 B. & Ad. 890; 1 L. J., K. B. 262.

In an ejectment against a weekly tenant, the notice proved was, to quit on Wednesday, the 4th August. The witness, who was called to prove that Wednesday was the expiration of the current week of the tenancy, said "that he guessed" the defendant came in "about Tuesday or Wednesday, but had no recollection which":—Held, insufficient. *Doe* d. *Finlayson* v. *Bayley*, 5 Car. & P. 67.

A person who was employed to serve notices to quit, and whose duty it was to inform his employer of their service, was sent with a notice to serve on R. C., and on his return he signed a memorandum, "29th September, served R. C." It turned out, in fact, that he had served, not R. C., but W. C., his father. It was proposed to shew that he stated this fact to his employer on his return, but the memorandum having been prepared beforehand, was not altered:—Held, that this evidence was not admissible after his death, as it was not made in the course of business or in discharge of a duty. *Stapylton* v. *Clough*, 2 El. & Bl. 933; 2 C. L. R. 266; 23 L. J., Q. B. 5; 18 Jur. 60; 2 W. R. 60.

Custom.]—The custom of the country is not admissible to prove that a notice to quit served on the 5th of April is a good notice to quit by reason of the tenancy being a Michaelmas tenancy, but it must be proved by direct evidence that such is the case. *Hogg* v. *Norris*, 2 F. & F. 246.

Service by Post.]—Between nine and ten o'clock on the 25th March, a tenant put into a post-office in London a letter, containing a notice to quit on the following Michaelmas, and addressed to the place of business of his landlord's agent. The agent was at his place until between six and seven o'clock in the evening, and did not receive the letter, but found it on the following morning:—Held, a sufficient notice to determine the tenancy, the jury having found that the letter was delivered on the 25th of March, after the agent had left his place of business. *Papillon* v. *Brunton*, 5 H. & N. 518; 29 L. J., Ex. 265.

By Duplicate Copy.]—Notice to quit may be proved by a duplicate or an examined copy, without any notice having been given to produce the original. *Doe* d. *Fleming* v. *Somerton*, 7 Q. B. 58; 14 L. J., Q. B. 210; 9 Jur. 775.

2. Forfeiture.

a. Construction and Operation of Provisoes.

Proviso for Re-entry.]—Provisoes for re-entry in leases are to be construed like other contracts; not with the strictness of conditions at common law. *Doe* d. *Davis* v. *Elsam*, M. & M. 189; 31 R. R. 729.

A proviso in a lease for re-entry on a condition broken can only operate during the term, and vanishes when that ends. *Johns* v. *Whittey*, 3 Wils. 127.

When a lease contains a proviso giving the lessor a right to re-enter in the event of breach of covenant by the lessee (but not making the lease ipso facto void in that event):—Quære, whether under the present practice the mere commencement of an action by the lessor to recover possession of the property for breach of covenant, or the commencement of such action followed by appearance by the trustee, will, without actual entry, operate to determine the lease. *Silcock* v. *Farmer* (46 L. T. 404) commented upon. *Dyke, Ex parte, Morrish, In re*, 22 Ch. D. 410; 48 L. T. 303—C. A.

Rent in Arrear.]—Where a lease contained two clauses for re-entry: the one, in case the yearly rent was in arrear thirty days after it became payable, and the other in case the yearly rent was in arrear, which was stated to be payable half-yearly at Lady-day and Michaelmas:—Held, that the landlord had a right to re-enter on nonpayment of each half-year's rent; as the former clause contained the description of the amount to be annually paid, and the latter the times for payment. *Doe* d. *Rudd* v. *Golding*, 6 Moore, 231; 23 R. R. 625.

—— **"If and whenever" no Sufficient Distress.**]—The defendant by a lease became lessee to the plaintiff of certain premises at a yearly rent, payable quarterly. The lease contained a proviso that "if and whenever" any one quarter's rent thereby reserved, or any part thereof, should be in arrear for twenty-one days, and no sufficient distress could be had or levied for the same, it should be lawful for the lessor to enter upon and take possession of the demised premises. Three quarters' rent being in arrear, the plaintiff put in a distress for the whole amount, but the proceeds of such distress were not sufficient to satisfy more than two quarters' arrears:—Held, in an action to recover possession of the premises, that the words "if and whenever" carried the case beyond the time when the distress was put in up to the commencement of the action; that as the plaintiff by bringing the action must be taken to have appropriated the proceeds of the distress to the first two quarters' arrears, there still remained another quarter's rent in arrear for twenty-one days in respect to which there was no sufficient distress upon the premises; and that, consequently, the plaintiff was entitled to recover possession under the

proviso for re-entry. *Shepherd* v. *Berger*, 60 L. J., Q. B. 395; [1891] 1 Q. B. 597; 64 L. T. 435; 39 W. R. 330; 55 J. P. 532—C. A.

Covenant not to Assign.]—Where a lessee covenanted to pay the rent, and not to assign without the leave of the lessor, and there was a proviso for re-entry if the rent was in arrear, or if all or any of the covenants thereinafter contained on the part of the lessee should be broken, and there were no covenants on the part of the lessee after the proviso, but only a covenant by the lessor, that upon the lessee paying the rent, and performing all and every the covenants thereinbefore contained on his part to be performed, he should quietly enjoy:—Held, that the lessor could not re-enter for breach of the covenant not to assign, for that the proviso was restrained by the word "hereinafter" to subsequent covenants, and though there were none such, yet the court could not reject the word. *Doe* d. *Spencer* v. *Godwin*, 4 M. & S. 265; 16 R. R. 463.

—— **Void Assignment.**]—A forfeiture cannot be enforced in respect of an act which of itself might work a forfeiture but which by a subsequent act is rendered void. Thus where a lease contained a clause of forfeiture in case the tenant should assign that lease, and the tenant did assign it to trustees for the benefit of his creditors and upon this deed (treated as an act of bankruptcy) a commission issued against the tenant:—Held, that this assignment, turning out to be void, was not sufficient to entitle the landlord to enforce it as a ground of forfeiture. *Doe* v. *Lloyd*, 4 L. J. (O.S.) K. B. 159; 27 R. R. 534.

Not to under-let without Landlord's Consent—Relief—Mistake—Negligence of Agent.]—A lease of business premises in the city of London contained a covenant by the lessees that they would not under-let the premises, or any part thereof, without the written consent of the landlord for that purpose first had and obtained, which consent the landlord thereby agreed should not be arbitrarily withheld in the case of a respectable and responsible person. The lease gave the landlord a power of re-entry for breach of any of the covenants. The lessees being desirous of under-letting part of the premises, sent instructions to their solicitor, in whose possession the lease was, to prepare an under-lease. The solicitor being absent, the under-lease was prepared by a clerk, who had not access to the lease, and did not know that it required the landlord's consent to the under-lease. The solicitor returned before the under-lease was executed, and the matter was concluded through him, but both he and the lessees forgot that the landlord's consent was necessary to the under-lease, and consequently the under-lease was executed without the landlord's consent being obtained. The under-lessees were respectable and responsible persons. No damage was sustained by the landlord in consequence of the under-lease, and no valid reason was given by him for objecting to the under-lessees:—Held, in an action of ejectment by the landlord upon the power of re-entry for breach of covenant, that he was entitled to recover, for there had been a forfeiture of the lease, against which the court would not grant relief to the lessees—per Lopes, L.J., and Kay, L.J., upon the ground that, assuming that the court had power to relieve in such a case, yet the lessees were responsible for the negligence of their solicitor in not examining the lease before the execution of the under-lease, and they have the means of knowledge and having neglected to inform themselves, the case was not a proper one for the exercise of the court's discretion to grant relief; per Lord Esher, M.R., upon the ground that the case was one of forgetfulness and not mistake within the meaning of the doctrine that equity will relieve against fraud, accident, or mistake. Per Lord Esher, M.R.: The mere fact that the mistake arises through the negligence of an agent does not preclude the court from relieving against a forfeiture. *Barrow* v. *Isaacs*, 60 L. J., Q. B. 179; [1891] 1 Q. B. 417; 64 L. T. 686; 39 W. R. 338; 55 J. P. 517—C. A.

—— **Incorporation of Covenants.**]—By an agreement in writing, but not under seal, A. agreed to let and B. to hire on lease for twenty-one years a house on the following terms: the rent to be 55*l.* per annum; the lease to commence from the 25th of March next, and to contain an extract of the covenants in the original lease which A. is bound under; that the proposed lease shall not be sold, parted with, or any portion of the property under-let without the consent in writing of A. In the original lease were six covenants by the lessee, with a proviso for re-entry on the breach of any of them; but there was no covenant not to under-let without the consent of the landlord. B. entered and paid rent, and under-let the premises without the consent of A., who thereupon brought ejectment, and was nonsuited:—Held, that the nonsuit was right. B. held as tenant from year to year on such of the terms of the agreement as were applicable to that tenancy. The agreement incorporated the six covenants in the original lease, and the proviso for re-entry on the breach of any one of those covenants: but the agreement could not be read as applying the proviso for re-entry to the new clause as to not under-letting; and on mere words of agreement a condition could not be created. *Crawley* v. *Price*, L. R. 10 Q. B. 302; 33 L. T. 203; 23 W. R. 874.

Grant by Lessee to Sub-Lessee of Residue of his Interest—Right of Re-entry by Lessor.]—When a lessor, being himself a tenant for years, grants to his sub-lessee the residue of his interest from the termination of the existing sub-lease, the grant operates as an interesse termini, and the existing sub-lease does not merge; and a right of re-entry contained in the original lease would still exist and enable the lessor to re-enter for breach of covenant. *Hyde* v. *Warden*, 47 L. J., Ex. 121; 3 Ex. D. 72; 37 L. T. 567; 26 W. R. 201—C. A.

Semble, where two pieces of land are demised by one lease containing a power of re-entry over both, and afterwards the reversion in one of them is assigned to the lessee, the right of re-entry remains intact over the piece of land of which the reversion remains vested in the lessor. *Ib.*

Not to imperil Licence.]—A married woman living apart from her husband had accumulated enough of her separate earnings to purchase the goodwill and stock of a beerhouse, which was taken for her by S., to whom the licence was transferred, and who agreed with the landlord not to do anything to imperil

the licence, on pain of forfeiting the tenancy and the fixtures. S. executed a declaration of trust in favour of the plaintiff, and handed it to her with the licence indorsed in blank; and she carried on the business. S. having gone away to sea, the defendant (the landlord) served a notice at the house, requiring him to remove his goods by the following day, and on the following day entered and took possession, turning the plaintiff and her furniture out of the house:—Held, on action brought to recover damages for the expulsion, that, in the absence of evidence that the house had been improperly conducted, the absence of S., the licensed person, did not cause the licence to be imperilled so as to create a forfeiture, and justify the entry by defendant. *Moore* v. *Robinson*, 48 L. J., Q. B. 156; 40 L. T. 99; 27 W. R. 312.

The lessee of a public-house, the lease of which contained a proviso for re-entry on breach of covenant, covenanted not to do any act that could or might affect, lessen, or make void either or any of the licences. She, on one day, kept open the house during prohibited hours, permitted drunkenness and was herself drunk. Convictions took place in respect of the two first-mentioned offences, but they were not recorded on the licence under the Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 13:—Held, that the covenant had not been broken. *Wooler* v. *Knott*, 45 L. J., Ex. 313; 1 Ex. D. 124; 34 L. T. 362; 24 W. R. 615. Affirmed, 45 L. J., Ex. 884; 1 Ex. D. 265; 35 L. T. 121; 24 W. R. 1004—C. A.

Not to carry Hay off the Premises.]—A lease contained a covenant that the tenant should not carry any hay, &c., off the premises under a penalty of 5*l.* per ton, and a clause followed which enumerated all the covenants except the above, and provided that, upon breach of any of the covenants, the lessor might re-enter:—Held, that the penalty of 5*l.* did not prevent the clause of re-entry from applying to the above covenant, the words of the proviso being large enough to comprehend it. *Doe* d. *Antrobus* v. *Jepson*, 3 B. & Ad. 402; 1 L. J., K. B. 154. See also *Silcock* v. *Farmer*, 46 L. T. 404, *and cases* post, M. 7, cols. 1180 et seq.

To Repair.]—A proviso in a lease, giving power of re-entry if the lessee "shall do or cause to be done any act, matter, or thing contrary to, and in breach of, any of the covenants," does not apply to a breach of the covenant to repair, the omission to repair not being an act done within the meaning of the proviso. *Doe* d. *Abdy* v. *Stevens*, 3 B. & Ad. 299; 1 L. J., K. B. 101.

A lessee was to incur a forfeiture if he did not do certain repairs "to the satisfaction of the surveyor" of the lessor; he did the repairs, but the lessor's surveyor was not satisfied:—Held, that if the jury thought the surveyor ought to have been satisfied, that would be sufficient, and there would be no forfeiture incurred. *Doe* d. *Baker* v. *Jones*, 2 Car. & K. 743.

Not to build on Premises.]—A proviso in a lease, giving power of re-entry if the tenant makes default in performance of any of the clauses by the space of thirty days after notice, does not apply to the breach of a covenant not to allow alterations in the premises, or permit new buildings to be made upon them without permission; and an under-tenant having erected a portico contrary to the covenant and notice having been given to him to replace the premises in their former state, which he neglected to do for thirty days:—Held, that no forfeiture was incurred. *Doe* d. *Palk* v. *Marchetti*, 1 B. & Ad. 715; 9 L. J. (O.S.) K. B. 126.

Premises consisting of a wharf and dock, dwelling-house, wash-house, and courtyard, were demised under a lease, containing a covenant that the lessee, his executors, administrators, or assigns should not erect or build any edifice or structure whatsoever on the wharf or dock, or place goods thereon above a certain height, "nor do any other matter or thing of any nature or kind which might obstruct the view of the river, from the White Hart public-house, or that should grow or be a nuisance or annoyance to the occupier; nor carry on a certain trade thereon, nor make any external alteration whatsoever in the premises, nor any internal alterations in the dwelling-house that may lessen the value thereof, without the consent in writing of the lessor for that purpose," with a proviso for re-entry for a breach:—Held, that this covenant absolutely prohibited all external alterations in any part of the demised premises, and that the qualification as to lessening "the value thereof," applied only to internal alterations in the dwelling-house. *Perry* v. *Davis*, 3 C. B. (N.S.) 769.

A lease contained a covenant by the lessee not to build on the demised premises without the consent of the lessor, any dwelling-house, edifice, cabin, farm, or other building, which should in the whole or in part be occupied as a dwelling-house, with a clause of re-entry on breach. At the date of the lease, there was a dwelling-house on the premises, to which the lessee, during the continuance of the demise, and without the lessor's consent, added a building containing several apartments, communicating with the original dwelling-house, and used together with it by the occupier as one entire dwelling-house:—Held, that the erection of the additional structure, without consent, was a breach of the covenant, and occasioned a forfeiture of the lease. *Domvile* v. *Colville*, Ir. R. 7 C. L. 68.

The owner of an estate granted a lease of a plot of ground to A., who covenanted that he, his executors, administrators, or assigns, would not during the term do on the premises anything which should be an annoyance to the neighbourhood or to the lessor or his tenants, or diminish the value of the adjoining property, nor build, nor allow to be built, on the ground any building or erection without first submitting the plans to the lessor and obtaining his approval. The landlord some years afterwards granted a lease of an adjoining plot to B., who entered into a similar restrictive covenant. Within twenty years A. commenced, with the approval of the lessor, to build upon his ground so as to darken the windows of B.'s house. On a bill by B. to restrain A. from erecting and the lessor from approving the building objected to:—Held, that B. was not entitled to relief either on the principle that the lessor could not derogate from his grant, or on the ground that the restrictive covenants in A.'s lease enured for B.'s benefit. *Master* v. *Hansard*, 46 L. J., Ch. 505; 4 Ch. D. 718; 36 L. T. 535; 25 W. R. 570—C. A.

Not to commit Waste.]—Where a lease contained a proviso for re-entry, if the lessee committed waste to the value of 10*s.*, and the lessor re-entered, and brought ejectment in consequence of the tenant's having pulled down

some old buildings of more than 10*s.* value, and substituted others of a different description :—Held, that the waste contemplated in the proviso was waste producing an injury to the reversion, and that it was a question for the jury whether, under all the circumstances, such waste to the value of 10*s.* had been committed. *Doe* d. *Darlington* (*Earl*) v. *Bond*, 5 B. & C. 855; 8 D. & R. 738; 5 L. J. (O.S.) K. B. 68; 29 R. R. 436.

To produce "R."]—A lease, for a term of years, if R. should so long live, contained a covenant that the lessee should, within three months after notice from the lessor, produce R., or otherwise make it appear to the lessor, within the time aforesaid, or within a reasonable time if R. should be in foreign parts, by a good and sufficient certificate, that he was living. Proviso for re-entry on default. R. went to Brazil. The lessee, being called on under the covenant, produced an affidavit, sworn in October, 1834, stating that the deponent had seen R. in Brazil in 1831, and had often heard of him from that time till January, 1834, as residing at a place in Brazil thirty miles from that in which the deponent lived during the same period, and that the deponent was convinced that R. was alive and well in January, 1834, when deponent left Brazil :—Held, that the fact subsequent to 1831 could not be properly certified by hearsay evidence ; and that the statement of occurrences in 1831, from which R. might be presumed alive in 1834, was not equivalent to such certificate as the covenant required, that R. was then alive ; and therefore, that the affidavit was not a sufficient certificate, and a forfeiture was incurred. *Randle* v. *Lory*, 6 A. & E. 218.

To complete Cottages.]—E., a tenant of leasehold premises, under-let a portion of them to B. for a term of years, reserving a few months' reversion. B. covenanted to complete some cottages on the premises by the 25th of June. By an indenture made on the 30th of July following, which recited that E. had entered into agreements and under-leases affecting the premises, the particulars of which were known to I., it was witnessed that "E. did bargain, sell, assign, transfer, and set over the premises, with their appurtenances, and all estate, right, title, and interest of E. into or out of the premises, and every part thereof, to I., to have and to hold the premises and every part thereof for the residue of the term of years granted by the indenture of lease under which E. held, and all other the estate and interest of E. therein or thereout, subject nevertheless to the agreements and under-leases hereinbefore referred to." B. did not build the cottages by the 25th of June. It did not appear whether E. knew of the fact or elected to treat the default as a breach of covenant and a forfeiture of the lease :—Held, that assuming the non-completion of the cottages was a breach of covenant, and gave E. a right of re-entry before the assignment to I., and that the 8 & 9 Vict. c. 106, s. 5, enabled E. to assign the right of entry for condition broken, yet that the language of the indenture was not sufficient to transfer that right to I., so as to enable him to take advantage of the forfeiture. *Hunt* v. *Remnant*, 9 Ex. 635; 23 L. J., Ex. 135; 18 Jur. 335; 2 W. R. 276—Ex. Ch.

Not to permit Auction to be held on Premises.]—At the trial of an ejectment for breach of a covenant contained in a lease whereby the lessee covenanted for himself and assigns not to permit any sale by public auction to take place on the demised premises without the consent in writing of the lessor, it was proved that the lessee, after mortgaging the premises, executed an assignment of his goods and chattels, and that the trustees, under this assignment, sold the goods by auction upon the premises. The judge having directed a nonsuit on the ground that the plaintiff was not called to prove that there was no assent to the sale, and that there was no evidence that the lessee knew of or permitted the sale :—Held, that the nonsuit was right. *Toleman* v. *Portbury*, 39 L. J., Q. B. 136; L. R. 5 Q. B. 288; 22 L. T. 33; 18 W. R. 579—Ex. Ch.

Negative Covenant.]—A lease contained a covenant by the lessee not to carry on any trade upon the premises other than that of a wine and spirit merchant, and not to assign or under-lease the premises without the consent in writing of the lessor. There was a proviso for re-entry if the lessee should not well and truly perform and keep all and singular the covenants, conditions and agreements thereinbefore contained to be observed, performed and kept :—Held, that the words of the proviso for re-entry were wide enough to cover a breach of the negative covenants. *Timms* v. *Baker*, 49 L. T. 106.

A proviso for re-entry, "or if the lessee shall make default in the performance of any other covenants, which on his part are or ought to be observed performed or kept," would apply to and forbid the breach of a negative as well as a positive covenant. *Croft* v. *Lumley*, 6 H. L. Cas. 672; 27 L. J., Q. B. 321; 4 Jur. (N.S.) 903; 6 W. R. 523.

Land Demised under Gilbert's Act.]—Land was demised for 1,000 years by indenture, in 1793, to A. and B., the latter described as visitor and guardian of the poor of the parish of C., their successors and assigns, under 22 Geo. 3, c. 83 (Gilbert's Act), for the purpose of erecting a poor-house thereon, and occupying and cultivating the same for the use and benefit of such poor-house and of the poor of C., and such other parishes as should be united therewith for the purposes of the act. Proviso for re-entry, if C. and all the other parishes which should or might at any time be so united, should of themselves discontinue to adopt the provisions of the statute. Further proviso, that, if during this demise, the legislature should repeal Gilbert's Act, so that the poor of the several parishes should no longer be permitted to remain under the care of the visitor and guardians of such parishes, it should be lawful for the visitor and guardians, their successors and assigns, yielding up the land, to pull down the poor-house, and carry away the materials. The house was built, and C. and other parishes adopted the provisions of the act, and C. continued to follow them till the making of the after-mentioned order; but the other parishes seceded from the union. In 1836 the poor-law commissioners incorporated parish C. in a union, and ordered all the paupers to be removed to the union workhouse, after which no paupers were received into the poor-house of C. but persons requiring only outdoor relief, and the parish officers issued a notice proposing to let part of the house and the land :—Held, no forfeiture under the first proviso. *Doe* d. *Grantley* (*Lord*) v. *Butcher*, 6 Q. B. 115.

Reference to Act of Parliament—Act altered by Later Act.]—A proviso for re-entry was contained in a lease granted in pursuance of and referring to a private act of parliament. The proviso for re-entry in the act was subsequently altered by another act:—Held, that the lessor could not afterwards enter by virtue of the proviso in the lease, on account of the subsequent act. *Doe* d. *Bywater* v. *Brandling*, 7 B. & C. 643; 1 M. & Ry. 600; 6 L. J. (O.S.) K. B. 162.

In the Event of Execution, Bankruptcy or Insolvency.]—A proviso for re-entry in case the tenant shall commit an act of bankruptcy whereon a commission shall issue, is good in law. *Roe* d. *Hunter* v. *Galliers*, 2 Term Rep. 133; 1 R. R. 445. S. P., *Church* v. *Browne*, 15 Ves. 268; 10 R. R. 74.

A lease contained a clause of re-entry in case the term of years thereby granted should be extended or taken in execution; and before the end of the term the sheriff entered the premises under a writ of extent against the lessee at the suit of the crown, held an inquisition, and seized the lessee's interests into the king's hands:—Held, that this proceeding was a taking in execution within the latter clause of the condition, and that the term was determined and forfeited to the lessor. *Rex* v. *Topping*, M'Clel. & Y. 544; 29 R. R. 839. And see *Davis* v. *Eyton*, 4 M. & P. 820; 7 Bing. 154; 9 L. J. (O.S.) C. P. 44.

Lease for twenty-one years to A., his executors, administrators, and assigns. Proviso, that if A., his executors, administrators, and assigns, should become bankrupt or insolvent, or suffer any judgment to be entered against him by confession or otherwise, or suffer any extent, process, or proceedings to be had or taken against him, whereby any reasonable probability might arise of the estate being extended, &c., the estate should determine, and the lessor have power to re-enter. A. died during the term, and by his will devised the premises to his executors on certain trusts. The surviving executor having become bankrupt:—Held, that the lessor's right of re-entering thereupon accrued. *Doe* d. *Bridgman* v. *David*, 1 C. M. & R. 405; 5 Tyr. 125. *S. C.*, nom. *Doe* d. *Williams* v. *David*, 6 Car. & P. 614; 4 L. J., Ex. 10.

The following proviso for re-entry, "that if the lessee, his executors, administrators, or assigns shall, either by their or his own act or acts, or by bankruptcy, insolvency, writ of extent or of execution, by fieri facias or other act of law or by any other means, whereby, either voluntarily or without his or their consent, whereunder the premises demised, or any part thereof, would, in case that proviso did not exist, be liable to be seized by the sheriff or any other person, or in case the lessee, his executors, administrators, or assigns shall at any time make breach or default in performance of the covenants or any of them, on his or their parts contained," then the lease was to be void, and the lessor to re-enter, is insensible and void. *Doe* d. *Wyndham* v. *Carew*, 2 Q. B. 317; 1 G. & D. 640; 11 L. J., Q. B. 5; 6 Jur. 457.

A lessee, who covenanted not to assign the demised premises without the consent in writing of the lessor, executed a deed under s. 192 of the 24 & 25 Vict. c. 134, whereby he assigned all his property to trustees for the benefit of his creditors:—Held, that the assignment was a forfeiture of the lease. *Holland* v. *Cole*, 1 H. & C. 67; 31 L. J., Ex. 481; 8 Jur. (N.S.) 1066; 6 L. T. 503; 10 W. R. 563.

A lease for years contained a proviso for re-entry in case the lessee should, at any time during the term, commit any act of bankruptcy whereupon a commission or fiat in bankruptcy should issue against him, and under which he should be duly found and declared a bankrupt. The lessee being a trader, committed an act of bankruptcy, on which a fiat issued against him, and he was found and declared a bankrupt; but the petitioning creditor's debt, on which the fiat was founded, was proved by A. and B. as partners, whereas it was due to A., B. and C., as partners:—Held, that the lessee was not duly found and declared a bankrupt within the meaning of the proviso. *Doe* d. *Lloyd* v. *Ingleby*, 15 M. & W. 465.

An incorporated company demised premises by a lease containing a clause that, if the lessee should become bankrupt, or become or be insolvent in his circumstances, the lease should be void at the election of the directors of the company; the lessee having presented to the Court of Bankruptcy a petition for arrangement:—Held, in an action for recovery of possession: first, that there was a forfeiture of the lease; and, secondly, that the bringing of the action was an election to avoid the lease. *Kilkenny Gas Co.* v. *Somerville*, 2 L. R., Ir. 192.

—— **On Tenant "being Bankrupt."**]—A lease (executed in 1880) of a mill and warehouse, for twenty-one years, contained a proviso that in case (inter alia) the lessees should during the term be bankrupts, or file a petition in liquidation, the term should cease. After the Bankruptcy Act, 1883, came into operation, the lessees presented a bankruptcy petition, and a receiving order was made:—Held, that the presentation of the petition caused a forfeiture of the term. *Gould* or *Goold, Ex parte, Walker, In re*, 13 Q. B. D. 454; 51 L. T. 368; 1 Morrell, 168.

Assignment by Lessee prior to Bankruptcy—Subsequent Bankruptcy of Lessee.]—A twenty-one years' lease of a house contained a proviso that if the lessee, his executors, administrators, or assigns, should become bankrupt, it should be lawful for the lessor to re-enter, and that the lease should become void. The lessee, with his lessor's consent, assigned the lease, and shortly afterwards became bankrupt:—Held, that the proviso referred only to the bankruptcy of the lessee, his executors or administrators, if there had been no assignment, or, if there had been an assignment, then to the bankruptcy of the assignee. The intention was that an approved assignee should take the same estate as that of his assignor; accordingly, as the assignee had not become bankrupt, no forfeiture under the proviso had been incurred. *Smith* v. *Gronow*, 60 L. J., Q. B. 776; [1891] 2 Q. B. 394; 65 L. T. 117; 40 W. R. 46.

Semble, re-entry on the bankruptcy of the lessee is not defeated by annulment of the bankruptcy after action brought. *Ib.*

Voidable at Election of Lessor.]—A proviso in a lease, after stating that in certain events the term should cease, determine and be utterly void, continued, "and it shall be lawful to and for (the landlord) to re-enter"; this gives the landlord a right to enter or not, at his election.

Armsby v. *Woodward*, 6 B. & C. 519 ; 9 D. & R. 536 ; 5 L. J. (O.S.) K. B. 199.

A proviso in an agreement of demise that the tenant should within a certain time erect a shop-front, and that, if he did not do so, it should be lawful for the landlord or his agents to re-take possession of the premises, and the agreement should be null and void, makes it a lease voidable only at the election of the lessor. *Doe* d. *Nash* v. *Birch*, 1 M. & W. 402 ; 5 L. J., Ex. 185.

Where there is a proviso in a lease, that, on nonpayment of rent, the term shall cease, the lessor, and not the lessee, has the option of determining the lease upon a breach made. *Reid* v. *Parsons*, 2 Chit. 247. And see *Doe* d. *Green* v. *Baker*, 2 Moore, 189 ; 8 Taunt. 241 ; 19 R. R. 502.

When in a lease it is provided, that, in case of nonperformance of the covenants, the lessor may re-enter and have the premises again, "as if the lease had never been made" :—Held, that the effect of the proviso was not to render the lease void ab initio upon re-entry, but only to avoid it from the period of re-entry. *Hartshorne* v. *Watson*, 4 Bing. (N.C.) 178 ; 5 Scott, 506 ; 6 D. P. C. 404 ; 1 Arn. 15 ; 7 L. J., C. P. 138 ; 2 Jur. 155.

Where a lease of coal mines reserved a royalty rent for every ton of coal raised, and contained a proviso that the lease should be void altogether if the tenant should cease working at any time within two years, but after the working had ceased more than two years the lessor received rent :—Held, that a tenancy from year to year was not thereby created, as the lease was not absolutely void by the lessee's ceasing to work, but voidable only at the option of the lessor, and that he might avoid the lease upon any cessation to work commencing two years before the day of the demise in the ejectment. *Doe* d. *Bryan* v. *Bancks*, 4 B. & Ald. 401 ; Gow, 220 ; 23 R. R. 318. And see *Doe* d. *Boscawen* v. *Bliss*, 4 Taunt. 735.

A proviso in a lease for years (whereby the rent is payable on a day certain at the mansion-house of the lessor), that if the rent shall be unpaid for forty days after the day whereon it is reserved (although not demanded) the lease shall be void, does not make the lease voidable by the lessee, by reason of his having overstayed the forty days allowed for payment. *Rede* v. *Farr*, 6 M. & S. 121 ; 18 R. R. 329.

A clause in a lease declaring that it shall be void upon a breach of conditions by the lessee, must be held to mean that it is voidable only at the option of the lessor, even if the condition was imposed by statute. *Davenport* v. *Reg.*, 47 L. J., P. C. 8 ; 3 App. Cas. 115 ; 37 L. T. 727.

Where a lease contains a proviso or condition that on breach of any of the covenants such lease "shall cease, determine and be void to all intents and purposes whatsoever," such words must be construed to mean void at the election of the lessor. Thus, where a lease contained a proviso to the effect that if the lessee should become bankrupt or insolvent the lease shall "cease, determine and be void," and, the lessee having become bankrupt, the trustee in the bankruptcy rejected a proof put in by the lessors founded on such lease upon the ground that on the bankruptcy the lease became void :—Held, that such rejection was wrong and must be reversed. *Leathersellers' Co., Ex parte, Tickle, In re*, 3 Morrell, 126.

Semble, a forfeiture for nonperformance of covenants does not apply to breaches of negative covenants. *Evans* v. *Davis*, 48 L. J., Ch. 223 ; 10 Ch. D. 747 ; 39 L. T. 391 ; 27 W. R. 285.

A lease provided, that, in case of any breach of covenant, it should be lawful for the lessor to re-enter and expel the lessee, and the lease should, in that case, be forfeited, and be utterly null and void. The lessee committed a breach by nonpayment of rent. Semble, such a lease is voidable and not void. *Bowser* v. *Colby*, 1 Hare, 109 ; 11 L. J., Ch. 132 ; 5 Jur. 1178.

Equitable agreements, charging the property comprised in a lease, but not accompanied with a change of possession or other alteration of the property, do not work a forfeiture of the lease in equity, notwithstanding there is a clause in the lease against assignment. Semble. *Ib.*

Term Conditional upon Performance of Acts.]—A term for years conditioned to be void upon non-performance of certain acts, becomes void without entry ; but if a landlord dispenses with the performance of a condition, he cannot insist upon a forfeiture for the non-performance. *Freeman* v. *Boyle*, 2 Ridgw. P. C. 79.

A lease for so long as the lessee should continue to inhabit the farmhouse and actually occupy the land, and not let or part with the lease, upon his ceasing to inhabit immediately becomes forfeited. *Doe* d. *Lockwood* v. *Clarke*, 8 East, 185 ; 9 R. R. 402. And see *Doe* d. *Norfolk* (*Duke*) v. *Hawke*, 2 East, 481.

Breach of Implied Warranty — Lease of Furnished House.]—*See* post, O. 2, col. 1281.

b. By Disclaimer.

Repudiation by Tenant of Title of Landlord.]—In an action of ejectment it was proved that the plaintiffs, who claimed to be landlords of certain tenements, had given notice to the defendants, as their tenants, that the rent of the tenements would be raised, and that the defendants had thereupon written a letter, stating that they "disputed the plaintiffs' alleged right to raise the rent, but were willing and offered to pay what was due in respect of the customary rent of 11*s.* a year, being all that they were liable to pay in respect of the property" :—Held, that this letter was a repudiation of the relation of landlord and tenant and an assertion of a right to hold the tenements upon payment of a customary rent in the sense of a quit rent, and that the plaintiffs were entitled to eject, upon proving their title, without proving a valid notice to quit. *Vivian* v. *Moat*, 50 L. J., Ch. 331 ; 16 Ch. D. 730 ; 44 L. T. 210 ; 29 W. R. 504.

Lands being held by G. as tenant from year to year to D., who died in 1837, having devised the same to trustees for a term of 140 years, to permit his wife E. to take the rents and profits during her life. G. paid the rent to E., the widow, after D.'s death, from 1837 to 1840, and on receiving a notice to quit from her in 1840, stated that he did not think she would turn him out of possession, as she had promised he should continue on as tenant from year to year :—Held, in ejectment by the trustees for the recovery of the premises, that this was sufficient evidence of a disclaimer by G. of the title of the trustees to warrant the jury in finding a verdict for the trustees. *Doe* d. *Davies* v. *Evans*, 9 M. & W. 48 ; 11 L. J., Ex. 9.

Parish lands had been let to the labouring inhabitants at a forehand rent of 4*s.* per acre; the lands having been afterwards inclosed, the churchwardens and overseers for the time being increased the rent to 12*s.* per acre, for the purpose of raising a fund to pay the expenses of the inclosure. The tenants having paid this increased rent for many years, conceiving that the inclosure expenses had been paid off, insisted that they were entitled to hold the land at the original rent of 4*s.* an acre, and refused to pay the 12*s.*:—Held, that this did not amount to a disclaimer of the landlord's title, so as to enable them to eject the tenants without notice. *Hunt* v. *Allgood*, 10 C. B. (N.S.) 253; 30 L. J., C. P. 313; 4 L. T. 215; 9 W. R. 536.

A denial by parol of a landlord's title does not incur a forfeiture of a lease for years. *Doe* d. *Graves* v. *Wells*, 2 P. & D. 396; 10 A. & E. 427; 3 Jur. 820; 8 L. J., Q. B. 265.

Giving up Possession to Third Person.]—A termor, after deserting the demised premises, delivered up the possession of them, with the lease, to a party who claimed by a title adverse to that of the landlord, with intent to assist him in setting up that title, and not that he should hold bonâ fide under the lease:—Held, that the term was forfeited by the act of betraying possession. *Doe* d. *Ellerbrock* v. *Flynn*, 1 C. M. & R. 137; 4 Tyr. 619; 3 L. J., Ex. 221.

A lessee who had paid his rent occasionally to a trustee, and occasionally to a cestui que trust, gave up possession on the last day of his term, but before his term was over, to the person who had been trustee, and not to the party then having the legal title:—Held, that, as the act was equivocal, it did not amount to a forfeiture of the term. *Ackland* v. *Lutley*, 9 A. & E. 87; 1 P. & D. 636; 8 L. J., Q. B. 164.

Paying Rent to Third Person.]—The mere payment by the tenant to a third person of the rent reserved by his lease does not amount to a disclaimer of the title of the landlord, so as to operate as a forfeiture of the lease. *Doe* d. *Dillon* v. *Parker*, Gow, 180; 21 R. R. 827.

Right of Tenant to Maintain Possession.]—Though a lessee sets up an adverse claim to the property in the premises which he holds under the lease, yet that does not incapacitate him from maintaining possession under the lease. *Rees* d. *Powell* v. *King*, Forrest, 19; 2 Br. & B. 514.

Acquiescence by Landlord—Effect of.]—The act of a tenant disclaiming his landlord's title and admitting title in a third person shall not affect his landlord's title, if the landlord have no knowledge of, or does not acquiesce in such act. *Hovenden* v. *Annesley* (*Lord*), 2 Sch. & Lef. 624; 9 R. R. 119.

But if the landlord, having given notice of such act of disclaimer, does not proceed for the forfeiture, but acquiesces, the Statute of Limitations will run against him, as in ordinary cases. *Ib.*

And see cases post, N. 1, cols. 1248 et seq..

c. Who may Re-enter.

Right of Lessor.]—A lessor who has demised his whole interest, subject to a right of re-entry on breach of a condition, may enter on the condition being broken, though he has no reversion. *Doe* d. *Freeman* v. *Bateman*, 2 B. & Ald. 168; 20 R. R. 399.

In an agreement between A. and B., not under seal, expressed to be made "in consideration of the rents and covenants to be reserved and contained in the lease agreed to be granted," it was provided that as soon as B. should have executed certain specified repairs, A. would lease certain premises to him for thirty-five years from a day passed, at a yearly rent, such lease to contain certain covenants on the part of B. as to rent and other matters, and also all other usual and proper covenants, and especially a proviso for re-entry for nonpayment of rent or nonperformance of covenants; and until the lease should be granted, A. should have the same powers and remedies for recovering and enforcing payment of the rent and performance of the covenants, as fully as if the lease had been actually granted, the repairs to be completed by a given day. Then followed this proviso: "Provided always, that if the rent should be in arrear, or if B. should make default in the observance and performance of the covenants and conditions, then, and in either of the cases, it shall be lawful for B. to enter the premises, and the same to have again and enjoy as in his former estate, and B. and all other occupiers thereout to remove, and thenceforth these presents and everything herein contained, shall cease and be void. B. was let into the premises, and paid rent. The repairs not having been done by the time agreed on:—Held, that A. was entitled to re-enter. *Hayne* v. *Cummings*, 16 C. B. (N.S.) 421; 10 Jur. (N.S.) 773; 10 L. T. 341.

See also cases ante, cols. 1008, 1009.

—— **Unconditional Option of Purchase by Tenant—Exercise of Option after Default.**]—A building agreement gave the tenant an option of purchasing the fee, not conditioned on his due performance of the contract. Whilst in default he exercised the option; whereupon the lessor, under a power in case of such default, determined the contract and sought to recover possession from the tenant:—Held, that, pending completion of the purchase, the tenant was owner in equity, and entitled, as such, to maintain existing tenancies, and that the lessor's interest, as vendor, did not justify the tenant's possession being determined. *Ruffety* v. *Schofield*, 66 L. J., Ch. 448; [1897] 1 Ch. 937; 76 L. T. 648; 45 W. R. 460.

Right of Reversioner.]—A house was demised, habendum, for twenty-one years from March 25th, 1809, paying rent on certain days, of which March 25th was one. The estate, of which the house formed part, had been devised by the landlord to trustees, to receive the rents and apply them to certain purposes. After the landlord's death, and before the trusts were completely executed, and during the tenancy the reversion was sold. For a year after this sale the purchasers received the rents, but, during the subsequent years, from Christmas, 1817, to Lady-day, 1830, they were received by the trustees. The trusts were completely executed in 1821. On March 25th, 1830, the lessee came to the house (no one being therein), gave the keys to the trustees, and departed. The trustees entered and the purchasers, who had been present at the above proceedings, and had come to take possession, entered also, but were put back by the trustees, and the latter

remained on the premises :—Held, that if the lessee's term had expired, the reversioner's entry would have been good, notwithstanding the entry of the trustees ; but that the term, under the lease, did not expire till the end of March 25th, 1830. *Ackland* v. *Lutley*, 9 A. & E. 879 ; 1 P. & D. 636 ; 8 L. J., Q. B. 164.

—— **Assignee of Reversion—Notice of Assignment.**]—The assignee of the reversion of a lease may maintain ejectment for breach of a covenant to repair, without giving the tenant notice of the assignment. *Scaltock* v. *Harston*, 45 L. J., C. P. 125 ; 1 C. P. D. 106 ; 34 L. T. 130 ; 24 W. R. 431.

Right of Stranger.]—B. bequeathed leasehold premises to trustees, on trust to permit and suffer his wife to receive the rents during her life. Afterwards, the surviving trustee and the widow granted a lease of the premises, the rent to be paid to the widow, and the lessor to have a power of re-entry upon nonpayment of rent ; the lease disclosed the title of the widow, who, after the death of the trustee, entered on the premises :—Held, that, being a stranger to the legal estate, the power of re-entry could not be reserved to her, and that the lease operated as a lease by the trustee, and a confirmation by the widow. *Doe* d. *Barker* v. *Goldsmith*, 2 C. & J. 674 ; 2 Tyr. 710 ; 1 L. J., Ex. 256.

Under a Power.]—Lease by a mortgagee and the executrix of the mortgagor, the mortgagee demised, and the executrix of the mortgagor demised and confirmed :—Held, that a re-entry under a power reserved for that purpose "to them or either of them," enured to revest the former estate, and to give the legal estate to the mortgagee. *Doe* d. *Barney* v. *Adams*, 2 Tyr. 289 ; 2 C. & J. 232 ; 1 L. J., Ex. 105*.

Effect of Re-entry—Rights of Sub-lessees.]—When a lessor re-enters on a forfeiture, the rights of under-lessees are gone. *G. W. Ry.* v. *Smith*, 45 L. J., Ch. 235 ; 2 Ch. D. 235 ; 34 L. T. 267 ; 24 W. R. 443—C. A. *S. C.*, sub nom. *Smith* v. *G. W. Ry.*, 47 L. J., Ch. 97 ; 3 App. Cas. 165 ; 37 L. T. 645 ; 26 W. R. 130—H. L. (E.)

d. Sufficiency of Re-entry.

Agreement to Let premises to Under-tenant.]—A lessor, finding the demised property out of repair, intending to take advantage of a clause of forfeiture contained in the lease, entered into an agreement with an under-tenant, whom he found there, to let them to him as a yearly tenant, and subsequently received rent from him :—Held, a sufficient re-entry to avoid the lease. *Baylis* v. *Le Gros*, 4 C. B. (N.S.) 537 ; 4 Jur. (N.S.) 513.

e. Operation of Licences.

What is a Breach of.]—The lease of a farm contained a covenant by the lessees, "that they would not assign or otherwise part with possession of the premises without the written consent of the lessor," with a proviso that "in case the lessees should fail in the observance or performance of any or either of the covenants and agreements on his or their part," it should be lawful for the lessor to re-enter. The lessees sold their interest to W., and the lessor, in a letter, consented that W. should take the farm "on the same conditions and in accordance with the lease." W. entered and took possession of the farm, but no assignment of the term was executed to him :—Held, that there was no such breach of the covenant not to assign without the written consent of the lessor as to enable him to maintain ejectment ; first, because W. appeared to have entered at the instance of the lessor rather than of the lessees ; and secondly, because the consent to the assignment did not prohibit the lessees from parting with possession of the premises till a lease had been executed. *West* v. *Dobb*, 10 B. & S. 987 ; 39 L. J., Q. B. 190 ; L. R. 5 Q. B. 460 ; 23 L. T. 76 ; 18 W. R. 1167.

The predecessor in title of the plaintiff let about thirty-three acres of land to B., who covenanted that he, his executors, administrators, or assigns, or any of them, should not during the term demise, let, assign, make over, or part with the possession of the lands (except to the extent of three acres therein described), without the licence and consent in writing of the lessor, his heirs or assigns. There was a proviso in the lease for re-entry upon breach of a covenant. After the passing of the 22 & 23 Vict. c. 35, the lessor gave B. a licence in writing to assign, transfer, and set over the premises to the defendant, his executors, administrators, and assigns, upon condition that he would not at any time assign or transfer the premises without the consent of the lessor, his heirs or assigns. The defendant assigned the three excepted acres to another defendant, Edge, for the remainder of the term, and let the rest of the premises by the year to another defendant, Jones ; Jones let the thirty acres to Edge by the year. There was no other licence by the lessor but that mentioned :—Held, that the words of the licence did not justify the letting of the thirty acres without a further licence ; and that this breach of covenant created a forfeiture of the whole of the premises let under the original lease. *Eyton* v. *Jones*, 21 L. T. 789.

A corporation by agreement under their seal, dated 24 July, 1811, covenanted to grant E. a building lease of certain ground for ninety-nine years, as soon as certain houses thereon were finished. E. proceeded to build the houses, and on 21 January, 1812, got a licence from the corporation to build a particular house as a baker's shop, which he proceeded with, but put in no shop-front, the space left for it being boarded up. On 30 December, 1812, the corporation, according to their agreement, granted a lease to E. containing a covenant by him not to injure any of the main timbers or walls of the demised premises, nor to convert, use, or occupy them into or for any shop, &c., without the previous written consent of the lessors, and a proviso for re-entry on breach. In 1814, the house which had been left unfinished was completed by E., as a private house, the space for the shop-front being filled by a brick wall with two windows. The house was occupied as a private dwelling till October, 1822, when E. took out the last-mentioned brick wall, and placing a shop window in its place, commenced the business of a baker there :—Held, a breach of covenant by which a forfeiture was incurred ; and that the original licence to build the house as a baker's shop had no operation as such after the lease executed containing the above covenants. *Doe* d. *Foundling Hospital* v. *Evans*, 4 L. J. (O.S.) K. B. 231.

Breach of—Delay in exercising Remedy.]—After twenty years' user of demised premises, converted into a shop without licence contrary to the covenants contained in the lease, an assignee of the reversion cannot take advantage of a condition of re-entry for such user subsequently to the assignment. *Gibson* v. *Doeg*, 2 H. & N. 615; 27 L. J., Ex. 37; 6 W. R. 107.

f. Waiver.

By Acceptance of Rent.]—Where in a lease a power of re-entry for a breach of covenant is reserved to the lessor, a forfeiture may be waived, as the lease is thereby rendered voidable only. *Doe* d. *Bryan* v. *Bancks*, 4 B. & Ald. 401; Gow, 220; 23 R. R. 318.

But it is otherwise where the lease is declared absolutely void. *Ib.*

Acceptance of rent after a forfeiture is a waiver of the forfeiture. *Arnsby* v. *Woodward*, 6 B. & C. 519; 9 D. & R. 536; 5 L. J. (O.S.) K. B. 199.

If the fact of forfeiture was known to the lessor at the time. *Roe* d. *Gregson* v. *Harrison*, 2 Term Rep. 425; 1 R. R. 513. S. P., *Goodright* d. *Walter* v. *Davids*, Cowp. 803. *Doe* d. *Cheney* v. *Batten*, Cowp. 243; 9 East, 314, n.; 9 R. R. 570, n. *Hume* v. *Kent*, 1 Ball & B. 554.

Acceptance of rent with knowledge of breach of covenant is a waiver of the breach of covenant. *Walrond* v. *Hawkins*, 44 L. J., C. P. 116; L. R. 10 C. P. 342; 32 L. T. 119; 23 W. R. 390.

If ejectment is brought on a forfeiture of a lease and after the bringing of such ejectment the landlord accepts rent, it is no waiver of the forfeiture. *Doe* d. *Morecraft* v. *Meux*, 1 Car. & P. 346; 7 D. & R. 98; 4 B. & C. 606; 4 L. J. (O.S.) K. B. 4; 28 R. R. 426.

And upon a clause of re-entry on breach of covenant, ejectment may be supported in respect of a continuing breach, as by user of rooms in a manner prohibited by the lease, though rent has been accepted with knowledge of the original breach. *Doe* d. *Ambler* v. *Woodbridge*, 4 M. & Ry. 303; 9 B. & C. 376; 7 L. J. (O.S.) K. B. 263; 28 R. R. 426.

A forfeiture of a lease accruing on the lessee's insolvency, is waived by acceptance of rent from him after his discharge under the Insolvent Debtors Act; and the nonpayment of a debt specified in the schedule to be due to the lessor, is not a continuing insolvency, to constitute a new forfeiture after such acceptance of rent. *Doe* d. *Gatehouse* v. *Rees*, 4 Bing. (N.C.) 384; 6 Scott, 161; 1 Arn. 159; 7 L. J., C. P. 184.

The receipt of rent is no waiver of a continuing breach of covenant. *Doe* d. *Baker* v. *Jones*, 5 Ex. 498; 19 L. J., Ex. 405.

The receipt of rent is not a waiver of a forfeiture, unless it is rent due on a day after the forfeiture is incurred. *Price* v. *Worwood*, 4 H. & N. 512; 28 L. J., Ex. 329; 5 Jur. (N.S.) 472; 7 W. R. 506.

Ejectment upon a forfeiture of a lease for not insuring, and continuing to insure, a house in the name of the lessor and lessee, according to the covenant. On the 24th January, 1836, a policy of insurance had been effected in the sole name of the lessee, which had been shewn to A., the then lessor, and approved of by him, and the premiums had been paid upon it up to Christmas, 1842. On the 14th January, 1843, A. conveyed his interest in the reversion to the plaintiff, and on the same day received from the defendant the rent due up to the 25th December, 1842:—Held, that though A. by his conduct might have waived the forfeiture up to the 25th December, 1842, yet that, there being a continuing covenant, a subsequent breach would entitle the plaintiff to enter. *Doe* d. *Muston* v. *Gladwin*, 6 Q. B. 953; 14 L. J., Q. B. 189; 9 Jur. 508.

The plaintiff leased premises to A. for a term of years, and A. died intestate pending the term, and the plaintiff considering that no one would administer to A.'s estate, agreed with A.'s son that he should occupy the premises as yearly tenant, at the same rent as that reserved under the lease to his father, and the son did so, and paid rent. The plaintiff repaired the premises at or about Michaelmas, 1861, and having afterwards discovered that the defendant, a daughter of A., had taken out letters of administration to his estate, and as such claimed to hold the premises for the remainder of the term, the plaintiff sued her on the covenant to repair, and in ejectment, as for a forfeiture for non-repair. In the action of covenant, however, the defendant paid money into court, which the plaintiff took out in satisfaction. There was no want of repair in the premises after the plaintiff had repaired them, and the rent due up to Michaelmas, 1861, was paid by A.'s son, and received by the plaintiff, before either action was commenced:—Held, that either the rent so paid was to be taken as a satisfaction of the rent due under the lease, and so the acceptance of it to operate as a waiver of the forfeiture, or that there had been an eviction of the defendant by the plaintiff, which prevented his taking advantage of a forfeiture for non-repair during the eviction. *Pellatt* v. *Boosey*, 31 L. J., C. P. 281; 8 Jur. (N.S.) 1107.

In a crown lease, a lessee covenanted not to convert the premises into a shop or a place of sale of any kind, without consent of the commissioners of woods and forests. The trade of an engraver had been carried on in it, without consent or objection, but rent had afterwards been received:—Held, that the forfeiture had been waived. *Bridges* v. *Longman*, 24 Beav. 27.

After forfeiture of a lease had been incurred, the time having come when the rent would become due, the lessee tendered the rent to the lessor. He refused to take it, except on the terms that it should be taken not as rent, but as compensation for use and occupation subsequent to the forfeiture. The lessee refused to agree to any such condition. The lessor then took the money, declaring he would not take it as rent, or as waiving the forfeiture:—Held, that in legal effect money must be taken according to the intent of the party paying it, in this case as rent; and that the receipt of rent, as a matter of law, operated to waive all forfeitures then known to the lessor, and that no protest on his part could prevent this legal effect. *Croft* v. *Lumley*, 5 El. & Bl. 648; 25 L. J., Q. B. 223; 2 Jur. (N.S.) 275; 4 W. R. 357—Ex. Ch. See *S. C.*, in H. L., post, col. 1019.

At the time of the receipt of the money, the lessor knew of most of the judgments by virtue of which a forfeiture had been incurred, but did not know of every instance:—Held, that he must be taken to waive all forfeitures by that breach of which he had notice, though it was more extensive than he was aware of. *Ib.*

When a lease contains a proviso for re-entry for nonperformance of covenants, and a cove-

nant is broken for want of the previous consent of the lessors to alterations, the receipt of rent is a waiver of the forfeiture. *Miles* v. *Tobin*, 17 L. T. 432; 16 W. R. 465.

The Australian Agricultural Reserves Act (27 Vict. No. 23) enacts (s. 8), "If any person selecting lands in an agricultural reserve shall fail to occupy and improve the same, as required by s. 7, then the right and interest of such selector to the land selected shall cease and determine." The Leasing Act, 1866 (30 Vict. No. 23) enacts (s. 8), "Lands in agricultural reserves . . . if taken up on lease shall be subject to the same condition . . . as to cultivation, &c., as if they were selected by purchase." D.'s predecessor in title became lessee of crown lands under this act, but failed to cultivate or improve his allotment as required by the former act. After becoming aware of the non-improvement, the government received rent for the allotment; but a notice was issued to the effect that "Rents which may be received upon such selections as may have been forfeited by operation of law will be deemed to have been received conditionally, and without prejudice to the right of the government to deal with the same according to the provisions contained in the act in that behalf." In an action of ejectment brought to recover the land:—Held, that notwithstanding the notice, the receipt of rent operated as a waiver of the forfeiture. *Darenport* v. *Reg.*, 47 L. J., P. C. 8; 3 App. Cas. 115; 37 L. T. 727.

The plaintiff, E. C., by lease of the 28th December, 1854, demised the premises for which the ejectment was brought to P. R. and T. R., their heirs, executors, administrators, and assigns, for lives still in being. The lease contained a clause that the lessees, their heirs, executors, or assigns, would not assign, sub-let, alien, convey away, mortgage, or otherwise incumber all or any part of the demised premises without the consent in writing of the lessor, his heirs or assigns, first had and obtained, under pain of forfeiture of the lease. On the 1st January, 1863, P. R. and T. R., by deed assigned their estate and interest in the lease to C. R. This assignment was without consent of the lessor; but he became aware of it, and subsequently received rent from C. R. In 1868 C. R. applied to the lessor for his assent to an assignment to P. S. The plaintiff refused. C. R. assigned to S. on the 2nd June, 1868, without assent; and the plaintiff brought ejectment against P. T., C. R. and P. S. P. S. defended; the other defendants allowed judgment to go by default:—Held, following *Butler* v. *Smith* (16 Ir. C. L. R. 213), that no estate whatever passed under the assignment of 1863; but that the assignment, though void, would cause a forfeiture of the lease, if the breach were not waived. That the clauses as to waiver of breach of covenant against alienation in the Sub-letting Acts being repealed by the Landlord and Tenant Act, 1860, and there being no provision as to waiver in such cases (though there is as to sub-letting), except in reference to leases made after the passing of the act (s. 43), the case rested as at common law, and therefore the receipt of rent would prevent the plaintiff from relying on the assignment of 1863. That the case of *Leinster* (*Duke*) v. *Metcalf* (11 Ir. L. R. 365) was not satisfactory. That there was no surrender by operation of law, and creation of a tenancy from year to year in C. R. by the change of possession, and payment of rent by him with the assent of the original lessees, as what the parties intended was that the lease should continue to subsist. That the attempted assignment in 1868 by C. R., who had no estate in the premises, would not work any forfeiture. That the decision of Burton, J., in *O'Brien* v. *Bernard* (6 Ir. L. R. 6), was wrong; and that the defendant S. had a right to rely on the outstanding estate in P. R. and T. R., though they had allowed judgment to go by default against them. *Clifford* v. *Reilly*, Ir. R. 4 C. L. 218.

The defendants held certain premises of the plaintiffs for a term of years under a lease, whereby the lessees covenanted not to permit or suffer, at any time during the said term, to be used, exercised, or carried on upon the premises, or any part thereof, any art, trade, profession, or business whatsoever, without the licence or consent in writing of the lessor, first obtained for that purpose. The lease contained a power of re-entry upon breach of covenant. The lessees had, by consent, made some alterations in the premises, and part of the new building was occupied by two of the defendants as plumbers, and they carried on their business there in a shop suited for the purpose. There was no written licence or consent of the lessor for this business, but two quarters' rent was paid as usual by the lessees after the business commenced, with the lessor's knowledge of this use of the premises. There was no evidence of the nature of the plumber's tenancy, but within a year of its commencement the plaintiffs took proceedings to recover the land on the ground of a forfeiture by a continuing breach of the covenant:—Held, that it could not be presumed that a plumber's business would be commenced upon a less tenancy than a year of the shop in which it was to be carried on; and that the plaintiff's waiver of the breach by receipt of rent was sufficient under the circumstances to render these proceedings ineffectual. *Griffin* v. *Tomkins*, 42 L. T. 359; 44 J. P. 457.

In an action of ejectment to recover possession of premises for breaches of covenants contained in certain leases, the defendant pleaded that after the bringing of the action the plaintiff, with the intention of waiving the breaches of covenant, accepted rent which was accrued due after the bringing of the action, and that thereby the breaches of covenant were waived:—Held (on demurrer), a good statement of defence, for the facts pleaded amounted to an agreement for a new tenancy on the terms of the old lease. *Evans* v. *Wyatt*, 43 L. T. 176; 44 J. P. 767.

A lease to two tenants containing a proviso for re-entry in case either of them should assign the premises without the landlord's consent. One of the tenants assigned his interest to the other, without the consent of the landlord, and the landlord from that time accepted the rent from the other tenant alone:—Held, that, although the landlord had waived the forfeiture by acceptance of rent after the assignment, he could not be compelled to grant a renewal to one only of the lessees, so long as the other was living. *Finch* v. *Underwood*, 45 L. J., Ch. 522; 2 Ch. D. 310; 34 L. T. 779; 24 W. R. 657.

—— **Without prejudice to Breaches of Covenant.**]—A tenant was in possession of plots of land under an agreement for leases to be granted when he should have fulfilled certain conditions as to building. The intention of the parties was, in the view of the court, that the agreement

should be regarded as a lease. The conditions were (to the landlord's knowledge) not fulfilled within the appointed time, but after that date the landlord demanded rent as under the leases, and the tenant paid it:—Held, that the landlord could not, on receiving the rent, stipulate that it was received "without prejudice to any breaches of covenant, made up to that time in the agreement for leases." *Strong* v. *Stringer*, 61 L. T. 470.

Rent Tendered—Received, but not as Rent.]—Where a lessee tendered rent which had accrued subsequently to breaches of covenant, as rent, but the lessor took it as compensation for occupation, expressly reserving the right of re-entry, it is, by force of the rule, "solutio accipitur in modum solventis," a waiver of the forfeiture in respect of such breaches as were known to the lessor—By a majority of the judges. *Croft* v. *Lumley*, 6 H. L. Cas. 672; 27 L. J., Q. B. 321; 4 Jur. (N.S.) 903; 6 W. R. 523.

Bringing Action for Rent accruing subsequent to Breach.]—A right of re-entry for breach of a covenant in a lease is waived by the lessor's bringing an action for rent accruing subsequently to the breach, with a knowledge of its existence. *Dendy* v. *Nicholl*, 4 C. B. (N.S.) 376; 27 L. J., C. P. 220; 6 W. R. 502.

—— **Where Breach Continuing.**]—A lease under which rent was payable quarterly on the usual quarter days contained a covenant by the tenant to keep the demised premises in repair, and gave the landlord a right of re-entry for breach of covenant. The premises being out of repair, the landlord on September 22, 1896, served a notice upon the tenant under s. 14, sub-s. 1, of the Conveyancing Act, 1881, requiring him to execute certain specified repairs within three months. The repairs were not executed, and on January 14, 1897, the physical condition of the premises being then the same as on September 22, 1896, the landlord commenced an action by which he claimed possession of the premises and rent for the quarter ending December 25, 1896:—Held, that the action was maintainable, for the breach of covenant being a continuing one, the landlord by claiming rent up to December 25, 1896, did not preclude himself from insisting upon his right of re-entry in respect of the continuing breach subsequent to that date, and, the physical condition of the premises being the same, the notice of September 22, 1896, was a good notice of the breach complained of within the meaning of s. 14, sub-s. 1, of the Conveyancing Act, 1881. *Penton* v. *Barnett*, 67 L. J., Q. B. 11; 46 W. R. 33—C. A.

By Particulars of Breaches.]—The plaintiff demised a house to C., who covenanted not to permit or suffer any sale by auction to take place on the premises. C. subsequently granted a bill of sale under seal assigning his goods in the house as security for a loan, and empowering the grantees to sell them by auction on the premises in default of repayment. He next mortgaged the house by an under-lease to the defendant, and finally executed a deed of assignment conveying all his estate to trustees for his creditors; he nevertheless remained in possession. The grantees of the bill of sale sold the goods by auction on the premises. The plaintiff brought an ejectment, and, in compliance with a judge's order, delivered particulars of the following breaches of covenant, upon which she relied as causing a forfeiture of the lease, namely: first, nonpayment of rent accrued since the day of the sale; and secondly, the permitting and suffering a sale by auction to take place on the premises. The arrears of rent were tendered to the plaintiff, and being refused, were paid into court, whereupon the proceedings on the first breach were stayed, but the action went to trial on the second. The jury found that C. permitted the sale:—Held, that he had power to do so, notwithstanding the conveyance of his estate, and having done so, had committed an act of forfeiture which was not waived by the plaintiff stating in the particulars of breaches the nonpayment of subsequent rent. *Toleman* v. *Portbury*, 41 L. J., Q. B. 98; L. R. 7 Q. B. 344; 26 L. T. 292; 20 W. R. 441—Ex. Ch.

By Pleading.]—A landlord suing in respect of breaches of covenants agreed to be inserted in a lease contracted for, claimed an injunction and possession; his pleadings stated that he was willing to grant the lease:—Held, that forfeiture was waived by the pleadings. *Evans* v. *Davis*, 48 L. J., Ch. 223; 10 Ch. D. 747; 39 L. T. 391; 27 W. R. 285.

By Distraining.]—A lease of a farm contained a condition of re-entry for breaches of covenants. Breaches of covenants took place before the 24th June, 1871. The lessors brought ejectment against the tenant on the 21st of July, 1871; but the writ did not claim possession as from any antecedent date. After the commencement of the action, but before the trial, the lessors distrained for rent due up to the 24th of June, 1871:—Held, that by such distress they had not precluded themselves from relying at the trial on any breach of covenant before the 24th of June, 1871, on the ground that by bringing the ejectment they had unequivocally declared their election to determine the lease on any ground of forfeiture which had not been waived before the commencement of the action, and that the subsequent distress, if not justifiable under the 8 Anne, c. 14, s. 7, which enables the landlord under certain circumstances to distrain after the determination of the tenancy, was a trespass. *Grimwood* v. *Moss*, 41 L. J., C. P. 239; L. R. 7 C. P. 360; 27 L. T. 268; 20 W. R. 972.

A distress and continuance in possession may be a waiver of an existing forfeiture, but not so as to any right which accrues subsequently. *Doe* d. *Taylor* v. *Johnson*, 1 Stark. 411; 18 R. R. 791. And see *Zouch* d. *Ward* v. *Willingale*, 1 H. Bl. 311; 2 R. R. 770.

Taking an insufficient distress after the forfeiture, for rent accruing before, is not a waiver of the right to re-enter. *Brewer* d. *Onslow* (*Lord*) v. *Eaton*, 3 Dougl. 230.

By a deed for twenty-one years from the 24th June, at a rent payable half-yearly, the lessor granted the lessee leave and licence to pick all the copperas stone over certain land, with a proviso that, if any part of the rent should be in arrear for twenty-one days, it should be lawful for the lessor, without any demand, to determine the grant by notice in writing. In March, 1858, he distrained the goods of the lessee for five and a half years' rent, due the preceding Christmas, whereupon an action was commenced for an illegal distress. In May and June of the same year, negotiations took place between the parties for a settlement of the action, and for granting a new lease, commencing on the 24th of June,

1864, when the former grant would expire; but the terms arranged were not carried out by the lessor, who, on the 3rd of July, 1858, gave the lessee a written notice that he determined the grant, on the ground that half a year's rent, due at Christmas, 1857, was in arrear:—Held, that the conduct of the lessor in making the distress (though it was an illegal act), together with the negotiations, was satisfactory evidence that he treated the licence as still subsisting, and was therefore a waiver of the forfeiture. *Ward* v. *Day*, 5 B. & S. 359; 33 L. J., Q. B. 254; 10 L. T. 578; 12 W. R. 829—Ex. Ch.

A lessee covenanted that his executors or assigns would insure the demised premises, and keep them insured during the term, and deposit the policy with the lessor. The lease contained a proviso for re-entry on breach of any of the covenants. The lessee assigned, and the premises were never insured either by him or his assignee. The lessor distrained on the 30th September for rent then due, and afterwards brought an ejectment on a demise laid on the 24th October:—Held, that though the distress was an acknowledgment of a tenancy to the 30th September, and a waiver of any forfeiture to that time, yet the lessor was entitled to recover in ejectment for the forfeiture incurred by the breach of covenant between the 30th September and the 24th October. *Doe* d. *Flower* v. *Peck*, 1 B. & Ad. 428; 9 L. J. (O.S.) K. B. 60. See also *Doe* d. *De Rutzen* v. *Lewis*, infra.

Where a landlord has distrained for rent, but after the realisation of the distress half a year's rent still remains due, the distress does not operate as a waiver of the landlord's right to re-enter for nonpayment of rent, so as to prevent him from serving a writ in ejectment for the recovery of the premises under s. 210 of the Common Law Procedure Act, 1852. *Thomas* v. *Lulham*, 64 L. J., Q. B. 720; [1895] 2 Q. B. 400; 14 R. 692; 73 L. T. 146; 43 W. R. 689; 59 J. P. 709—C. A.

Bringing Ejectment.]—The service by a lessor upon the lessee of a declaration in ejectment for the demised premises for a forfeiture, operates as a final election by the lessor to determine the term; and he cannot afterwards (although there has not been any judgment in the ejectment) sue for rent due or for covenants broken after the service of the declaration (or by 15 & 16 Vict. c. 76, s. 168, after the service of the writ). *Jones* v. *Carter*, 15 M. & W. 718.

Notice to Repair.]—A forfeiture incurred by the breach of a general covenant to keep the premises in repair, is not waived by a notice given under a covenant to repair within three months. *Roe* d. *Goatly* v. *Paine*, 2 Camp. 520.

A lease of lands and houses by A. to B. contained a general covenant by B. to repair, and a further covenant that A. might give notice to B. of all defects and want of repairs, and if B. did not repair the said defects within two months, A. might enter and do the repairs himself, the expense of which B. was to repay at the time of paying his next rent; and if he did not do so, A. might distrain on him for the expense, as in case of rent in arrear. There was also a power to A. to re-enter, upon breach of any covenant. The premises being out of repair, A. gave B. notice to repair within six months, and that, if B. did not repair within that time, he would perform the repairs, and charge B. with the expense. The premises were not repaired within the six months; during that time a negotiation was entered into by A. and B., and, after the expiration of the six months, A. gave notice to B. that, if he did not agree to certain terms in three days, A. would hold him to the covenants in his lease. B. did not agree:—Held, that A. could not recover in ejectment for a forfeiture, he having elected to perform the repairs, and distrain on B. for the expense, and the general power to re-enter not being revived by the three days' notice. *Doe* d. *De Rutzen* v. *Lewis*, 5 A. & E. 277; 6 N. & M. 764; 2 H. & W. 162; 5 L. J., K. B. 217.

Where a landlord, finding the premises out of repair, gave the tenant three months' notice to repair, pursuant to his covenant:—Held, first, that he could not maintain ejectment for a forfeiture until the three months had elapsed; and, secondly, that the notice was a waiver of the breach of the general covenant to repair. *Doe* d. *Morecraft* v. *Meux*, 7 D. & R. 98; 4 B. & C. 606; 1 Car. & P. 346; 4 L. J. (O.S.) K. B. 4; 28 R. R. 426.

A right of re-entry, acquired by an omission to repair three months after notice, is suspended, but not waived, by an agreement to allow the tenant further time to repair. *Doe* d. *Rankin* v. *Brindley*, 1 N. & M. 1; 4 B. & Ad. 84; 2 L. J., K. B. 7.

Where a lease contains a covenant by the lessee to repair and keep in repair, and also to repair within three months after notice, with a clause of re-entry for nonperformance of covenants, the landlord may re-enter, as for a forfeiture, on finding the premises out of repair. *Baylis* v. *Le Gros*, 4 C. B. (N.S.) 537; 4 Jur. (N.S.) 513.

A lessee, under a covenant to repair on three months' notice, with a penalty of re-entry, received notice on the 16th September to repair according to a specification, and out of the twenty-two items specified only two were not commenced, and eight not completely finished, on the 18th December, the latter having been delayed by the state of the weather. There was no entry by the lessors to inspect, and no notice from them to expedite the works during the interval, and the whole of the works were completely finished in the second week in January:—Held, that the lessee was entitled to be relieved against an ejectment for the breach of covenant. *Bargent* v. *Thomson*, 4 Giff. 473; 9 Jur. (N.S.) 1192; 9 L. T. 365.

Permitting or Recognising Breach.]—If a lessee exercises a trade on the demised premises by which his lease is forfeited, the landlord does not, by merely lying by, and witnessing the act for six years, waive the forfeiture. *Doe* d. *Sheppard* v. *Allen*, 3 Taunt. 78; 12 R. R. 579.

Some positive act of waiver, as the receipt of rent, is necessary. *Ib.*

If, on the trial of an ejectment against the assignee of a tenant on a forfeiture of a lease by breach of covenant, it appears that the landlord so acted as to induce the tenant's assignee to believe that the latter was doing all that he ought, the landlord cannot recover, although the covenants are actually broken, and there is neither a release nor a dispensation on the part of the landlord. *Doe* d. *Knight* v. *Rowe*, 2 Car. & P. 246; R. & M. 343. See *West* v. *Blakeway*, 3 Scott (N.R.) 199; 9 D. P. C. 846; 2 Man. & G. 729; 10 L. J., C. P. 173; 5 Jur. 630.

On an action of ejectment for the breach of a condition that the lessee should not under-let, in an agreement amounting to a lease, it appeared that the lessor of the plaintiff asked the defendant what he would take for his land; and on the defendant naming a price, said, "Then let it, and I shall know what it will produce next year": —Held, that this was a waiver of the forfeiture on a breach of such condition. *Doe* d. *Henniker* v. *Watt*, 1 M. & Ry. 694; 8 B. & C. 308; 6 L. J. (o.s.) K. B. 185.

If a lessor, after a forfeiture, advises a person to purchase the term of his lessee, he cannot maintain an ejectment for such forfeiture against such purchaser; but he may do so if the party has an interest, viz. an annuity secured on the premises, and the advice is merely "to take to them." *Doe* d. *Sore* v. *Eykins*, 1 Car. & P. 154; R. & M. 29.

Land was demised to the lessee, who covenanted in the lease to build and complete certain houses thereon within a year, and that if he did not the lease should be void; the houses not being completed within the specified period:— Held, that the forfeiture was not waived by the steward of the lessor having permitted the lessee to employ workmen in completing the houses for a short period after such forfeiture. *Doe* d. *Kensington* v. *Brindley*, 12 Moore, 37; 5 L. J. (o.s.) C. P. 3.

An owner of an estate covered it with houses, and sold some of them, subject to a covenant not to carry on any trade, business, or calling therein, or to otherwise use or suffer the same to be used, to the annoyance, nuisance, or injury of any of the houses on the estate:—Held, that the carrying on of a girls' school in one of the houses was a breach of the covenant, and that the covenantee had not waived the benefit of the covenant, though he had permitted other houses, held under the like covenant, to be used as schools. *Kemp* v. *Sober*, 1 Sim. (N.S.) 517; 20 L. J., Ch. 602; 15 Jur. 458.

Mere standing by and seeing the lessee making alterations which are in breach of his covenant, does not operate as a waiver on the part of the lessor. *Perry* v. *Davis*, 3 C. B. (N.S.) 769.

By a lease empowering the lessee to build, he covenanted to cultivate part of the land, on which no buildings should be erected, in a husbandlike manner, and there was a clause of forfeiture for breach of covenant. The lessee built a vitriol factory on the land, with the knowledge of the lessor, but being obliged to discontinue the manufacture by an indictment he pulled down the manufactory, and paid part of the proceeds of the building materials to the lessor in pursuance of an agreement between them:—Held, that the lessor had not in equity precluded himself from entering for the non-cultivation of the land after the manufactory was pulled down. *Hills* v. *Rowland*, 4 De G. M. & G. 430; 1 W. R. 422.

To permit a tenant to remain in possession and expend his money in building with the knowledge of the landlord, after an eviction for nonpayment of rent, is a waiver of the forfeiture under the ejectment statutes. *Hume* v. *Kent*, 1 Ball & B. 554.

A lease was granted of coals and ironstone for 300 years at a fixed rent and paying certain royalties not fixed, and the lease contained a stipulation that the working shall not be delayed more than five years from the date of the lease; also that as to three out of four of the mines, the lessees may either work or relinquish, but shall not under-let or assign without the consent of the lessor, except to responsible persons. The mines were worked for twenty-four years, when the lessee died, and a suit was instituted to administer his estate and a receiver appointed. The ironstone mine was then no longer worked, and ten years after the working of the coal mines was also stopped. Rent continued to be received, and a correspondence ensued, not assuming a peremptory tone, until fifteen years after the mines were shut up, the lessors having had knowledge of the abandonment all along. An ejectment was brought, but restrained by reason of there being a receiver; and on summons for liberty to proceed with the action:— Held, that the lessors had no right to prohibit the letting to responsible persons, and that by acquiescence with knowledge of the breaches of covenant, they had lost their right to proceed to recover possession immediately, but must give the lessees a reasonable time for restitution of the works; and the application for liberty to proceed at law ordered to stand over for three months. *Whitehead* v. *Bennett*, 9 W. R. 626.

—— **Effect of.**]—A lessor, who has a right of re-entry reserved on breach of a covenant not to under-let, does not, by waiving his re-entry on one under-letting, lose his right to re-enter on a subsequent under-letting. Nor, by waiving his right to re-enter on a breach of covenant to repair, does he waive his re-entry on a subsequent want of repairs. *Doe* d. *Boscawen* v. *Bliss*, 4 Taunt. 735.

Where circumstances occur which entitle a party to take advantage of a clause of forfeiture, and he does acts which shew that he waives that forfeiture (though the acts were such as he was not entitled to do), he cannot afterwards take advantage of the forfeiture. *Ward* v. *Day*, 5 B. & S. 359; 33 L. J., Q. B. 254; 10 L. T. 578; 12 W. R. 829—Ex. Ch.

None where Forfeiture Complete.]—When a forfeiture is complete, there can be no waiver of it. Thus, where a condition is annexed to a lease for years, upon breach of which the lease becomes void, the forfeiture works the instant such breach happens, and is then complete without entry, so that there can be no waiver; but where the condition is annexed to a freehold, there may be a waiver after the breach, and before the entry, for until then the forfeiture is not complete. *Sexton* v. *Boyle*, Vern. & Scriv. 414.

Other Matters as to.]—Where, during the existence of a lease containing a proviso for re-entry in case of assignment or under-letting without licence in writing, the lessor, who had purchased the remainder of the interest in it, engaged to grant a new lease to the defendant to take effect on the expiration of the old lease:— Held, that the lessor could not maintain ejectment against the defendant on the fact of his possession, though no licence in writing had been granted, as there was a waiver of the forfeiture if any had taken place, or else there was no forfeiture at all, for the defendant came in with the lessor's consent. *Doe* d. *Weatherhead* v. *Curwood*, 1 H. & W. 140.

A tenant is not absolved from the performance of the covenants of his lease by a notice to quit

such notice ought rather to be regarded as a notice to be more vigilant in the performance of the covenants. *Gregory* v. *Wilson*, 9 Hare, 683; 16 Jur. 304.

g. Demand of Rent.

When Necessary.]—Upon a lease reserving rent payable quarterly, with a proviso that if the rent is in arrear twenty-one days next after the day of payment, being lawfully demanded, the lessor may re-enter:—Held, that five quarters being in arrear, and no sufficient distress on the premises, the lessor might re-enter without a demand. *Doe* d. *Scholefield* v. *Alexander*, 2 M. & S. 525; 15 R. R. 338. See *S. C.*, 3 Camp. 516; 14 R. R. 830.

Where a lease contained a proviso that if the rent was in arrear for twenty-one days, the lessor might re-enter, although no legal or formal demand should be made:—Held, that the rent having been in arrear for twenty-one days, the lessor might maintain ejectment without actual re-entry or demanding the rent. *Doe* d. *Harris* v. *Masters*, 4 D. & R. 45; 2 B. & C. 490; 2 L. J. (O.S.) K. B. 117; 26 R. R. 422. And see *Rede* v. *Farr*, 6 M. & S. 121; 18 R. R. 329.

Where a landlord has a right to re-enter for nonpayment of rent, he cannot recover in ejectment at common law, unless he demands the rent on the day when it becomes due; nor under 4 Geo. 2, c. 28, s. 2, if there is a sufficient distress on the premises. *Doe* d. *Forster* v. *Wandlass*, 7 Term Rep. 117; 4 R. R. 393.

A lease contained the following clause: "And it shall be lawful for the lessor, her executors, &c. to call on tenant for quarterly payment of rent, or, if otherwise, as now accepted, at Michaelmas and Lady-day, as a matter of favour, with a quarter remaining in hand, and, if not paid in twenty days after, rent as stated, and 10*l.* of increased rent for breaking up land by acre, then the tenant shall be liable to have the rent due recovered by sale and distress, or to enter on the premises for the same till it be fully satisfied":—Held, first, that the clause might be understood as reserving a right of entry, upon nonpayment of rent, to hold the premises till the arrears were paid. *Doe* d. *Durke* v. *Bowditch*, 8 Q. B. 973; 15 L. J., Q. B. 266; 10 Jur. 637.

Held, secondly that under the clause the lessor could not enter without the common-law formalities, the 4 Geo. 4, c. 28, s. 2, applying only where there is a right of re-entry by which the lease is avoided. *Ib.*

An agreement of tenancy contained the following clause: This agreement is entered into upon the express condition that, if the tenant shall make default in payment of the rent, or any part thereof, within twenty-one days after the same shall become due, being demanded, it shall be lawful for the landlord, without giving any notice to quit, and without any other warrant, authority, or proceedings, to re-enter: — Held, that, to entitle the landlord to avail himself of the right of re-entry, the rent must be in arrear twenty-one days, and a demand (but without the formalities of a common-law demand of payment) be then made. *Phillips* v. *Bridge*, 43 L. J., C. P. 13; 9 L. R. C. P. 48; 29 L. T. 692; 22 W. R. 237.

What is Sufficient.]—A demand of rent due from the lessee to the lessor, though made of a stranger, if made upon the land, is a sufficient demand, and need not be general to sustain ejectment for a forfeiture for nonpayment of rent, being lawfully demanded. *Doe* d. *Brooke* v. *Bridges*, 2 D. & R. 29; 1 L. J. (O.S.) K. B. 9.

A demand within the twenty-one days is insufficient. *Phillips* v. *Bridge*, supra.

A lease for years contained a covenant to pay rent, and a proviso for re-entry on nonpayment of rent, the rent "being first lawfully demanded." The property being vacant, the landlord asked for payment of rent from the person liable to pay it, and not receiving it, re-entered:—Held, that there had been a sufficient demand, and that the lease was effectually determined. *Manser* v. *Dix*, 8 De G. M. & G. 703; 3 Jur. (N.S.) 252.

By a lease, rent was payable on the usual quarter days, provided that if the rent should be in arrear for twenty-eight days after any of the days appointed for payment after the same had been lawfully demanded, it should be lawful for the lessor to re-enter and take possession if necessary, without bringing an ejectment. The rent being unpaid:—Held, that a demand made on the premises at half-past ten o'clock on the morning of the last day was not sufficient to entitle the lessor to re-enter without action. *Acocks* v. *Phillips*, 5 H. & N. 183.

Invalid Notice or Demand.]—By an agreement in writing dated the 7th March, 1884, made between the plaintiffs and defendants, the defendants agreed to lease to the plaintiffs the advertisement spaces on the cars of the defendants running at N. for three years, from the 7th January, 1884, at a rent of 120*l.* a year payable quarterly. The agreement provided that the advertising boards and fittings should be found by the plaintiffs; and it contained a condition that in the event of default by the plaintiffs in payment of any moneys due under the agreement for thirty days after demand in writing, the defendants should be at liberty at once to determine the agreement or lease, and on the determination thereof the boards were to become the property of the defendants, who were to have the option of purchasing the other fittings. The plaintiffs usually paid the rent upon the first day of the month. Upon the 7th April, 1885, the plaintiffs not having paid the rent for the past quarter, the defendants sent a written demand for the payment of 30*l.*, "being one quarter's rent under the advertising agreement due on the 1st inst.," and on the 30th May, the rent being still in arrear, they wrote to the plaintiffs determining the agreement:—Held, that the demand of 7th April being inaccurate, was not a demand on which a forfeiture could be founded, and that the agreement was not properly determined. *Jackson* v. *Northampton Street Tramways Co.*, 55 L. T. 91.

When Excessive.]—In ejectment to recover premises for nonpayment of rent under the usual proviso for re-entry on nonpayment for twenty-one days, it appeared that the rent was payable quarterly, and that a demand of more than one quarter's rent was made on the twenty-first day at one o'clock:—Held, that only one quarter's rent should have been demanded, and that at sunset. *Doe* d. *Wheeldon* v. *Paul*, 3 Car. & P. 613.

Effect of Tenant Refusing to Pay after.]—A tenant for a definite term of years does not forfeit

his term by orally refusing, upon demand of the rent made by his landlord, to pay the rent, and claiming the fee as his own. *Doe* d. *Graves* v. *Wells*, 10 A. & E. 427; 2 P. & D. 396; 8 L. J., Q. B. 265; 3 Jur. 820.

h. How Available in Pleading.

Defence—Of Lessor.]—Where a right of entry accrues by forfeiture, and several forfeitures of the same kind have happened, though the landlord has not availed himself of them, if he pleads his right of entry in trespass brought against him by his tenant, he must set out the specific forfeiture on which he grounds such right. *Kavanagh* v. *Gudge*, 6 Scott (N.R.) 508; 5 Man. & G. 726; 12 L. J., C. P. 258; 7 Jur. 352.

—— **Of Lessee.**]—To an action for rent, the defendant pleaded a plea to the further maintenance of the action, setting out an indenture, by which premises were demised by S. to the plaintiff, with a power of re-entry in favour of S., in case of nonperformance by the plaintiff of the covenants contained therein; that, before the rent accrued due, the plaintiff broke one of such covenants; and that, by means of the premises, the estate and interest of the plaintiff in the premises became forfeited, and that, by reason and in consequence of the forfeiture, S. brought an ejectment. The plea set out the proceedings and judgment in ejectment given after the commencement of the action, and that the defendant afterwards on being required to do so, attorned tenant to S., and paid him the rent:—Held, a good answer to the further maintenance. *Franklin* v. *Carter*, 3 D. & L. 213; 1 C. B. 750; 14 L. J., C. P. 241; 9 Jur. 874.

i. Relief against.

i. *In Equity.*

The court refuses to relieve lessees against the legal consequences of breaches of covenant, as well in cases which rest in contract as where the legal relation between the parties is fully established. *Gregory* v. *Wilson*, 9 Hare, 683; 16 Jur. 304.

It must be a strong case of equity created by a landlord against himself to control his legal right. *Ib.*

Grounds for—No one to Perform.]—The fact of there being no personal representative of a lessee on whom the duty of performing the covenants of the lease has devolved cannot be set up against the landlord. *Ib.*

—— **Conduct of Lessor.**]—Where a lessee had forfeited his lease at law, but shewed reasonable ground for belief that he had a good defence in equity, the landlord was restrained from proceeding to execution at law until the hearing of the cause. *North Staffordshire Steel, &c. Co.* v. *Camoys*, 11 Jur. (N.S.) 555.

Semble, that where a landlord is aware that a lease is or must be forfeited, and allows the tenant to go on spending money on the property, the landlord will be restrained from availing himself of the forfeiture at law. *Ib.*

Relief lies in general against a forfeiture of a lease during a period when the landlord dealt with the tenant so as to lead him to suppose the forfeiture would not be insisted on; but where a subsequent forfeiture was incurred after such dealings had ceased:—Held, that the prior transactions raised no equity. *Flattery* v. *Anderson*, 12 Ir. Eq. R. 218.

—— **Possibility of Compensation.**]—Relief against forfeiture by breach of covenant by lessee, where compensation can be made. *Davis* v. *West*, 12 Ves. 475.

Relief against forfeiture where compensation can be made; as against a clause of re-entry for breach of a covenant to lay out a specific sum in repairs in a given time, and not limited to cases of accident, &c. but even against negligence and voluntary acts. *Sanders* v. *Pope*, 12 Ves. 282.

Action for—Payment into Court—Payment out.]—The arrears of rent and amount of costs brought into court by the plaintiff, in a suit to redeem a lease forfeited, by nonpayment of rent, must, if the bill is dismissed, be repaid to the plaintiff semble. *Bowser* v. *Colby*, 1 Hare, 109; 11 L. J., Ch. 132; 5 Jur. 1106.

Forfeiture of Right to Renewal.]—*See* ante, cols. 831 et seq.

Nonpayment of Rent.]—*See* ante, cols. 909 et seq.

Breach of Covenant to Repair.]—*See* ante, cols. 1120 et seq.

Breach of Covenant against Assignment.]—*See* ante, col. 1168.

Breach of Covenant to Insure.]—*See* ante, cols. 1212, 1213.

ii. *Under Common Law Procedure Acts.*

Act of 1860—Nonpayment of Rent—Costs.]—Where in an action of ejectment upon a forfeiture by non-payment of rent the plaintiff obtains judgment but without costs, the defendant may obtain relief from the forfeiture under the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 1, without being required to pay the plaintiff any costs other than those of the summons for relief. *Croft* v. *London and County Banking Co.*, 54 L. J., Q. B. 277; 14 Q. B. D. 347; 52 L. T. 374; 49 J. P. 356—C. A.

—— **Necessary Parties—Original Lessee.**]—After judgment in an action of ejectment for nonpayment of rent, a mortgagee of land by subdemise when applying under s. 1 of the Common Law Procedure Act, 1860, for relief against forfeiture, must make the original lessee a party to the proceedings. *Berney* v. *Moore* (2 Ridgway, 310) explained; *Doe* d. *Whitfield* v. *Roe* (3 Taunt. 402) distinguished. *Hare* v. *Elms*, 62 L. J., Q. B. 187; [1893] 1 Q. B. 604; 5 R. 189; 68 L. T. 223; 41 W. R. 297; 57 J. P. 309.

Act of 1852—Nonpayment of Rent—Bankruptcy of Lessee—Assignment by Trustee to Mortgagee—Re-entry without Process of Law—Form of Order—Damages.]—Relief against forfeiture for nonpayment of rent is not confined to the case impliedly referred to in the Common Law Procedure Act, 1852,—namely, recovery by process of law—but will extend also to a case where there has been peaceable resumption of premises without such process. Such relief will be given to a mortgagee to whom the trustee in bankruptcy of the lessee has assigned the lease.

The time for applying for relief is, however, by analogy to the statute, limited to six months after recovery of possession. In such a case the plaintiff, an equitable mortgagee to whom a lease had been assigned by the trustee in bankruptcy of the lessee, was declared to be entitled, on payment of the arrears of rent, to enjoy the demised land according to the lease, already in existence. But no damages can be awarded to the plaintiff as compensation in respect of the time during which he has been kept out of possession. *Howard* v. *Fanshawe*, 64 L. J., Ch. 666; [1895] 2 Ch. 581; 13 R. 663; 73 L. T. 77; 43 W. R. 645.

iii. *Under Conveyancing Acts.*

Statutes.]—44 & 45 Vict. c. 41 (Conveyancing Act, 1881), s. 14, and 55 & 56 Vict. c. 13 (Conveyancing Act, 1892), ss. 2, 4 and 5.

Notice to Remedy Breach—Form of.]—The notice required by s. 14 of the Conveyancing and Law of Property Act, 1881, to be served by a lessor on a lessee before enforcing a right of re-entry or forfeiture for breach of covenant, must specify the particular breach complained of with sufficient clearness to enable the lessee to remedy the same. *Fletcher* v. *Nokes*, 66 L. J., Ch. 177; [1897] 1 Ch. 271; 76 L. T. 107; 45 W. R. 471; 61 J. P. 232.

A notice stating that "you have broken the covenants for repairing the inside and outside of the houses (naming them all) contained in a lease of the said premises (describing it)," was held insufficient, as it did not distinctly specify the particular houses in respect of which the covenants had been broken. *Ib.*

A notice by the lessor under s. 14, sub-s. 1, specifying the breach complained of, and requiring the lessee to remedy it, is not invalid because it does not contain a claim for compensation in money for the breach. *North London Land Co.* v. *Jacques* (49 L. T. 659), overruled. *Lock* v. *Pearce*, 62 L. J., Ch. 582; [1893] 2 Ch. 271; 2 R. 403; 68 L. T. 569; 41 W. R. 369.

—— **Service of—"Lessee."**]—An assignee of a lease is a "lessee" withing the meaning of s. 14, sub-s. 1, of the Conveyancing Act, 1881. A notice, under s. 14, sub-s. 1, of the Conveyancing Act, 1881, addressed to A. B. (the original lessee), and "all others whom it doth or may concern," and served on the persons in occupation of the premises demised, is sufficiently addressed to, and validly served on, the assignee of the lease. *Cromin* v. *Rogers*, 1 Cab. & E. 348.

—— **Sufficiency of.**]—A lease under which rent was payable quarterly on the usual quarter days contained a covenant by the tenant to keep the premises in repair, and gave the landlord a right of re-entry for breach of covenant. The premises being out of repair, the landlord on 22nd September, 1896, served a notice on the tenant under s. 14, sub-s. 1 of the Conveyancing Act, 1881, requiring him to execute certain specified repairs within three months. The repairs were not executed, and on 14th January, 1897, the physical state of the premises continuing the same, the landlord brought an action claiming possession and rent for the quarter ending 25th December, 1896:—Held, that the action was maintainable for the breach of covenant being a continuing one, the landlord, by claiming rent up to 25th December, 1896, did not preclude himself from insisting on his right of re-entry in respect of the continuing breach subsequent to that date, and the state of the premises continuing the same, the notice of 22nd September, 1896, was a good notice of the breach complained of within s. 14, sub-s. 1, of the Conveyancing Act, 1881. *Penton* v. *Barnett*, 67 L. J., Q. B. 11; 46 W. R. 33—C. A.

A lessee of building property, with a covenant in his lease to complete the buildings by a certain date, failed to complete them within the required time. The lessor commenced an action to eject him, and, in default of his appearance, signed judgment and issued a writ of possession. The lessor, before commencing his action, served the lessee with a notice stating the breach, but not requiring him to remedy it, or to make compensation, as required by s. 14, sub-s. 1, of the Conveyancing Act, 1881. An application was made by equitable mortgagees of the property to be relieved against the forfeiture on the ground of this informality in the notice. They offered to submit to such terms as the court thought fit:—Held, that no notice sufficient for the purposes of the act had been given, and the equitable mortgagees were entitled to be relieved against the forfeiture on the terms of their undertaking to complete the buildings by a certain time, and, if not so completed, to re-deliver possession of the property to the lessor, and the lessor was ordered to give immediate possession to the mortgagees. *North London Land Co.* v. *Jacques*, 49 L. T. 659; 32 W. R. 283; 48 J. P. 505.

—— **Want of—Effect.**]—Where a person has gained possession of property, but has no title to it, being, in fact, a trespasser, the rightful owner is entitled to use force in ejecting him, so long as he does him no personal injury. Lessors had not, before re-entering upon premises for nonpayment of rent and breach of covenant, served upon the tenant the notice required by s. 14, sub-s. 1, of the Conveyancing Act, 1881, specifying the breach of covenant complained of:—Held, that by reason of sub-s. 8 of the section, its provisions did not affect the law relating to re-entry for nonpayment of rent; and under sub-s. 2 the court had a discretion to refuse relief against re-entry for breach of covenant on the ground of want of notice, and the circumstances of this case were such that the court would refuse such relief. *Scott* v. *Brown*, 51 L. T. 746.

—— **Expenses of.**]—By the Conveyancing and Law of Property Act, 1881, s. 14, sub-s. 1, it is provided that a right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable . . . unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money, for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach:—Held, that the expenses to which a lessor might be put in the preparation of the notice specifying the breach complained of were not payable as compensation within the meaning of this enactment. *Skinners' Co.* v. *Knight*, 60 L. J., Q. B. 629; [1891] 2 Q. B. 542; 65 L. T. 240; 40 W. R. 57; 56 J. P. 36—C. A. *But see* 55 & 56 Vict. c. 13, s. 2, and *Bridge* v. *Quick*, post, col. 1032.

Sub-s. 3 of s. 14 of the Conveyancing and Law of Property Act, 1881, which provides that for the purposes of that section a lessee includes an under-lessee and a lessor an under-lessor, applies also to s. 2, sub-s. 1, of the Conveyancing and Law of Property Act, 1892; but that provision only has the effect of making what is enacted in those sections as between lessor and lessee applicable as between under-lessor and under-lessee, and does not create any rights or liabilities as between lessor and under-lessee. *Nind* v. *Nineteenth Century Building Society*, 63 L. J., Q. B. 636; [1894] 2 Q. B. 226; 9 R. 468; 70 L. T. 831; 42 W. R. 481; 58 J. P. 732—C. A.

Per Lord Esher, M.R., and Davey, L.J.: A lessee who has complied with a notice under s. 14, sub-s. 1, of the Conveyancing and Law of Property Act, 1881, to remedy a breach of covenant, has not been "relieved" so as to be liable to an action, under s. 2, sub-s. 1, of the Conveyancing and Law of Property Act, 1892, for costs and expenses in reference to such breach, "relieved" in that subsection meaning relieved by the court. *Ib.*

Application — Originating Summons.]—An application by a lessee, under s. 14, sub-s. 2, of the Conveyancing Act, 1881, for relief against forfeiture by reason of a breach of covenant cannot be made by originating summons. *Lock* v. *Pearce*, 62 L. J., Ch. 582; [1893] 2 Ch. 271; 2 R. 403; 68 L. T. 569; 41 W. R. 369—C. A.

—— **Time for.**]—An application for relief against re-entry, under 44 & 45 Vict. c. 41, s. 14, sub-s. 2, cannot be granted if made after actual re-entry by a landlord who has duly given notice under sub-s. 1. *North London Land Co.* v. *Jacques* (9 Q. B. D. 672) distinguished. *Rogers* v. *Rice*, 61 L. J., Ch. 573; [1892] 2 Ch. 170; 66 L. T. 640; 40 W. R. 489—C. A.

Jurisdiction—Action pending at Commencement of Act—Power of Court of Appeal.]—A landlord brought an action to recover the demised property under a proviso of re-entry for breach of covenant to insure. The defendant claimed relief under statute 22 & 23 Vict. c. 35, s. 4. The plaintiff obtained judgment on the 4th of July, 1881. On the 4th of August the defendant appealed. A stay of proceedings was granted and continued, so that the plaintiff never obtained possession. On the 1st of January, 1882, the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), came into operation, after which the appeal came on to be heard:—Held, that the Conveyancing and Law of Property Act, 1881, s. 14, sub-s. 2, is not confined to breaches taking place after the act came into operation, but extends also to breaches committed before the act, and to proceedings pending when the act came into operation, and that as the landlord had not obtained possession, but the action was still pending, there was jurisdiction to grant relief to the tenant under that sub-section. *Quilter* v. *Mapleson*, 52 L. J., Q. B. 44; 9 Q. B. D. 672; 31 W. R. 75—C. A.

Held, also, that assuming the judgment of the court below to have been correct according to the law as it then stood, the Court of Appeal could grant to the tenant the relief to which he was entitled according to the law as it stood at the hearing of the appeal, since the general orders provide that appeals shall be by way of rehearing, and give power to the Court of Appeal not merely to make any order which ought to have been made by the court below, but to make such further or other order as the case may require. *Ib.*

—— **Stay of Action—Terms—Lessor's Costs as between Solicitor and Client — Surveyor's Charges.**]—Where in an action for re-entry upon breach of covenant to repair, the defendant applies to the court for relief under s. 14, sub-s. 2, of the Conveyancing Act, 1881, the court may, in its discretion, make an order to stay the action upon payment by the defendant of the plaintiff's costs as between solicitor and client, as well as the costs of surveys and schedules of dilapidations. *Skinners Co.* v. *Knight* ([1891] 2 Q. B. 542), distinguished. *Bridge* v. *Quick*, 61 L. J., Q. B. 375; 67 L. T. 54; 56 J. P. 696.

Relief when Granted—Nonpayment of Rent.]—See *Scott* v. *Brown*, supra, col. 1030.

—— **Nonpayment of Renewal Fines.**]—Where the right of renewal of a lease for lives renewable for ever had been forfeited by non-payment of renewal fines within the time prescribed by the lease, though demanded in writing by the reversioner, the court refused to grant relief against the forfeiture under s. 14, sub-s. 2, of the Conveyancing Act, 1881. *Ruttledge* v. *Whelan*, 10 L. R. Ir. 263.

—— **Breach of Covenant to Repair.**]—In an action for the recovery of land for breach of a covenant to repair, relief will be granted under the Conveyancing Act, 1881, although the premises are in a very dilapidated condition, and the relief was not claimed in the pleadings. *Mitchison* v. *Thompson*, 1 Cab. & E. 72.

—— **Tenancy determined by Bankruptcy.**]—Where a tenant presents a petition in bankruptcy by reason of which the lease is determined:—Held, that s. 14 of the Conveyancing Act, 1881, has no application. *Gould* or *Goold*, *Ex parte*, *Walker*, *In re*, 13 Q. B. D. 454; 51 L. T. 368; 1 Morrell, 168.

—— **Two Houses in same Lease—Covenant broken as to one.**]—The doctrine established by the case of *Darlington* v. *Hamilton* (Kay, 559), —namely, that where two houses are comprised in one lease, and subject to covenants common to both, an under-lessee of one house is liable to have his underlease determined by re-entry by the original lessor for breach of any covenant relating to the other house—still prevails, and is not affected by s. 14 of the Conveyancing Act, 1881, which merely protects a lessee or under-lessee against re-entry or forfeiture by giving him an opportunity of making good any breach of covenant. *Creswell* v. *Davidson*, 56 L. T. 811.

Agreement for Lease.]—Sect. 14 of the Conveyancing Act, 1881, applies to an agreement for a lease of which the tenant is entitled independently of the act, to demand specific performance. Dicta in *Swain* v. *Ayres* (21 Q. B. D. 289), adopted. *Strong* v. *Stringer*, 61 L. T. 470.

An agreement for a lease is not a lease within the meaning of s. 14 of the Conveyancing and Law of Property Act, 1881, and therefore the terms of that section do not apply to a mere tenancy under an agreement for a lease, where there is no actual lease in existence, nor any title to specific performance. The defendant in an action for recovery of land was in possession of

the premises as tenant, under an agreement for a lease, which provided that the lease to be executed thereunder should contain (inter alia) a covenant to keep the premises in repair, and a condition for re-entry for breach of such covenant. Rent had been paid under the agreement, but no lease had been executed. The premises being out of repair, the landlord brought the action to recover them as upon a forfeiture. No notice had been given before action under the above-mentioned section: — Held, that there being no lease in fact executed, or title shewn to a decree for specific performance by execution of a lease, the section did not apply, and the action was maintainable. *Swain* v. *Ayres*, 57 L. J., Q. B. 428; 21 Q. B. D. 289; 36 W. R. 798—C. A. Affirming 52 J. P. 500.

—— **Tenancy at Will.**]—The plaintiff entered into possession of a farm under an agreement for a lease for twenty-one years from the defendant. Before any rent was due or had been paid the landlord gave the plaintiff notice to quit, and turned him out of possession, because he had done that which had amounted to a breach of a covenant contained in the agreement and intended to be inserted in the lease. The tenant brought an action for trespass:—Held, that the plaintiff was not entitled to recover; that as he was in possession under an agreement for a lease for twenty-one years, and had paid no rent, he was only a tenant at will; that his landlord was therefore entitled so to determine that tenancy; and that the tenancy was not subject to or controlled by the provisions of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 14. *Coatsworth* v. *Johnson*, 55 L. J., Q. B. 220; 54 L. T. 520—C. A.

Right of Sub-lessee to Relief.]—A sub-lessee of part of the premises leased is not entitled to relief as against the principal lessor, under s. 14, sub-ss. 2 and 3, of the Conveyancing Act, 1881. *Burt* v. *Gray*, 60 L. J., Q. B. 664; [1891] 2 Q. B. 98; 65 L. T. 229; 39 W. R. 429.

In an action by a lessor to recover possession of premises on the ground of forfeiture by the lessee, the court will, under the power conferred upon it by the Conveyancing Act, 1892, s. 4, grant relief to an under-lessee, and vest the property in him for the whole of his term, on condition that such under-lessee pays all rent due, and executes a deed containing the same covenants as the lessee had entered into with the lessor; and the court will do this, notwithstanding that it is prevented by the Conveyancing Act, 1881, s. 14, sub-s. 6, from granting similar relief to the lessee. *Highgate School* or *Cholmeley's School* v. *Sewell*, 63 L. J., Q. B. 820; [1894] 2 Q. B. 906; 10 R. 368; 71 L. T. 88; 58 J. P. 531.

Sect. 4 of the Conveyancing Act, 1892, is not a section amending s. 14 of the Conveyancing Act, 1881, but is an independent enactment. *Imray* v. *Oakshette*, 66 L. J., Q. B. 544; [1897] 2 Q. B. 218; 76 L. T. 632; 45 W. R. 681—C. A.

The court has jurisdiction to relieve an under-lessee upon forfeiture of the superior lease for breach by the lessee of a covenant not to assign or underlet without consent, although it could not grant such relief to the lessee himself; but this jurisdiction is discretionary and must be exercised with caution. *Ib.*

A person who accepts an underlease without inquiring into the superior title is guilty of such negligence as disentitles him to relief. *Ib.*

—— **Application for Vesting Order.**]—Where a lessor has brought an action against the lessee and his under-lessees, claiming possession of the demised premises under a proviso for re-entry upon the bankruptcy of the lessee, it is competent for the under-lessees to set up by way of defence and counterclaim in that action a claim for an order vesting in them the property in question for the remainder of their lease under s. 4 of the Conveyancing and Law of Property Act, 1892. It is not necessary that the application for such an order should be made by summons at chambers. *Highgate School* or *Cholmeley's School* v. *Sewell*, 62 L. J., Q. B. 476; [1893] 2 Q. B. 254; 5 R. 501; 69 L. T. 118; 41 W. R. 637; 57 J. P. 680.

3. Resumption of Premises.

See post, M. 8 (cols. 1206, et seq.).

4. By Surrender.

a. Of Lease.

By Writing.] — A surrender might be by writing without a deed, or sealing, before 8 & 9 Vict. c. 106, s. 3. *Farmer* d. *Earl* v. *Rogers*, 2 Wils. 26.

Executrices of tenant from year to year signed the following instrument: — "We do hereby renounce and disclaim, and also surrender and yield up to the lessor, all right, title, interest, uses, trust, and terms of years whatsoever; and possession of that messuage called B.:—Held, a surrender, and not a disclaimer. *Doe* d. *Wyatt* v. *Stagg*, 5 Bing. (N.C.) 564; 7 Scott, 690; 9 L. J., C. P. 73.

Effect of Cancelling Lease.]—The fact of a lease being found in the possession of the lessor in a cancelled state is no evidence of a surrender by deed or note in writing. *Doe* d. *Courtail* v. *Thomas*, 4 M. & Ry. 218; 9 B. & C. 288; 7 L. J. (O.S.) K. B. 214.

The mere cancelling in fact of a lease is not, under 8 & 9 Vict. c. 106, s. 3, a sufficient surrender of the term thereby granted. *Roe* d. *Berkeley* (*Earl*) v. *York* (*Archbishop*), 6 East, 86; 2 Smith, 166; 8 R. R. 413.

To whom made.]—A surrender of a lease cannot be made to sequestrators from the Court of Chancery; it must be to the lessor, or to a party legally entitled under him. *Cornish* v. *Searell*, 1 M. & Ry. 703; 8 B. & C. 471; 6 L. J. (O.S.) K. B. 254.

—— **To One of Two Joint Tenants.**]—Where a tenant had taken a house from two joint tenants, who had both signed the lease, but one of them only had afterwards interfered in the management of the house:—Held, that a surrender to one was a surrender to both. *Dodd* v. *Acklom*, 6 Man. & G. 673; 7 Scott (N.R.) 415; 13 L. J., C. P. 11.

—— **To Lessor who has Sold.**]—A leasehold house was underlet for twenty-one years to P. by trustees. The trustees afterwards granted a fresh under-lease to K. for twenty-one years, and sold the property by auction to a purchaser, who had no notice of the first under-lease. P. after the sale, by deed, purported to surrender his interest to the trustees:—Held, that as the first lessee had not attorned to the second, the

surrender was rightly made, and the purchaser must complete. *Edwards* v. *Wickwar*, 35 L. J., Ch. 309 ; L. R. 1 Eq. 403 ; 12 Jur. (N.S.) 158 ; 14 W. R. 363.

Where Infant Beneficially Entitled.]—The provisions of the act 11 Geo. 4 & 1 Will. 4, c. 65, for the surrender of a lease to which an infant is entitled, apply to a lease to which an infant is only beneficially entitled, the legal estate being vested in a trustee for him. *Griffiths, In re*, 54 L. J., Ch. 742 ; 29 Ch. D. 248 ; 53 L. T. 262 ; 33 W. R. 728.

Direction to Under-tenant to attorn.]—In 1699 certain land was leased by a parish for a term of 1000 years at a rent of 10*l.* per annum. The land was subsequently built upon, pursuant to the provisions of the lease, and part of it had devolved upon G. and part upon F. The parish officers sought to induce G. and F. to give up possession by threatening them with an information in chancery, and by offering them leases for twenty-one years at two-thirds of the annual value, which offers were refused. G., however, verbally promised the attorney of the officers to give up possession, and directed his under-tenant of part of the premises to attorn to the officers as from last quarter-day. The under-tenant did so, and the officers took possession of the untenanted houses and afterwards received the rents. F., who was a trustee for others, refused the offered lease, but one of his cestui que trusts directed the under-tenant in possession to attorn to the officers. This direction was obeyed, and the officers thereafter, with the knowledge of F., received the rents. Ejectment having been brought by the officers and special cases stated for the opinion of the court :—Held, that in the case of G., the circumstances did, but that in that of F. they did not, amount to a surrender of his term in the land. *Gray* v. *Balls*, 5 L. T. 395.

By Operation of Law.]—The mere surrender of a small part of demised premises and proportionate reduction of the rent does not in itself amount to a surrender by operation of law of the old tenancy, and the creation of a new one. *Holme* v. *Brunskill*, 47 L. J., Q. B. 610 ; 3 Q. B. D. 495 ; 38 L. T. 838—C. A.

The plaintiff, while lessee of five rooms from the defendants for a term, entered into negotiations with them by which he was to hold three only of the rooms at a diminished rent, and on the next quarter-day he paid and took a receipt for rent at the lesser rate. There was evidence that the parties intended a written agreement to be prepared, embodying the terms of the new agreement, but they ultimately disagreed, and such agreement was never, in fact, signed. On the following quarter-day the defendants claimed rent of the plaintiff under the old lease, which he repudiated. There was evidence that the plaintiff had given up possession of two of the rooms :—Held, that the jury were justified in finding that there was a new tenancy, and therefore that there was a surrender by operation of law. *Jones* v. *Bridgman*, 39 L. T. 500.

A., the tenant of a house, three cottages, and a stable and yard, let at an entire rent, for a term of seven years, before the expiration of the term assigned all the premises to B. for the remainder of the term, the house and cottages being in the possession of under-tenants and the stable and yard in that of A. The landlord accepted a sum of money as rent up to the day of the assignment, which was in the middle of the quarter. B. took possession of the yard and stable only. The occupiers of the cottages having left them after the assignment, and before the expiration of the term, the landlord relet them. A. paid no rent after the assignment, but the landlord received rent from the under-tenants. Before the expiration of the term the landlord advertised the whole of the premises to be let or sold :—Held, that this was a surrender by operation of law of all the premises. *Reeve* v. *Bird*, 1 C. M. & R. 31 ; 4 Tyr. 612 ; 3 L. J., Ex. 282.

A surrender by deed is unnecessary where the former lessee is the party who takes the new lease, as the fact of his doing is evidence that the new lease has been accepted by him, and such an acceptance operates as a surrender in law ; but it is not enough that the lessee agrees to an act done by the reversioner. *Lyon* v. *Reed*, 13 M. & W. 285 ; 13 L. J., Ex. 377 ; 8 Jur. 762.

The term "surrender by operation of law" is properly applied to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate continued to exist. *Ib.*

Thus, when a lessee for years accepts a new lease from his lessor, he is estopped from saying that his lessor had not the power to make a new lease ; and as the lessor could not grant the new lease until the prior one had been surrendered, the acceptance of such new lease is of itself a surrender of the former one. *Ib.*

Such surrender is the act of the law, and takes place independently of, and even in spite of, the intention of the parties. *Ib.*

The defendant held premises, as tenant to the plaintiff, under a memorandum of agreement for three years. He left the premises in the first year. On application being then made by the plaintiff for rent due, the defendant, by letter, authorised the plaintiff to let the premises to anyone else. The plaintiff then let them to another tenant for three years, and gave him possession :—Held, in an action for rent on the original agreement, that these facts constituted a surrender by operation of law. *Nicholls* v. *Atherstone*, 10 Q. B. 944 ; 16 L. J., Q. B. 371 ; 11 Jur. 778. See also, *Page* v. *Mann*, 6 L. J. (O.S.) K. B. 63.

A lessee, who had paid his rent occasionally to a trustee, and occasionally to a cestui que trust, gave up possession on the last day of his term, but before his term was over, to the person who had been trustee, and not to the party then having legal title :—Held, that, as the act was equivocal, it did not amount either to a surrender or a forfeiture of the term. *Ackland* v. *Lutley*, 1 P. & D. 636 ; 9 A. & E. 809 ; 8 L. J., Q. B. 164.

R. was entitled to one-half of the equitable interest, and to one-sixth of the legal estate, by descent ex parte maternâ, in lands held under a lease of 1740 for lives, renewable for ever. In 1766 X., being the surviving cestui que vie in that lease, and R. being then a minor, his father, who took no interest under the lease of 1740, procured a renewal of it, by a demise of the lands, to be made to himself for the lives of X. and two new lives, with a covenant for perpetual renewal. On his death in 1779, the legal estate under the lease of 1766 descended upon R. as

his heir, X. being at that time the only surviving life in it:—Held, that upon the death of R. intestate, his heir ex parte maternâ was entitled to the lands; that under the circumstances it could not be presumed that the persons entitled to the legal estate under the lease of 1740 had conveyed or surrendered it to the lessee in the lease of 1766, or that they had assented to the lessor therein making the renewal of 1766 to the lessee therein. The doctrine of *Thomas* v. *Cook* (2 B. & Ald. 119; 20 R. R. 374), viz. surrender by operation of law resulting from acquiescence by the tenant in a new demise by the landlord, is not to be extended. *Lynch* (*Lessee of*) v. *Lynch* (6 L. R., Ir. 131) doubted. *Lyon* v. *Reed* (13 M. & W. 285), approved. Quære, what is the precise operation of the indenture of 1766. *Creagh* v. *Blood*, 3 Jo. & Lat. 138; 8 Ir. Eq. R. 688.

The court has no authority to set up a lease, which, by the bonâ fide exercise of the power vested by law in a tenant for life to grant a new lease, has by the doctrine of surrender by operation of law been determined, there being no fraud or collusion, or other circumstance, to justify the interference of the court. *Nixon* v. *Robinson*, 2 Jo. & Lat. 4; 7 Ir. Eq. R. 520.

—— **What Necessary to Effect.**]—To effect a surrender of a lease by operation of law there must be an agreement by landlord and tenant that the term shall be put an end to, acted upon by the tenant's quitting the premises and the landlord, by some unequivocal act, taking possession. *Panther Lead Co., In re*, 65 L. J., Ch. 499; [1896] 1 Ch. 978; 44 W. R. 573; 3 Manson, 165.

—— **Delivery of Key to Landlord.**]—It is not necessary that a surrender should be in writing; but the jury may presume a surrender from the delivery up of the key to the landlord, coupled with other facts, shewing reasons for the landlord accepting a surrender, and the tenant giving up the tenancy. *Ackland* v. *Lutley*, supra.

When a tenant has quitted the demised premises before the expiration of the term, and has sent the key to the landlord with the intention of giving up possession, the mere fact that the landlord has received the key, and attempted unsuccessfully to relet the premises, does not estop him from alleging that the tenancy still subsists. And if afterwards, before the expiration of the term, the landlord relets the premises, the surrender by operation of law takes effect from such reletting, and does not relate back to the original receipt of the key by him. *Oastler* v. *Henderson*, 46 L. J., Q. B. 607; 2 Q. B. D. 575; 37 L. T. 22—C. A.

An agreement by landlord and tenant that the term shall be put an end to, acted upon by the tenant's quitting the premises, and the landlord by some unequivocal act taking possession, amounts to a surrender by operation of law. *Phené* v. *Popplewell*, 12 C. B. (N.S.) 334; 31 L. J., C. P. 235; 8 Jur. (N.S.) 1104; 6 L. T. 247; 10 W. R. 523.

Where, therefore, a tenant left the key at the counting-house of the landlord, and the latter, though he at first refused to accept it, afterwards put up a board to let the premises, and used the key to shew them, and painted out the tenant's name from the front:—Held, sufficient evidence of a surrender by operation of law. *Ib.*

A. and B. demised a house, by lease in writing to C., at a rent payable quarterly. The key was delivered to C.'s wife. C. entered into possession; but before the first quarter's rent became due (there having been some dispute as to arrears of rent and taxes), C.'s wife delivered the key back to A., who accepted it. B., after signing the lease, had never interfered:—Held, that the delivering back of the key by the tenant, animo sursum reddendi, and the acceptance thereof by the landlord, amounted to a surrender of the term by act and operation of law. *Dodd* v. *Acklom*, 6 Man. & G. 673; 7 Scott (N.R.) 415; 13 L. J., C. P. 11.

Held, also, that the jury was, upon the facts warranted in finding that C.'s wife acted as his agent in surrendering the term, and that A. acted as agent for B. in accepting such surrender, and that B. was bound by such surrender and acceptance. *Ib.*

A. was tenant to B. of rooms for a term of years. Upon the bankruptcy of B., A. sent the key of the rooms to the office of the official assignee, where it was left with a clerk, who was told that it was the key of the rooms which A. had occupied. A. immediately quitted possession, and no further communication took place:—Held, not to amount to a surrender by act or operation of law. *Cannan* v. *Hartley*, 9 C. B. 634; 19 L. J., C. P. 323; 14 Jur. 577.

Lessee for years having agreed to surrender his lease to the lessor, delivers up the key, which the lessor accepts, but afterwards refuses to accept the surrender. Lessee decreed discharged from the rent. *Natchbolt* v. *Porter*, 2 Vern. 112.

See also *Whitehead* v. *Clifford*, post, col. 1052.

Condition Precedent to Staying an Action for Rent.]—To an action upon an indenture of lease for nonpayment of rent and for nonrepair, the defendant proposed to plead, that it was agreed between the plaintiff and the defendant that the latter should surrender the tenancy to the plaintiff, by yielding up possession of such portion of the premises as was in his occupation, and by permitting the plaintiff to receive all future rents of such part as was occupied by the defendant's tenants, and by permitting the tenants to attorn to the plaintiff, the defendant to pay a certain sum of money, and give up certain machinery, all of which was to be done by the defendant, and accepted by the plaintiff, in satisfaction of the covenants of the lease, and that the lease and counterpart should be given up to be cancelled. The plea alleged that the defendant paid to the plaintiff the money, and gave up the machinery, and delivered the lease to him, and that the plaintiff excused himself from delivering up the counterpart; that the defendant accordingly withdrew from the possession of the premises which he occupied, and had never since been in the occupation or in the receipt of the rents, and that he had always permitted the plaintiff to receive the same, and the tenants to attorn. Upon an application to plead several matters, the court refused to allow the plea to be pleaded, as not disclosing an equitable defence, on the ground that a court of equity would require the execution by the defendant of a valid surrender of the term as a condition precedent to staying the action, and that a court of common law has no power to enforce such condition. *Mines Royal Society* v. *Magnay*, 10 Ex. 489; 2 C. L. R. 171; 24 L. J., Ex. 7; 18 Jur. 1028; 3 W. R. 75.

Acceptance of a New Lease.]—Acceptance of a new good lease implies the surrender of a former. *Davison* d. *Bromley* v. *Stanley*, 4 Burr. 2210.

A recital in a second lease, that it was granted in part consideration of the surrender of a prior lease of the same premises is not a surrender by deed or note in writing of such prior lease; it not purporting in the terms of it to be of itself a surrender or yielding up of the interest; though, in some instances, the acceptance of a second lease for part of the same term before demised, may be a surrender of such prior term by operation of law; and this even though the second lease is voidable, if it is not merely void. *Roe* d. *Berkeley* (*Earl*) v. *York* (*Archbishop*), 6 East, 86; 2 Smith, 166; 8 R. R. 413.

A fire having occurred upon leasehold premises, the lessor entered. Subsequently an executory agreement was entered into between the parties for a new lease at an increased rent, as was evidenced by letters which passed between them, in one of which a suggestion was made that a memorandum should be indorsed upon the old lease referring to the increase of rent. This was not carried out, but payments of the increased rent were demanded and made, but under protest by the lessee's solicitor. Upon the bankruptcy of the lessee the lessor distrained for rent at the increased rate. The county court judge held that the old lease was still subsisting, and that consequently the old rental alone could be distrained for:—Held, on appeal, reversing that decision, that the old lease was surrendered by operation of law, and that the agreement for an increased rent having been made and acted upon, the distress for such increased rent was lawful. *Vitale, Ex parte, Young, In re*, 47 L. T. 480.

A new letting to an old tenant, commencing immediately, operates as a surrender of the original term, because the lessor could have no power to create the new term if the original term had subsisted; and, for a like reason, a new letting to a third party, with the assent of the original tenant, has the same operation. *M'Donnell* v. *Pope*, 9 Hare, 705; 16 Jur. 771.

A quasi tenant in tail of a freehold lease for lives may, by surrendering the old lease, without the trustees joining, and taking a new lease to himself, bar the remainders over; notwithstanding there were prior existing trusts at the time of making such surrender. *Blake* v. *Luxton*, G. Coop. 178; 3 P. Wms. 10; 6 Term Rep. 290, n.; 14 R. R. 235.

Where a lease by a bishop, which had been granted in consideration of the surrender of a prior lease by deed-poll, had been avoided by the successor, the first lease was not revived by such avoidance. *Doe* d. *Rochester* (*Bishop*) v. *Bridges*, 1 B. & Ad. 847; 9 L. J. (O.S.) K. B. 113.

Where a landlord grants a new lease to a stranger with the assent of the tenant under an existing lease, and the latter gives up his own possession, that is a surrender by operation of law. *Davison* v. *Gent*, 1 H. & N. 744; 26 L. J., Ex. 122; 3 Jur. (N.S.) 342; 5 W. R. 229.

A lease of lands was granted conformably to a power to lease. A later lease was expressed to be granted "for the consideration of the surrender of the present lease, and which is hereby surrendered accordingly," and of a sum of money. The earlier lease was actually given up on the execution of the second. The second lease was not valid as an execution of the power; but rent was received according to its terms, by successive tenants for life and in remainder under the settlement:—Held, that the surrender of the first lease was good. *Doe* d. *Egremont* (*Earl*) v. *Forwood*, 3 Q. B. 627; 11 L. J., Q. B. 321.

Lands, which were devised for life, remainder over, with a power of leasing to the tenant for life, were held under two leases, of 1760 and 1784, for ninety-nine years, determinable on lives. In 1788, S., the lessee, agreed to sell a parcel to A.; and G., tenant for life under the will, in consideration of the surrendering into his hands of the two indentures, 1760 and 1784, and in order to effectuate the agreement between S. and A. with respect to that parcel which was intended to be demised by an indenture bearing even date therewith, demised the residue of the lands to S., with an apportionment of the rents and heriots, the parcel being severed. The lease of 1788 was not a due execution of the power. In ejectment by the remainderman after the death of the tenant for life:—Held, that the acceptance by S. of the lease of 1788 did not, as to the lands thereby demised, operate as an absolute surrender in law of the lease of 1784, which was then subsisting, but as a conditional surrender only during the life of the tenant for life. *Doe* d. *Biddulph* v. *Poole*, 11 Q. B. 713; 17 L. J., Q. B. 143; 12 Jur. 450.

A subsisting tenancy is not determined by an agreement, whereby the landlord lets to his tenant at a valuation to be made by two persons, and stipulating that the tenant is to give sureties to answer for the rent, if no valuation be made and no sureties given. *John* v. *Jenkins*, 1 C. & M. 227; 3 Tyr. 170; 2 L. J., Ex. 83.

Lands were demised for life, remainder over, with a power of leasing to the tenant for life. In 1755 the testator made a lease for ninety-nine years, if certain lives should so long live. In 1812 the tenant for life under the will made a lease, "in consideration of the surrendering up into the hands of the lessor by the lessee" the lease of 1755, "which surrender was thereby made and accepted accordingly"; this lease was invalid, being not made conformably to the power:—Held, that as the new lease did not pass an interest according to the contract, the acceptance of it did not operate as a surrender of the former lease. *Doe* d. *Egremont* (*Earl*) v. *Courtney*, 11 Q. B. 702; 17 L. J., Q. B. 151; 12 Jur. 454. But see *Brinkley* v. *M'Munn*, 32 L. R., Ir. 532, post, col. 1050.

In 1742, a farm was demised by the Broderers' Company to F. for 100 years, with a covenant for perpetual renewal. In 1827 the residue of this term had become vested in B., who in that year assigned it, by way of mortgage, with a proviso for redemption. On the 22nd May, 1828, H. demised the farm for twenty-one years to the plaintiff. On the 12th January, 1836, the mortgagees and H. surrendered the premises to the Broderers' Company. On the 13th January, 1836, the company demised them to H. for 100 years, and shortly afterwards the unexpired residue of that term, and all the estate and interest of H. in the premises, were assigned to the defendant. In an action by the plaintiff against the defendant on a covenant in the lease from H. to the plaintiff to keep down the rabbits on the farm, the defendant pleaded that H. did not demise to the plaintiff; that the reversion on that lease did not vest in the defendant:—Held, that both these issues ought to be entered for the plaintiff, for that the lease being by deed was a demise by way of estoppel, and a reversion in H. by estoppel was thereby created which,

primâ facie, was a reversion in fee, and therefore was not surrendered to the Broderers' Company, but passed from H. to the defendant. *Sturgeon* v. *Wingfield*, 15 M. & W. 224; 15 L. J., Ex. 212.

And see *Forquet* v. *Moore*, 7 Ex. 870; 22 L. J., Ex 35, ante, col. 805.

Acceptance of New Tenant by Landlord.]—A tenant by his own act alone, and contrary to the terms on which he holds, cannot dissolve the relationship of landlord and tenant and discharge himself from the liabilities to which he is thereby subject. But where the landlord by the express acceptance of a second tenant, or by acts shewing such acceptance, shews that he considers the first tenancy at an end, the first tenant is discharged from liability. *Page* v. *Mann*, 6 L. J. (O.S.) K. B. 63.

—— **Assent of Tenant—Change of Possession—Statute of Frauds.**]—The oral assent by the tenant of an existing lease to his lessor granting a new lease of the premises to a new tenant does not constitute a surrender of the existing lease unless the existing tenant gives up possession to the new tenant at or about the time of the grant of the new lease. *Davison* v. *Gent* (1 H. & N. 744), *Thomas* v. *Cook* (2 B. & Ald. 119; 20 R. R. 374), and *Lyon* v. *Reed* (13 M. & W. 285) considered. Dictum in *Baring* v. *Abingdon* ([1893] 2 Ch. 374) explained. *Wallis* v. *Hands*, 62 L. J., Ch. 586; [1893] 2 Ch. 75; 3 R. 351; 68 L. T. 428; 41 W. R. 471.

—— **Rights of Under-Tenant.**]—A. demised premises to B., which B. demised to C., reserving rent; the interest of B. was afterwards sold to D., upon which D. obtained from A. a new lease, the lease to B. having been cancelled; B. and D. afterwards distrained for rent in the name of D., upon which occasion D. declared that the premises belonged to him:—Held, in an action against B., D. and their servants, that the cancellation and new lease did not operate as a surrender of the interest of B., and that rent being due to B. by effluxion of time, B., D. and their servants were justified in making the distress, though in the name of D. *Wootley* v. *Gregory*, 2 Y. & J. 536; 31 R. R. 626.

See further, as to acceptance of new tenant, cases, post, cols. 1049, 1050.

Validity of, as affecting Assignee under Bill of Sale—Growing Crops.]—B., the tenant from year to year of a farm of the defendant, assigned by bill of sale to the plaintiff all his property upon the farm together with all growing and all other crops, which at any time thereafter should be in or about the same or any other premises of his. On the 25th of April, after the execution of this bill of sale, the defendant distrained for rent, and while in possession under that distress, he, having no knowledge of the bill of sale, agreed with B. that he would forego all claim for rent, that B. should surrender the farm to him, and that the tenancy should be determined as from the 24th of June next ensuing. In May, B. having made default in payment of the instalments under the bill of sale, the plaintiff took an inventory of the goods on the farm, and put locks on the gates of the fields in which the crops were growing. The defendant then informed the plaintiff of the agreement between himself and B.; whereon the plaintiff removed the locks and shortly after gave the defendant notice of the assignment to him by the bill of sale of the crops. The defendant attended to the cultivation of the crops, took possession of the farm on the 24th of June, and reaped and sold the crops as they came to maturity. In an action of trover, and for the conversion of the crops:—Held, that although the plaintiff was in equity entitled to relief, yet an action of trover could not be maintained; that the surrender by the tenant to the landlord was a valid surrender at law, but that it could not affect prejudicially the equitable rights of the plaintiff as assignee of the crops; that if there could be no valid surrender as against the plaintiff, and if the tenant must still be considered with regard to the plaintiff to be in possession, so that the plaintiff could claim to be by the assignment in the same position as the tenant, then the plaintiff, although entitled to the value of the crops when sold, was also liable to pay the rent of the farm and the expenses of cultivating and harvesting the crops, and that as the balance on a settlement of account was in favour of the defendant, judgment must, in the circumstances of the case, be entered for the defendant. *Clements* v. *Mathews*, 52 L. J., Q. B. 772; 11 Q. B. D. 808—C. A. Reversing 47 L. T. 251.

Unstamped Agreement for.]—An agreement between a landlord and tenant for the latter to give up possession, and the former to take the stock at a valuation, and to make compensation for fallows, to pay all taxes, and permit the tenant to keep possession of part of the messuage and some of the outhouses up to a certain day, without paying rent or taxes, was held to operate as a surrender of the term, and not being on a deed stamp was void. *Williams* v. *Sawyer*, 6 Moore, 226; 3 Br. & B. 70.

Surrender of Lease in consideration of Interest in New Lease.]—R., the last life in a bishop's lease, agrees with C. to surrender this lease on a promise of the bishop to grant a new one for the lives of R. and C., and the son of C.; and in consideration of C. surrendering the old lease, it was agreed the new one should be in trust for the infant son of C. The whole purchase-money was paid by C. to the bishop, but the legal estate was granted on the new lease to R. and his heirs, during his own life and the lives of C. and his son. C., after the death of R., took upon him to dispose of it; R., by a deed dated the day after the lease, declares his intention to be that C. and his son should, after his decease, hold to them and their heirs during the remainder of the term:—Held, that R. had a valuable share in the consideration of the new lease, having given up his interest in the old, and that having a right to declare the trust, C. had his life only in the lease. *Crop* v. *Norton*, 2 Atk. 74; 9 Mod. 233; Barnard. 179.

Agreement for, without Consideration.]—T. L. holding lands under the see of D. for a renewable term of twenty-one years, demised them in 1787 to two persons for a like term, with a toties quoties covenant for renewal. These sold their interest in part of the lands, and divided the rest equally among them. On the death of one, his share passed to his two sons, A. and A. Lowry; the share of the other was sold to P. The two Lowrys obtained a renewal of the lease of all the lands to themselves in 1822 without P.'s knowledge, and then mortgaged them to M., and obtained a judgment in ejectment against P., who thereupon filed a bill against them and M., and obtained in 1826 a decree for an account and

reconveyance of his part on payment of his proportion of the renewal fines and costs. W., who had been the attorney of the Lowrys in all these matters, obtained an assignment of their interest in 1829. P. did not make up the decree of 1826, but he made several payments to W. in respect of the renewal fines and costs, and urged him to reconvey to him his part of the lands and grant a renewal, but being in distress he signed an agreement to surrender his lands to W. and take part of them as his tenant:—Held, that the agreement signed by P. to surrender was without consideration and void, and that he was entitled to the value of his lands while they were in the possession of W. and to a reconveyance and renewal upon payment of the balance found due from him. *Wallace* v. *Patten*, 12 Cl. & F. 491. Affirming *S. C.*, sub nom. *Patten* v. *Wallace*, Longf. & T. 470.

Suit on promise to surrender lease, dismissed to court of law. *Greville* v. *Bowker*, Cary, 95.

Surrender after Notice of Assignment of future Rent.]—The plaintiffs sub-let a portion of premises, of which they had a lease, to the defendant. They afterwards assigned their interest in the premises to B., and agreed in writing with B., that notwithstanding this assignment they should receive the rent due from the defendant for the remainder of her lease, and notice of this agreement was given to the defendant. The defendant afterwards surrendered her lease to B. In an action for rent claimed as accruing after the surrender:—Held, that even if there was a valid assignment of a chose in action, still that the plaintiffs could not recover, for that the assignment was of rent to become due, whereas no rent had accrued due after the surrender, and the defendant could not be prevented by the agreement between the plaintiffs and B. from surrendering her lease to B. *Southwell* v. *Scotter*, 49 L. J., Ex. 356; 44 J. P. 376—C. A.

Surrender by Assignee of Part of Premises—Covenant to pay Rent—Liability of Lessee.]—The plaintiff demised a house and premises for a term of years by deed containing a covenant by the lessee to pay the rent reserved. The lessee assigned the term, and the assignee surrendered a small portion of the premises, upon which was a scullery, to the plaintiff, who, in consideration therefor, paid the assignee 25*l.* and built for him a new scullery of equal value upon another part of the premises. The rent apportionable for the part surrendered was 4*l.* a year. In an action against the lessee upon the covenant for a quarter's rent less the sum apportioned for the part surrendered:—Held, without deciding whether the covenant was apportionable or not, that the lessee, by assigning his interest in the term, empowered the assignee to surrender any part of the premises; that therefore there had not been any eviction of the lessee by the plaintiff; that the lessee, notwithstanding the surrender, was still liable on the covenant, and that the liability of the lessee upon the covenant after assignment was not that of surety for the assignee. *Baynton* v. *Morgan*, 58 L. J., Q. B. 139; 22 Q. B. D. 74; 37 W. R. 148; 53 J. P. 166—C. A. Affirming 59 L. T. 478.

Premises Relet to Lessor.]—Where a lease came into the hands of the original lessor, by an agreement entered into between him and the assignee of the original lessee, "that the lessor should have the premises as mentioned in the lease, and should pay a particular sum over and above the rent, annually, towards the goodwill already paid by such assignee"; such agreement operates as a surrender of the whole term. *Smith* v. *Mapleback*, 1 Term Rep. 441; 1 R. R. 247.

Other Modes of.]—A. demised a farm to B. under an agreement to hold from Michaelmas, 1799, to Michaelmas, 1816, at a yearly rent. A. died, and devised the premises to C., who in 1813 put them up to sale by auction: D. became the purchaser, and also agreed to buy B.'s outstanding term, without C.'s knowledge or assent. D., having let E. into possession, became bankrupt. In 1814, C., by letter to B., admitted that E. occupied the premises, and afterwards demanded rent from him. C. and D.'s assignees afterwards executed mutual deeds of release, and D.'s assignees released E.:—Held, that C. was entitled to recover the rent from 1813 to 1816 from B., as there had been no surrender in writing of his interest to D., and as C. had not assented to E.'s being let into possession. *Matthews* v. *Sawell*, 2 Moore, 262.

By an agreement dated in May, to which A., B. and C. were parties, A. and B. agreed to sell by auction an estate to which they were entitled as tenants in common, or in default of such sale, that such parts of it as should not be sold after the 1st August and before the 1st September following should be divided into two equal lots between A. and B., and that 100*l.* should be paid by A. to C., the principal tenant, as a remuneration for his giving up possession of his farm at Michaelmas following; and C. agreed to give up possession of his farm accordingly. No part of the estate was sold by the 1st September, but some portions were sold subsequently, and the remainder was divided between A. and B., but such division was not completed till the following March. C. continued in possession, by the desire of A. and B., until that time, and then quitted:—Held, that the agreement was not a surrender of A.'s term. *Weddall* or *Weddle* v. *Capes*, 1 M. & W. 50; 1 Gale, 432; 1 Tyr. & G. 430; 5 L. J., Ex. 111.

Although a surrender of a life estate to the owner of the fee is as between the parties an extinguishment of the estate surrendered, yet it may have continuance to uphold a prior interest derived under it. *Doe* d. *Beadon* v. *Pyke*, 5 M. & S. 146; 17 R. R. 296.

A. being seised in fee of premises, by indenture of the 5th July, 1814, demised them for twenty-one years to B., who entered, and was possessed accordingly. B., by indenture of the 3rd November, demised the premises to C. for the residue of his term therein, excepting the last twenty-one days; and, on the 12th February, 1816, B., by deed-poll, indorsed on the counterpart of the lease to C., granted all his (B.'s) estate and interest in the premises to A., to hold to him for all such time or term in the counterpart of the lease mentioned, namely, the next immediate reversion expectant on the determination of B.'s lease. A., by deeds of lease and release, of the 15th and 16th July, 1822, granted, sold, and assigned all his estate and interest in the premises to the plaintiff by way of mortgage. On the 19th October, 1816, C. assigned all his interest in the premises to the defendant, who never entered, and C. remained in possession. In an action against the defendant for nonpayment of rent:—Held, that the deed-poll did not operate as a surrender of B.'s reversion of twenty-one days to

A., but only of his interest for the term co-extensive with C.'s lease; and that the plaintiff might sue the defendant on the covenants contained in such lease. *Burton* v. *Barclay*, 5 M. & P. 785; 7 Bing. 745; 9 L. J. (o.s.) C. P. 231.

Defence—To forego Rent in consideration of Possession.]—To an action for rent due under a demise, the defendant pleaded that, before the rent became due, it was agreed between the plaintiff and the defendant that, in consideration of his giving up possession, he should be discharged from any further rent, and that he had given up possession accordingly, concluding with an allegation that the tenancy was thereby surrendered:—Held, that the plea was not to be taken as setting up a surrender so as to require a memorandum in writing; but that it afforded a valid excuse for the non-payment of the rent, by shewing the agreement and the giving up of possession. *Gore* v. *Wright*, 3 N. & P. 243; 8 A. & E. 118; 1 W. W. & H. 266; 7 L. J., Q. B. 147; 2 Jur. 840.

Bill to restrain the prosecution of an action at law for rent and dilapidations; the defendant at law applied for and was refused leave to plead with other pleas, by way of equitable defence, an agreement to surrender his lease on certain terms. There was conflict of evidence whether the agreement was complete. An injunction was granted on the plaintiff giving judgment at law, bringing in the money, and undertaking to bring in further amounts of rent. *Magnay* v. *Mines Royal Co.*, 3 Drew. 130; 24 L. J., Ch. 413; 1 Jur. (N.S.) 153; 3 Eq. R. 377; 3 W. R. 258.

Observations on special injunctions to restrain proceedings at law. *Ib.*

Power of Court to compel.]—Lessee of a church lease makes an under-lease, and would have under-lessee to surrender, in order to enable him to renew with the church. There being no covenant in the tenant's lease to surrender, the court cannot compel him to do it. *Colchester* v. *Arnott*, 2 Vern. 283; Pre. Ch. 124.

Specific Performance of Agreement for—Sale by Mortgagee of Lease.]—An agreement was entered into between a lessor and lessee for releasing the lessee from all liability on certain payments being made by the lessee to the lessor, and on the lessee assigning to the lessor all his interest in the lease. At the date of the agreement the lessor had notice that the lessee had demised the property by way of mortgage, with a power of sale, which had become absolute. In a suit by the lessee for a specific performance of the agreement, one of the witnesses deposed that this power of sale had been exercised, but that fact was not put in issue by the pleadings:—Held, that it might constitute a defence if the lessor had no notice of it, and that the plaintiff was entitled to the option of having his bill dismissed without costs, or of having an inquiry as to the circumstances of the sale. *Phelps* v. *Prothero*, 2 De G. & Sm. 274. And see *S. C.*, 17 L. J., Ch. 404.

b. Presumption of.

Generally.]—An acceptance of a surrender of a lease is not to be presumed from the circumstances of the rent having been paid by a third person, and not by the original tenant. *Copeland* v. *Watts*, 1 Stark. 96.

Under certain circumstances the jury may presume a satisfied term to have been surrendered to the cestui que use; but if no such presumption is made, and it appears in a special verdict in ejectment that such a term is still outstanding in a trustee who is not joined in bringing the ejectment, the cestui que use cannot recover. *Goodtitle* d. *Jones* v. *Jones*, 7 Term Rep. 47. S. P., *Godfrey* v. *Hudson*, 2 Esp. 499, n.

A satisfied term may be presumed to be surrendered: but an unsatisfied term, raised for the purpose of securing an annuity, during the life of the annuitant, cannot; and may be set up as a bar to the heir-at-law, even though he claims only subject to the charge. *Doe* d. *Hodsden* v. *Staple*, 2 Term Rep. 684; 1 R. R. 595.

In 1772 a term of 1,000 years was created by deed, for the purpose of securing 5,000*l.*; and in 1787, the principal and interest having been paid, the residue of the term was assigned in trust for the devisees of the person who created the term. In 1789, the premises were conveyed to a purchaser by deed, and the residue of the term was assigned in trust for the purchaser, her heirs and assigns, or as she should appoint, and in the meantime to attend the inheritance. The purchaser entered into possession of the premises, and continued so possessed till her death. In 1808, she executed a marriage settlement, reserving to herself a power of appointment by deed or will; and after the marriage, she, in December, 1813, devised all her real estate. Neither in the marriage settlement nor in the will was any mention made of the term of 1,000 years. She and her husband having both died:—Held, on ejectment brought by her heir-at-law, that there were no premises from which a surrender of the term could be presumed. *Doe* d. *Blacknell* v. *Plowman*, 2 B. & Ad. 573; 9 L. J. (o.s.) K. B. 289.

Mortgage Terms.]—Where an old mortgage term of 1,000 years, created in 1727, was recognised in a marriage settlement of the owner of the inheritance in 1751, by which a sum was appropriated to its discharge; and no further notice was had of it till 1802, when a deed, to which the then owner of the inheritance and the representatives of the termors were parties, reciting that the term was still subsisting, conveyed it to others to secure a mortgage:—Held, that it could not be presumed to have been surrendered against the owner of the inheritance, who was interested in upholding it. *Doe* d. *Graham* v. *Scott*, 11 East, 478.

A testator, in a codicil to his will, stated that certain premises mentioned in the will were charged with a mortgage for 500*l.*, which he directed his executors to pay off:—Held, that after the lapse of nearly forty years, during all which time the testator's representatives had been in the perception of the rent, the mortgagee might be presumed to have been satisfied, and the term surrendered. *Doe* d. *Mantin* v. *Austin*, 2 M. & Scott, 107; 9 Bing. 41; 1 L. J., C. P. 152.

Evidence to go to Jury as to.]—A. devised an estate to trustees for years with remainder to B., which B., eighteen years after the death of A., treated as his freehold, and leased for lives. In an action by the lessee of B., as reversioner, the jury was told that they could not presume a surrender of the term by the trustees to B.; and, upon motion for a new trial, the direction was held right. *Day* v. *Williams*, 2 C. & J. 460; 1 L. J., Ex. 168.

Where an alleged outstanding term appears

to have done the duty for which it was created, the jury is at liberty to presume a surrender of it. *Bartlett* v. *Downes*, 5 D. & R. 526; 3 B. & C. 616; 1 Car. & P. 522; 3 L. J. (O.S.) K. B. 90; 27 R. R. 436.

A. having granted a lease to B. for twenty-one years, before the expiration of the term, granted another lease of the same premises to C. No surrender in writing of B.'s interest was shewn, but the lease granted to him was produced from A.'s custody, with the seals torn off; and it was proved to be the custom to send in the old leases to A.'s office, before a renewal was made, and which old leases were thereupon cancelled by A.'s officer:—Held, that this was evidence from which the jury might presume that B. had assented to the grant of the lease to C., so as to determine his interest by act and operation of law within the 29 Car. 2, c. 3, s. 3. *Walker* v. *Richardson*, 2 M. & W. 882; M. & H. 251; 6 L. J., Ex. 229.

In the case of a plain trust, where the trustees were directed to convey to a devisee on his attaining twenty-one, the jury may be directed to presume a conveyance at any time afterwards, though considerably less than twenty years. *England* d. *Sybourn* v. *Slade*, 4 Term Rep. 682; 2 R. R. 498.

The jury may presume an old satisfied term surrendered to the cestui que use in order to substantiate a lease executed by him. *Doe* d. *Bowerman* v. *Sybourn*, 7 Term Rep. 2; 2 Esp. 496; 4 R. R. 363.

By a marriage settlement, the settlor limited his estate to A. and B., as trustees, "to the only proper use and behoof of them, their heirs and assigns, for ever," in trust for the settlor until his marriage, in trust for husband and wife for life and the longest liver; then in trust for a term to other trustees to raise portions for younger children; then in trust for the first son and heirs male of the body; then to the second son in like manner; and then to the daughters; and, for default of such issue, then over to the right heirs of the settlor:—Held, that the first set of trustees took the legal estate by common law, and not by the Statute of Uses; and the second use could not be executed by the statute. The purposes of the settlement, however, being at an end, in ejectment by the devisee of the person last seised, after the lapse of forty years:—Held, that it might be left to the jury to presume a reconveyance of the legal estate from the trustees. *Doe* d. *Lloyd* v. *Passingham*, 9 D. & R. 416; 6 B. & C. 305; 5 L. J. (O.S.) K. B. 146; 30 R. R. 327.

Where the defendant's ancestor came into possession of certain lands seventy years ago, as a creditor under a judgment obtained against the then owner, and the defendant's family had continued in possession ever since:—Held, that the original possession not having been taken under any conveyance, the length of possession was only primâ facie evidence from which the jury might infer a subsequent conveyance by the original owner, or some of his descendants; but that it might be rebutted by other evidence; and that the jury was not to presume such conveyance from length of possession, unless satisfied that such conveyance had actually been executed. *Doe* d. *Fenwick* v. *Reed*, 5 B. & Ald. 232; 24 R. R. 338.

A term of years was created in 1762, and assigned over to a trustee in 1779 to attend the inheritance. In 1814, the owner of the inheritance executed a marriage settlement, and, in 1816, he conveyed his life interest in the estate to a purchaser, as a security for a debt; but no assignment of the term or delivery of the deeds relating to it took place on either occasion. In 1819, an actual assignment of the term was made by the administrator of the trustee in 1779, to a new trustee for the purchaser in 1816:—Held, that, under these circumstances, on an ejectment brought by a prior incumbrancer against the purchaser, the jury was warranted in presuming that the term had, previously to 1819, been surrendered. *Doe* d. *Putland* v. *Hilder*, 2 B. & Ald. 782; 21 R. R. 488.

The plaintiff was tenant to A. of one close; K. was tenant to B. of another close; the plaintiff and K. verbally agreed to exchange their holdings; "the plaintiff to have B.'s land and pay K.'s rent, K. to have A.'s land and pay the plaintiff's rent." On the same day each took possession of the other's land. K. undertook to communicate their bargain to C., who was the agent of both A. and B.; he did accordingly, some days afterwards, communicate it to him, and C. expressed his concurrence:—Held, that this was evidence to go to the jury of a surrender by K. to B. of his interest in B.'s close. *Bees* v. *Williams*, 2 C. M. & R. 581; 1 Tyr. & G. 23; 1 Gale, 332.

A term of 1,000 years was created by deed in 1717, and in 1735 was assigned for the purpose of securing an annuity to A., and after that to attend the inheritance. A. having died in 1741, and the estate having remained undisturbed in the hands of the owner of the inheritance and her devisee from 1735 to 1813, without any notice having been in the meantime taken of the term, except that, in 1801, the devisee, in whose possession the deeds creating and assigning it were found, covenanted to produce those deeds when called for:—Held, that, under these circumstances, the jury was warranted, in an ejectment brought for the premises by the heir-at-law, to presume a surrender of the term. *Doe* d. *Burdett* v. *Wrighte*, 2 B. & Ald. 710; 21 R. R. 461.

Feoffee not taking Possession.]—A tenant in tail conveyed by feoffment in 1779: but the feoffee never entered, and the tenant in tail and those claiming under him remained in possession till 1829; they were also in possession of the deed of feoffment and suffered a recovery:—Held, that a reconveyance from the feoffee might be presumed. *Jenny* v. *Jones*, 10 Bing. 75.

Where Term subservient to Leasing Power.]—An estate was settled on A. for life, with power to charge it with an annuity for her husband, and portions for their younger children, and to grant leases. A. granted the estate to trustees for 500 years, on trust, if she should so direct, to raise portions by mortgages or sale:—Held, that the term till called into operation, was subservient to the leasing power, and was no answer to an ejectment by a lessee holding under a lease granted subsequently to the settlement. *Doe* d. *Courtail* v. *Thomas*, 4 M. & Ry. 218; 9 B. & C. 288; 7 L. J. (O.S.) K. B. 214.

Agreement, Lessor and Lessee and Lessor and Under-Lessee.]—A. demises to B., who underlets to C. In the middle of both terms it is agreed between A. and B., that B.'s tenancy shall cease, and between A. and C., that C. shall hold under A. for a longer term. This arrangement enures as a surrender from B. to A., and a new demise

from A. to C. *Rex* v. *Banbury*, 3 N. & M. 292; 1 A. & E. 136; 3 L. J., M. C. 76.

Acts of Ownership on part of Lessor.]—If a tenant quits apartments without giving notice, the landlord may recover the rent, although he has put up a bill in the window for the purpose of letting the apartments. *Redpath* v. *Roberts*, 3 Esp. 225.

So, if the landlord lights fires in the rooms, or even uses the fires, it will not deprive him of his right to rent. *Griffith* v. *Hodges*, 1 Car. & P. 419.

Lessee expecting Goods to be seized for Rent—Quitting.]—A tenant of apartments is not justified in quitting without notice, merely from a fear, however reasonable, that his goods may be seized for his landlord's rent. *Rickett* v. *Tullick*, 6 Car. & P. 56.

c. Of Tenancies from Year to Year.

Generally.]—A tenancy from year to year cannot be determined, so as to bar the interest of the tenant's creditors, unless there is either a legal notice to quit, or a surrender in writing. *Doe* d. *Read* v. *Ridout*, 5 Taunt. 519.

A verbal agreement to lease a ferry for a year may be put an end to by a verbal agreement before the expiration of the year. *Peter* v. *Kendal*, 6 B. & C. 703; 5 L. J. (o.s.) K. B. 282; 30 R. R. 504.

Acceptance of another Tenant.]—A parol agreement between a landlord and a tenant from year to year, that another tenant should be substituted in his place, who was accordingly substituted, is a sufficient surrender according to the Statute of Frauds to determine the former tenancy. *Stone* v. *Whiting*, 2 Stark. 235; 19 R. R. 710.

But it is not sufficient if the third person does not take possession. *Taylor* v. *Chapman*, Peake, Ad. C. 19; 4 R. R. 884.

A., being tenant from year to year, underlet the premises to B., and the original landlord, with the assent of A., accepted B. as his tenant, but there was no surrender in writing of A.'s interest; rent being subsequently in arrear, the landlord distrained on B.'s goods:—Held, that these circumstances constituted a valid surrender of A.'s interest by act and operation of law within the Statute of Frauds. *Thomas* v. *Cook*, 2 B. & Ald. 119; 2 Stark. 408; 20 R. R. 374. But see *Matthews* v. *Sawell*, 2 Moore, 262.

Where premises had been let to B. for a term determinable by a notice to quit, and pending such term C. applied to A., the landlord, for leave to become the tenant instead of B., and upon A. consenting, agreed to stand in B.'s place, and offered to pay rent:—Held, that (though B.'s term had not been determined either by a notice to quit, or a surrender in writing) A. might maintain an action for use and occupation against C., and that the latter could not set up B.'s title in defence to that action. *Phipps* v. *Sculthorpe*, 1 B. & Ald. 50; 18 R. R. 426.

Where a lessee quitted, in the middle of his term, apartments which he had taken for a year, and the lessor let them to another tenant:—Held, that she could not recover rent against the lessee for a subsequent portion of the year, during which the apartments had been unoccupied. *Walls* v. *Atcheson*, 3 Bing. 462; 11 Moore, 379; 2 Car. & P. 268; 4 L. J. (o.s.) C. P. 154; 28 R. R. 657.

A tenant from year to year, at a rent payable half-yearly, without giving any notice to the landlord, quitted the premises at the expiration of the current year. Before the next half-year expired, the landlord let the premises to another tenant, who occupied the same:—Held, that the landlord was not entitled to recover rent from the first tenant from the expiration of the current year, when he quitted the premises, to the time when the landlord relet the same to the second tenant. *Hall* v. *Burgess*, 5 B. & C. 332; 8 D. & R. 67; 4 L. J. (o.s.) K. B. 172.

A., being tenant from year to year to B., died, leaving his widow in possession. C., some time after, took out letters of administration to the deceased, and the widow continued in possession, paying rent to B., with the knowledge of C., who never objected to such payment, or made any demand of rent:—Held, that there was no evidence of a surrender by operation of law, so as to create the relation of landlord and tenant between B. and the widow. *Doe* d. *Hull* v. *Wood*, 14 M. & W. 682; 15 L. J., Ex. 41; 9 Jur. 1060.

Acceptance of New Lease Exceeding Lessor's Power.]—A tenant for life made a lease, for a term exceeding his power, of two parcels of land, of one of which the lessee, previous to the commencement of the lease, had been tenant from year to year. In an action of ejectment on the title brought upon the death of the tenant for life by the remainderman:—Held, that the lessee could not rely, as a defence, upon his former tenancy from year to year as unsurrendered or rehabilitated. *Doe* d. *Egremont* v. *Courtney* (11 Q. B. D. 702) distinguished. *Brinkley* v. *M'Munn*, 32 L. R., Ir. 532.

Acceptance of Old Tenant jointly with New One.]—Where a sole tenant from year to year, before the termination of his tenancy, entered into an agreement with his landlord for a lease to be granted to him and another jointly, and both entered upon and occupied the premises jointly:—Held, that the first tenancy was determined, though the lease was never executed pursuant to the agreement. *Hammerton* v. *Stead*, 5 D. & R. 206; 3 B. & C. 478; 3 L. J. (o.s.) K. B. 33; 27 R. R. 407.

Insolvency of New Tenant to Knowledge of Original Tenant.]—Where A. at the request of B., his yearly tenant, accepted C. as tenant in his stead, who proved to be insolvent, and it appeared that B., when he proposed C. to A., knew that C. had compounded with his creditors, but did not communicate the fact to A.:—Held, that the suppression of such a fact was a fraud in B., which rendered him still liable to A. for the rent. *Bruce* v. *Ruler*, 2 M. & Ry. 3; 6 L. J. (o.s.) K. B. 228.

Tenants Exchanging Premises.]—Two persons being tenants from year to year of two closes, under different lessors, agreed to exchange them; both the lessors had the same steward, to whom the arrangement was mentioned; he expressed his assent to it:—Held, that this amounted to evidence of new demises of the respective closes, and of a surrender by operation of law of the previous interests of the tenants. *Bees* v. *Williams*, 1 Gale, 332; 2 C. M. & R. 581; 1 Tyr. & G. 23.

Defence in Action for Rent.]—The plaintiffs declared that they were tenants of chambers to

H., at a certain rent, and that in consideration that they would let the chambers to the defendant, he promised to pay the same rent to H., and that if he did not do so he would indemnify the plaintiffs. The declaration averred the letting to the defendant on such terms, and that the defendant did not pay to H. rent which afterwards become due, nor indemnify the plaintiffs who paid it. The defendant pleaded, first, that before rent became due the tenancy of the defendant to the plaintiffs was ended by surrender and operation of law; and secondly, that before rent was due the defendant agreed with the plaintiff C., on behalf of himself and the other plaintiff, to deliver up possession of the chambers to the plaintiff C., and that the defendant did accordingly so deliver up possession:—Held, that the pleas were good. *Coles* or *Smith* v. *Lovell*, 1 L. M. & P. 794; 10 C. B. 6; 20 L. J., C. P. 37; 15 Jur. 250.

To an action for a quarter's rent from Lady-day to Midsummer, the defendant pleaded that by agreement between the plaintiffs, executors of A., and the defendant, the defendant agreed to take of the plaintiffs' executors the premises; that it was afterwards agreed between them and B., that B. should become tenant to the plaintiffs from Lady-day, and that the defendant should be discharged from liability for subsequent rent; that the defendant accordingly gave up possession to B., and the plaintiffs accepted him as tenant:—Held, that the plea was not proved by evidence that one of the plaintiffs had so agreed to accept B. as tenant in lieu of the defendant. *Turner* v. *Hardey*, 9 M. & W. 770; 1 D. (N.S.) 954; 11 L. J., Ex. 277.

—— **In Trespass.**]—A plea to a declaration in trespass quare clausum fregit stated that B. was seised in fee of the locus in quo, and that the plaintiff held it of him as tenant from year to year, upon terms that B. or his in-coming tenant at any time after a certain day, when the plaintiff should have received notice to quit, should have liberty to enter and plough the arable land held by the plaintiff. Averment of notice to quit; that B. agreed to let, and the defendant agreed to take, the premises as tenant from year to year from and after the expiration of the plaintiff's tenancy; and that the defendant thereupon became the in-coming tenant, and entered after the certain day to plough the land:—Held, that the plea was good, inasmuch as enough appeared to warrant the allegation that the defendant was the in-coming tenant, which might have been traversed. *Milner* v. *Myers* or *Gordon*, 8 Q. B. 615; 15 L. J., Q. B. 157; 10 Jur. 472.

Evidence of Surrender of Tenancy—Admissions.]—In an action of trespass to premises which had been held by the plaintiff under a tenancy from year to year, determinable by notice of surrender:—Held, that in order to prove a surrender defore the acts complained of, evidence was admissible on behalf of the defendent of oral admissions made by the plaintiff, and made in his presence by his son, who had been acting as his manager, that notice of surrender had been given by the plaintiff. *Slatterie* v. *Pooley* (6 M. & W. 664), followed. *Martin* v. *Doherty*, 6 L. R., Ir. 194.

Licence to Quit and Delivery of Possession.]—A tenancy from year to year, created by parol, is not determined by a parol licence from the landlord to the tenant, to quit in the middle of a quarter, and the tenant's quitting the premises accordingly. *Mollett* v. *Brayne*, 2 Camp. 103; 11 R. R. 676. S. P., *Thomson* v. *Wilson*, 2 Stark. 379; 20 R. R. 696.

If a landlord in the middle of a quarter accepts from his tenant the key of the house demised, under a parol agreement, that, upon her then giving up the possession, the rent shall cease, and she never afterwards occupies the premises, he cannot recover in an action for the use and occupation of the house for the time subsequent to his accepting the key. *Whitehead* v. *Clifford*, 5 Taunt. 518; 15 R. R. 579.

One being in possession of premises as tenant from year to year, under an agreement for a lease for fourteen years, and, the rent being in arrear, entered into an indenture with his landlords, whereby, reciting such tenancy and arrears of rent accrued, and that he had agreed to quit and to deliver up the premises to them, and that a valuation should be made of his effects on the premises by two indifferent persons, and that the same should in the meantime be assigned and delivered up to a trustee for the landlords, assigned his effects on the premises to such trustee, to have the valuation made, and out of the amount to retain the arrears of rent, and pay the residue to the tenant:—Held, that the tenant not having in fact quitted the possession, nor any valuation having been made of his effects, such agreement to quit being conditional, and the condition not performed, nor the agreement in any manner acted upon, did not operate as a surrender of the tenant's legal term from year to year. *Coupland* v. *Maynard*, 12 East, 134.

Upon a tenancy from year to year, determinable at a quarter's notice, the lessor licenses the tenant to quit in the middle of a quarter, and the tenant quits, and the lessor accepts possession; this is a surrender by operation of law, destroying the right to rent for the whole or any part of the current quarter. *Grimman* v. *Legge*, 8 B. & C. 324; 2 M. & Ry. 438; 6 L. J. (O.S.) K. B. 321.

When a tenant left the key at the counting-house of the landlord, and the latter, though he at first refused to accept it, afterwards put up a board to let the premises, and used the key to shew them, and painted out the tenant's name from the front:—Held, sufficient evidence of a surrender by operation of law. *Phené* v. *Popplewell*, 12 C. B. (N.S.) 334; 31 L. J., C. P. 235; 8 Jur. (N.S.) 1104; 6 L. T. 247; 10 W. R. 523.

To an action by a landlord against his tenant for breach of promise to use the premises in a tenant-like manner, he pleaded, that during the tenancy, and before any breach, the premises, and his estate and interest therein, were duly surrendered to the landlord by act and operation of law, that is to say, by the tenant's quitting the premises, and every part thereof, with the licence and consent of the landlord, and relinquishing the possession thereof to him with the intention of putting an end to the tenancy, and by his accepting such possession, with the intention of putting an end to the tenancy:—Held, that if the tenancy continued up to the time of the arrangement stated, such arrangement would not enure, as a surrender by act and operation of law. *Morrison* v. *Chadwick*, 7 C. B. 266; 6 D. & L. 567; 18 L. J., C. P. 189.

In an action upon a parol demise, a plea, that, during the term, it was agreed that the defendant should relinquish the possession to the plaintiff for a month, after which the possession should

be resumed by the defendant; and that the defendant did relinquish the possession, but the plaintiff would not restore the possession, is bad, as not shewing a surrender or an eviction. *Dunn* v. *Di Nuovo*, 3 Man. & G. 105; 3 Scott (N.R.) 487; 10 L. J., C. P. 318.

A tenant remains liable for rent unless he delivers up complete possession of the premises, or the landlord accepts of another in his room. *Harding* v. *Crethorn*, 1 Esp. 57; 5 R. R. 719.

By Notice to Quit.]—If a tenant from year to year gives notice to quit, not expiring with the year, the landlord, if the notice is in writing and signed by the tenant, may, if he pleases, treat this irregular notice as a surrender of the tenancy. *Aldenburgh* v. *Peaple*, 6 Car. & P. 212.

If a landlord attests a notice given by a lessee to his under-tenant to pay rent to the landlord, and has a knowledge of its contents, it is a termination of the tenancy of the lessee, and a discharge to him to that time. *Harding* v. *Crethorn*, 1 Esp. 57; 5 R. R. 719.

Otherwise, if the landlord has no knowledge of the contents of the notice. *Ib.*

What insufficient to constitute Surrender.]—Where a tenant from year to year, by a Lady-day holding, agreed by parol with his landlord's agent to quit at the ensuing Lady-day, which was within half a year, and the premises were relet by auction, at which the tenant attended and bid, but the new tenant was not let into possession:— Held, that the tenancy was not determined; there not having been either a sufficient notice to quit, nor a surrender by operation of law, within the Statute of Frauds, 29 Car. 2, c. 3, s. 3. *Doe* d. *Huddleston* v. *Johnston*, M'Clel. & Y. 141. And see *Johnstone* v. *Huddleston*, 4 B. & C. 922; 7 D. & R. 411; 4 L. J. (O.S.) K. B. 71: 28 R. R. 505. *Doe* d. *Murrell* v. *Milward*, 3 M. & W. 328; 1 H. & H. 79; 7 L. J., Ex. 57.

A party who occupied a house as tenant from year to year, entered into the following agreement with his landlord: "1831, September 2. S. S. (the tenant) purchased an estate in the parish of Corbeg, bought of R. G. (the landlord) at the sum of 100*l.* Received on account 10*s.* Mr. R. G. is willing to let the sum lie, by paying 4 per cent." :—Held, that as there was an implied condition in the contract that the landlord should make out a good title, the agreement for the purchase did not operate as a surrender of the tenancy by operation of law. *Doe* d. *Gray* v. *Stanion*, 1 M. & W. 695; 2 Gale, 154; 1 Tyr. & G. 1065; 5 L. J., Ex. 253.

d. Where there is an Under-Tenant.

Effect of.]—A voluntary surrender by a tenant to his landlord does not affect the rights of a person holding on a sub-tenancy created by the tenant, nor is the sub-tenant's knowledge of the surrender equivalent to notice to him to quit. *Mellor* v. *Watkins*, L. R. 9 Q. B. 400; 23 W. R. 55.

When a lessor re-enters on a forfeiture the rights of under-lessees are gone, but where a lessor accepts a surrender from a lessee the rights of the under-lessees remain, although the lessee was at the time liable to forfeiture. *G. W. Ry.* v. *Smith*, 45 L. J., Ch. 235; 2 Ch. D. 235; 34 L. T. 267; 24 W. R. 443—C. A. *S. C.*, in H. L., sub nom. *Smith* v. *G. W. Ry.*, 3 App. Cas. 165; 47 L. J., Ch. 97; 37 L. T. 645.

Premises being demised and underlet, the first tenant surrendered his lease, and took a new one with similar covenants. The under-tenant continued in possession, and never surrendered. Quære, whether special covenants in the new lease co-extensive with those in the old (as not to erect new buildings without leave), could be enforced by the head landlord against such under-tenant, as "duties reserved" by the second lease, within the above provision. *Doe* d. *Palk* v. *Marchetti*, 1 B. & Ad. 715; 9 L. J. (O.S.) K. B. 126.

The effect of 4 Geo. 2, c. 28, s. 6, while it gives a lessee the right to surrender notwithstanding his contracts with his under-lessee, leaves untouched the sub-interest, though it is merely an agreement for an underlease; and the effect of a new demise after the surrender for the residue of the original term is to make the new lessee the assignee of the reversion of the terms created by the surrenderor. *Cousins* v. *Phillips*, 3 H. & C. 892; 35 L. J., Ex. 84.

The defendant held two plots of building land, B. and C., under a lease which contained a covenant to build the houses not less than thirty feet apart, the effect of which was to secure to houses on plot B. a sea view over plot C. H. having entered into a treaty with the defendant for an underlease of B., made inquiries of the defendant as to what could be built on the land in front. The defendant replied that he, the defendant, could not build on C. closer than thirty feet, as his lease did not allow it. H., after having inspected the original lease, took an underlease of B., containing a covenant by the defendant that he, his executors, administrators, and assigns, would observe the lessee's covenants in the original lease. The defendant afterwards surrendered his lease to the ground landlord, took a new lease not containing the old restrictions, and commenced building on C. in a way which would obstruct the sea view from houses on B., belonging to the plaintiff, who was the assignee of H.:—Held, that the rights of H., under the defendant's covenant to observe the covenants in the original lease, were not affected by the defendant's surrender of that lease, and that the plaintiff was on that ground entitled to an injunction to restrain the defendant from building in contravention of those covenants. *Piggott* v. *Stratton*, 1 De G. F. & J. 33; 29 L. J., Ch. 1; 6 Jur. (N.S.) 129; 1 L. T. 111; 8 W. R. 13.

Held, also, that even if, by reason of the surrender, the covenant was gone, the plaintiff was entitled to an injunction, on equitable grounds, for that what the defendant had said to H. amounted to a representation that the defendant could not, during the term of his lease build otherwise than in a particular way, which representation he was bound to make good. *Ib.*

5. Merger.

Statute.]—By the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 4, *there shall not after the commencement of the act be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity.*

Lease for Years in Estate in Fee.]—A. was lessee of premises for a term of twenty-one years, which would expire at Michaelmas, 1809; in December, 1799, A. took a further lease of the same premises for sixty years, to commence from Michaelmas, 1809; the lessor died in December, 1800, and devised the premises to A., the lessee,

for his life: by lease and release, A., in 1806, conveyed his life estate to B.:—Held, that A.'s interest in the lease of 1799, which was to commence in 1809, was not merged in his estate for life. *Doe* d. *Rawlings* v. *Walker*, 5 B. & C. 111; 7 D. & R. 487; 4 L. J. (o.s.) K. B. 93; 29 R. R. 184.

L., being seised in fee, demised to B. for twenty-one years from June, 1814. B. demised to M. for twenty-one years from June, 1814, wanting twenty-one days; and then by deed-poll granted to L. the indenture of lease to M., the premises thereby granted, and the rent reserved, to hold to L., his executors, &c., for the term mentioned in the demise to M.; L. conveyed the premises, the reversion and reversions, rents, issues, and profits, and all his interests in fee to the plaintiff by way of mortgage; M. assigned his term to the defendant by way of mortgage, but the defendant never entered:—Held, that the deed-poll from B. to L. did not merge the chattel interest in the fee, nor suspend the right to sue on the lease to M. *Burton* v. *Barclay*, 7 Bing. 745; 5 M. & P. 785; 9 L. J. (o.s.) C. P. 231.

A lease was granted in 1759 for 99 years, if certain parties should so long live. The lessees in 1818 demised the premises to P. for 62 years, from the 25th March, 1821, if their interest should so long continue, subject to a rent of 40*l.* and various covenants, with a proviso for re-entry in case of default. P. had already the reversion in fee, subject to a mortgage granted by him before the last-mentioned demise. By lease and release executed in 1820, to which the mortgagee was a party, P. in consideration of a sum of money (part of which went to discharge the mortgage) conveyed the premises in fee to a purchaser, to whom the mortgagee also assigned his term; and it was stipulated that the purchaser should retain 300*l.* of the purchase-money upon trust, that, if P. should pay the 42*l.* rent, and perform the covenants contained in the lease of 1818, the purchaser should pay over to him the 300*l.* at the expiration of the term, or extinguishment of the lease of 1759, and interest in the meantime:—Held, that the deed of 1818 was an assignment of all the interest of the then lease to P., and that, by the conveyance of 1820, that interest, as well as the reversion in fee, passed to the purchaser, and (the mortgage being at the same time put an end to) the term became merged in the inheritance; and consequently, that, as soon as the term became vested in the purchaser, P. was discharged from the rent and covenants, and entitled to the 300*l.* *Thorn* v. *Woolcombe*, 3 B. & Ad. 586.

By an indenture in 1742, the Broderers' Company demised a farm for 100 years, with a covenant for perpetual renewal. On the 25th of August, 1827, the party in whom the term vested assigned the residue to H. On the 28th of August, 1827, he assigned the residue of the term to mortgagees, with a proviso for redemption on payment of 5,000*l.* within twelve months. In May, 1828, a lease of the premises was executed by H. and the plaintiff, for twenty-one years, under which the plaintiff entered into possession, and paid rent to H. up to 1835, and afterwards to the defendant. On the 12th of January, 1836, by an indenture between the mortgagees, H., the defendant, and the Broderers' Company, the mortgagees and H. surrendered to the company the premises, for the residue of the term, together with all covenants, to the intent that the residue of the term might be merged in the reversion, and the covenant for renewal be extinguished. On the 13th of January, 1836, the Broderers' Company demised the premises to H. for 100 years, and by an indenture of the 4th of February, 1836, the unexpired residue of the term became vested in the defendant. An action having been brought against him as assignee of H. for a breach of covenant:—Held, first, that H. did demise to the plaintiff, as the lease by him was good by way of estoppel. *Sturgeon* v. *Wingfield*, 15 M. & W. 224; 15 L. J., Ex. 212.

Held, secondly, that the reversion became vested in the defendant, as it was good by way of estoppel. *Ib.*

A., being tenant for life in 1769 made a lease of premises, to commence in 1784, for the term of forty-six years, and died in 1775. B., the assignee of that term, in 1795 demised the premises to C., D. and E., whose assignees the plaintiffs were, for thirty-four years and three-quarters; and the plaintiffs, in 1812, demised the premises to the defendant for eighteen years and a quarter. The declaration stated, that C., D. and E. were possessed of the premises for the residue of a term of thirty-four years and three-quarters, and that the plaintiffs were possessed of the reversion of the premises. The judge ruled at the trial that the interest of C., D. and E. was properly described in the declaration, and that the plaintiffs were possessed of the reversion. On motion for a new trial, on the ground of misdirection:—Held, that there was no ground for a new trial. *Oxley* v. *James*, 13 M. & W. 209; 13 L. J., Ex. 358.

Held, also, that the plaintiffs were possessed of the reversion. *Ib.*

B., after mortgaging premises in fee, demised them by deed to the defendant for thirty-one years. B. afterwards became bankrupt and died, and his assignees sold the premises to D.; and the mortgagee, being paid off, by the direction of the assignees, conveyed to D. in fee, the assignees also being parties and joining in the conveyance. D. after receiving rent for two years gave the defendant notice to quit:—Held, that the lease being good against B., by estoppel only, D. was not estopped by it in consequence of the assignees of B. having joined in the conveyance to him, and might bring ejectment and an action for use and occupation. *Doe* d. *Downe* (*Lord*) v. *Thompson*, 9 Q. B. 1037; 11 Jur. 1007.

A., in May, 1823, demised premises to B. for eighty years, with a proviso for re-entry in case the lessee, his executors, &c. should exercise or carry on, or permit to be exercised or carried on, the business of a victualler or publican. B., in November, 1823, mortgaged to C., and in 1829, the mortgage term was assigned to D., and ultimately became vested in E. After B. had assigned to C., and when he had no reversion but a mere equity of redemption, he by indenture granted an underlease for seventy-six years to F., with a proviso for re-entry similar to that contained in the original lease from A. Some of the mesne assignments were made subject to this underlease. In ejectment by the legal representatives of E., for a breach of the covenant in the original lease in using the premises as a public-house or beershop:—Held, first, that the underlease granted by B. operated merely as a demise by estoppel, inasmuch as he had not, at the time of making it, or since, any legal interest. *Doe* d. *Prior* v. *Ongley*, 10 C. B. 25; 20 L. J., C. P. 26.

Held, secondly, that the lessors of the plaintiff,

or the persons under whom they claimed, not being parties to the underlease, or to any of the assignments which recognised and referred to it, were not bound by any covenants contained therein. *Ib.*

Held, thirdly, that the payment to and acceptance by E. of rent, under the underlease by B. to F., merely created a tenancy from year to year; and that such tenancy was well determined by a notice to quit served upon the attorney of the administratrix of the person who had paid the rent to the lessors of the plaintiff, and under whom the defendant claimed. *Ib.*

A lease of premises for a term of years was granted to K., L. and C. Some time afterwards L. granted a lease of the residue of the term, wanting one day, to the defendants, by whom the lease was executed, and rent was paid to L. Both leases contained covenants to repair and insure, and a proviso for re-entry for breach of either of them, but a performance of the covenant to insure in the lease to the defendants would not necessarily have included a performance of the corresponding covenant in the original lease. The premises being out of repair, and uninsured, the original lessor entered for a forfeiture. In an action by L. as reversioner against the defendants for a breach of their covenants to repair and insure, and for damages sustained by his loss of the term:—Held, first, that the execution of the lease and payment of rent to L. by the defendants were evidence that L. was solely entitled to the reversion, upon the determination of the lease granted to the defendants. *Logan* v. *Hall*, 4 C. B. 598; 16 L. J., C.P. 252; 11 Jur. 804.

Held, secondly, that L. (a sub-lessor) could not recover against the defendants (sub-lessees) the value of the term granted by the original lease, which he had lost by the defendants' breach of covenants. *Ib.*

A corporation being seised in fee of a close, by a deed of the 17th February, 1800, demised the same to H. for a term of lives and years. By deed of the 23rd July, 1803, H. assigned to C. his interest in the premises, to secure payment of 1,200*l.* lent by C. to H. By deed of the 19th February, 1804, reciting the two former deeds, and that H. agreed to sell part of the land to M. and W. for a sum out of which the sum due from H. should be paid to C., C. bargained, sold, assigned and transferred, and H. granted, bargained, sold, assigned and transferred to M. and W. part of the premises. In 1812, H. died, having made his will, whereby, after bequeathing his estates to his wife for life, he devised the same after her death to J. and M. in manner following: "Upon trust to pay and apply the rents, issues and profits of the same to and for the life and benefit of my daughter Mary and her assigns, during her life, and independent of her present or any future husband; and after her death, I give, devise and bequeath my real and leasehold estates unto and equally among all and every the children of my daughter, share and share alike as tenants in common." In 1816, the wife of H. died. By deed of the 11th December, 1817, the corporation assigned to the trustees the reversion in fee simple of the close:—Held, that, as the trustees took only an estate during the life of Mary, the lease for lives did not merge on the grant of the reversion. *Cooke* v. *Blake*, 1 Ex. 220; 17 L. J., Ex. 370.

Term in Longer Term.]—C., as administrator, held land for a term of years, which he demised to P. for a shorter period. P. soon afterwards assigned this land to C. for the shorter term. In the first deed C. was described as administrator, but not in the second:—Held, that there had been no merger in equity, and that the plaintiffs, who would be entitled to the land if the term was in existence, could maintain an action to establish their title to the land for the term and for mesne profits. *Chambers* v. *Kingham*, 48 L. J., Ch. 169; 10 Ch. D. 743; 39 L. T. 472; 27 W. R. 289.

If a tenant for life of an underlease for eighteen years, granted by a person who himself holds the premises so underlet along with other property under a lease for twenty-one years, purchases the interest of his immediate lessor, and obtains from his superior lessor a renewal of the lease thus purchased, the renewed lease is subject so far as regards the premises which were comprised in the underlease, to the same trusts as would have affected the underlease, if it had not been merged or had not expired by effluxion of time. The same rule holds, though at the time of the purchase the property was vested in a trustee upon trusts under which he could not have granted a renewal of the underlease, and though the tenant for life outlived, by twenty-five years, the time at which the underlease would have expired by effluxion of time. *Giddings* v. *Giddings*, 3 Russ. 241; 27 R. R. 78.

Effect—On Covenants.]—A., being possessed of a piece of land for a term of ninety-nine years, laid it out in plots, and underleased one plot to the defendant for the residue of the term, less three days, the defendant covenanting not to build more than twenty feet in height on that side of his plot which adjoined a narrow passage. A. underleased another plot, which abutted on the other side of the passage, to the plaintiffs. On A.'s death, the estate was sold under conditions which provided that the purchaser of the largest lot in value should take an assignment of the whole, and grant fresh underleases to the various under-lessees, for the residue of the term of ninety-nine years less two days. The defendant purchased his own plot, and the plaintiffs purchased their plot, which was the largest in value. The plaintiffs took an assignment of the whole, and granted a fresh underlease to the defendant of his lot for the residue of the term less two days at an apportioned ground rent:—Held, that though the defendant's original underlease was merged at law, he was still bound in equity to observe his building covenant; and that the plaintiffs could obtain an injunction to restrain him from infringing it. *Birmingham Joint Stock Co.* v. *Lea*, 36 L. T. 843.

If a tenant for a term of years leases for a less term, and assigns his reversion, and the assignee takes a conveyance of the fee, by which his former reversionary interest is merged, the covenants incident to that reversionary interest are thereby extinguished. *Webb* v. *Russell*, 3 Term Rep. 393; 1 R. R. 725.

—— **On Charges upon Leaseholds.**]—A. was beneficially entitled to renewable leaseholds for three lives held on trust to renew, and subject to certain charges. All the cestuis que vie had died. It being disputed whether the right to renew was lost, the reversioners granted a lease to A. for three new lives, without prejudice to the disputed question. A. subsequently bought the reversion:—Held, that the fee became subject

to the charges. *Trumper* v. *Trumper*, 41 L. J., Ch. 673; L. R. 14 Eq. 295. Affirmed, 42 L. J., Ch. 641; L. R. 8 Ch. 870; 29 L. T. 86; 21 W. R. 692.

—— **On Right of Way Reserved to Lessors.**]—In 1820, A., B. and C., who were tenants in common in fee, demised a strip of land intersecting their estate to T. for 1,000 years for the purpose of making a canal. The lease reserved to the lessors and their assigns a right of way over or across the demised land. In 1838, the estate was partitioned, the reversion of part of the canal being conveyed to B. and the lands abutting on it to A. and C. respectively. In 1839, B. conveyed his reversion in that part of the canal to the lessee. On a claim by A. to enforce the right of way reserved by the lease:—Held, that that right was reserved to the lessors as owners of the reversion and not as owners of the adjoining lands, and consequently that the conveyance by B. in 1839, by causing the term to become merged in the reversion extinguished the rights of A. and C. over that part of the canal included in that conveyance. *Dyneror (Lord)* v. *Tennant*, 57 L. J., Ch. 1078; 13 App. Cas. 279; 59 L. T. 5; 37 W. R. 193—H. L. (E.)

Pleadings.]—Declaration in an action by the plaintiffs and P. on an indenture, by which, after reciting that they were owners of the premises subject to a mortgage for 3,500*l.* the interest of which was payable half yearly at the office of an attorney named, the plaintiffs and P. demised the premises to the defendant for seven years, yielding and paying the clear yearly sum of 153*l.* 11*s.* in part of interest on the mortgage. Breach, nonpayment of rent; and an averment, that the plaintiffs had not, nor had either of them, at or since the making of the indenture, any reversion of or in the premises, purported to be demised. Plea, the reversion in the premises expectant on the determination of the lease was in the plaintiffs and P., and after P.'s death was in the plaintiffs, who survived her; and, before breach, the plaintiffs conveyed their reversion to S., who became the assignee. Replication, no reversion was at the making of the indenture or since in the plaintiffs and P., nor since the death of P. in the plaintiffs:—Held, first, that the replication was not a departure from the declaration. *Pargeter* v. *Harris*, 7 Q. B. 708; 15 L. J., Q. B. 113; 10 Jur. 260.

Held, secondly, that the declaration was good, inasmuch as the facts disclosed in the lease did not estop the plaintiffs from saying that they had no reversion; and that, therefore, the covenant for payment of rent was a covenant in gross. *Ib.*

Held, thirdly, that the plea was bad, inasmuch as the defendant was not at liberty to assume that there was a reversion. *Ib.*

K. ASSIGNMENT.

1. Of Lease.

a. Agreement to Assign.

Effect of.]—A. agreed to execute to B. an effectual assignment of the two leases of a house and shop, "as he holds the same for a term of twenty-eight years," and B. agreed to accept "a proper assignment of the leases as above described, without requiring the lessor's title":—Held, that B. was bound to take an assignment of two consecutive leases, though the second was void, being under a power which had not been pursued. *Spratt* v. *Jeffery*, 5 M. & Ry. 188; 10 B. & C. 249; 8 L. J. (O.S.) K. B. 114.

In an agreement for the assignment of a lease of a public-house, it was agreed that the intended assignee should take the lease, subject to the payment of the yearly rent and to the performance of the covenants thereby reserved and contained, such covenants being common and usual in leases of public-houses. The lease contained the following clause: "Provided always, and these presents are upon the express condition, that all and every underlease or underleases, deed or deeds of assignment of the premises, or of the devolution of the same by will or act of law, shall be left with the solicitor to the lessor within two calendar months from the date thereof, for the purpose of registration." In an action by the intended purchaser to recover his deposit, the jury found that the above clause was not common or usual in leases of public-houses:—Held, that the clause in question was included in the word "covenant" as used in the contract between the parties, and that the intended assignee was discharged from his agreement to accept an assignment of the lease. *Brooks* v. *Drysdale*, 3 C. P. D. 52; 37 L. T. 467; 26 W. R. 331.

Conditional.]—A. agreed, in consideration and on payment of 200*l.* at stipulated times, to assign to B. the lease of certain premises, for the residue of a term of which A. was assignee, at the yearly rent of 100*l.*, and under and subject to the covenants, provisoes and agreements in the original lease; and B. agreed to accept the lease on payment of the 200*l.* and interest, and in the meantime and until such assignment was made, to pay the rent and perform the covenants in the lease, and from the same to save harmless and indemnify A.; with a proviso, that, in case of default in payment of any or either of the instalments of the 200*l.*, A. should not be at liberty to re-enter:—Held, that this was not an absolute assignment, but only an agreement to assign on a given event. *Hartshorne* v. *Watson*, 7 Scott, 494; 5 Bing. (N.C.) 477; 2 Arn. 70; 8 L. J., C. P. 299.

Licence to Assign.]—If the vendor of a lease, in which is a covenant not to assign, contracts to assign his interest, it is incumbent on him, and not on the purchaser, to procure the lessor's licence for the assignment. *Lloyd* v. *Crispe*, 5 Taunt. 249; 14 R. R. 744.

A lease contained a covenant not to assign without the licence of the lessor, with a proviso for re-entry on breach. The lessee became bankrupt, and the assignees assigned to the defendant, who contracted to sell the term to the plaintiff. The plaintiff required the defendant to obtain the licence of the lessor, which the defendant failed to do:—Held, that the defendant was bound to obtain the landlord's licence to assign, as the assignment by the assignees was no breach of the covenant. *Winter* v. *Dumerque*, 12 Jur. (N.S.) 726; 14 W. R. 699—Ex. Ch.

A. assigned his effects to B. for the benefit of his creditors, and a lease of a farm from C., which contained a covenant not to assign without C.'s consent in writing. B. agreed to assign the lease to D.'s nominee, D. to pay the expense of the assignment, and 180*l.* on a day certain for the

improvements and manure; to take the crops at a valuation, and to have immediate possession :—Held, that to support an action on this agreement, B. must shew that he had obtained C.'s consent in writing to the assignment, though D. had taken possession of the premises, had cut down the crops, and had paid part of the 180*l.* to B. *Mason* v. *Corder*, 2 Marsh. 332; 7 Taunt. 9; 17 R. R. 427.

A lease contained a covenant by the lessee not to assign without licence, and the lessor covenanted not to withhold his licence to assign unreasonably or vexatiously :—Held, that it was unreasonable and vexatious in the lessor to refuse his licence to assign to a person wholly unobjectionable, his object in refusing the licence being, avowedly, his wish to get a surrender of the lease for the purpose of rebuilding. *Lehmann* v. *M'Arthur*, L. R. 3 Eq. 746; 16 L. T. 196; 15 W. R. 551.

Consent of Landlord to Assignment not obtained—Specific Performance of Agreement.]—To a suit for specific performance by the purchaser against the vendor of a leasehold interest, it is not a defence that the lease contains a covenant against alienation without the consent of the landlord, and that it does not appear that the consent of the landlord has been obtained. *Leitch* v. *Simpson*, Ir. R. 5 Eq. 613.

The defendant, having agreed to take an assignment of an underlease from the plaintiff, found on examining the lease that it contained a covenant by the plaintiff not to underlet without the consent of the lessor, the lessor agreeing not to withhold his consent from any assignment to a respectable and responsible person :—Held, that the fact that the lessor's consent had not been obtained at the time of the agreement to take an assignment was not enough to enable the defendant to resist a claim for specific performance. *Hyde* v. *Warden*, 47 L. J., Ex. 121; 3 Ex. D. 72; 37 L. T. 567; 26 W. R. 201—C. A.

The lessee of three acres of land agreed in January, 1874, to let one acre to the plaintiff for the whole of the residue of his term and he agreed also to sell to the plaintiff his interest in the whole three acres at any time within five years from the date of the agreement. The lease contained a covenant by the lessee not to assign the property, or to part with the possession of it, or any part of it, without the written consent of the lessor. The plaintiff was not, in fact aware of this covenant. He was let into possession of the one acre, and he laid out money upon it, and also upon adjoining property of his own with the view of occupying the two together. The lessor was aware of this expenditure. In October, 1877, the lessee, without the plaintiff's knowledge, surrendered the lease to the lessor, in exchange for a new lease for a longer term of the three acres together with other property. The new lease contained a similar covenant by the lessee not to assign, &c., without licence. In November, 1877, the plaintiff gave the lessee notice of his desire to exercise his option to purchase his interest under the original lease in the three acres. The lessee declined to perform his agreement, on the ground that the lessor refused to give his licence to an assignment. The plaintiff brought the action against the lessee and the lessor, claiming specific performance of the agreement by the lessee, and to compel the lessor to give his licence, on the ground, inter alia, that he had acquiesced in the plaintiff's expenditure knowing that he was acting in the mistaken belief that the lessee was able to assign the property to him. It appeared that the lessor was not, when the plaintiff's expenditure was incurred, aware of the existence of the lessee's covenant not to assign without licence :—Held, that the lessee could not be compelled to perform his agreement, inasmuch as his doing so would involve a breach of his prior covenant not to assign without licence, for that, as the plaintiff was seeking to treat the original lease as still subsisting for one purpose, he must treat the covenant not to assign contained in it as still subsisting. *Willmott* v. *Barber*, 15 Ch. D. 96; 43 L. T. 95; 28 W. R. 911.

Held, also, that inasmuch as the lessor was ignorant of his own rights, and there was nothing to shew that he knew that the plaintiff had been acting in ignorance of his legal rights, the lessor could not be compelled to give his licence to assign to the plaintiff. *Ib.*

—— **Determination of Lease — Right of Assignee to recover Sum paid for Lessee's Improvements.**]—A lease of a house was granted by S. to the lessee for twenty-one years from Christmas, 1856, determinable at the end of the first seven or fourteen years upon six months' notice by either party, with power of re-entry if the lessee assigned possession without the lessor's consent. In October, 1861, the lessee agreed in writing, without the lessor's consent, to sell his interest in the premises to the plaintiff, the terms being that he was to pay 1,800*l.* for the lessee's improvements, which sum was to be repaid to the plaintiff if he was ejected by the lessee in the first instance; "if the lessor exercised the power of determining the lease at Christmas, 1863, and if the plaintiff then leaves the house," the sum of 1,100*l.*, part of the 1,800*l.*, was to be returned to the plaintiff. The lessor gave notice of determining the lease at Christmas, 1863, and subsequently granted a new lease at a largely increased rent to C., the aunt of the plaintiff, who had resided with him in the house, since October, 1861, and with whom the plaintiff continued to reside in the house under the new lease, so that he did not actually and as a matter of fact leave the house :—Held, that the plaintiff was entitled to recover the 1,100*l.*, inasmuch as the lease to C. was a new lease to a different person for a different term, and at a different rent from the original lease, and the plaintiff had not got the equivalent for which he bargained as a consideration for the 1,100*l.*, as he had lost his interest in the house as tenant, which, by a reasonable construction, amounted to leaving the house. *Rideout* v. *Lucas*, 14 L. T. 738—Ex. Ch.

See also VENDOR AND PURCHASER.

Evidence as to.]—An averment in a declaration that the plaintiff was possessed of premises for the remainder of a certain term of years, then unexpired therein, which he agreed to assign, is supported by evidence of a tenancy from year to year. *Botting* v. *Martin*, 1 Camp. 317.

b. The Instrument.

What is an Assignment.]—A demise for a term of years, if it is by deed, and for the whole term which the lessor has in the premises, operates as an assignment. *Beardman* v. *Wilson*, 38 L. J., C. P. 91; L. R. 4 C. P. 57; 19 L. T. 282; 17 W. R. 54.

An underlease of the whole term amounts to an assignment. *Ib.*

Action by the assignee of the reversion of a lease on a covenant to repair. The defendant was the representative of an assignee of the lease, and had made an underlease ending at the same date as the original term :—Held, that the underlease amounted to an assignment, and that the assignee of the reversion was not entitled to recover. *Ib.*

The assignment of a parol lease from year to year, otherwise than by deed or note in writing, is void, under the Statute of Frauds. *Botting* v. *Martin*, 1 Camp. 318.

Where a person transfers all his interest in a term to another, reserving rent to himself, it does not operate as an assignment, but as an underlease. *Preece* v. *Corrie*, 2 M. & P. 57 ; 5 Bing. 24 ; 6 L. J. (O.S.) C. P. 205 ; 30 R. R. 536. See *Barrett* v. *Rolph*, 14 M. & W. 348 ; 14 L. J., Ex. 308.

One who has a term, which expired on the 11th November, let the premises orally from the 11th September to the 11th November for 270*l.* payable immediately :—Held, that this was a lease of which parol evidence might be given, and not an assignment requiring a writing. *Ib.*

L., being seised in fee, demised to B. for twenty-one years from June, 1814 ; B. demised to M. for twenty-one years from June, 1814, wanting twenty-one days, and then by deed-poll granted to L. the indenture of lease to M., the premises thereby granted, and the rent reserved, to hold to L., his executors, &c., for the term mentioned in the demise to M. ; L., by lease and release, conveyed the premises, the reversion and reversions, rents, issues and profits, and all his interest in fee, to the plaintiff by way of mortgage ; M. assigned his term to the defendant by way of mortgage, but the defendant never entered :—Held, that the conveyance in fee from L. to the plaintiff passed the chattel interest created by B., as well as the fee, and that it was well described in the declaration as an assignment of the chattel interest. *Burton* v. *Barclay*, 7 Bing. 745 ; 5 M. & P. 785 ; 9 L. J. (O.S.) C. P. 231.

A lessee for years under-demised for a term longer than the residue held by him, the underlessee covenanting to pay to the lessee, his executors and administrators, the yearly sum of 75*l.*, by quarterly payments :—Held, that notwithstanding the instrument amounted to an assignment, inasmuch as all the lessee's term was thereby conveyed, an action of covenant lay at the suit of the executor of the lessee, to recover arrears of this rent accruing during the continuance of the lessee's term. *Baker* v. *Gostling*, 4 M. & Scott, 539 ; 1 Bing. (N.C.) 19 ; 3 L. J., C. P. 292.

A parol assignment by a sheriff of a leasehold seized by him under a fi. fa. is void by the Statute of Frauds, even although the assignee has paid rent to the head landlord. *Doe* d. *Hughes* v. *Jones*, 9 M. & W. 372 ; 1 D. (N.S.) 352 ; 12 L. J., Ex. 265 ; 6 Jur. 302.

H. was tenant under an agreement for a lease. K. wrote to him "I propose to purchase your interest" on certain terms. "I am to have all the benefit and advantage of the agreement under which you hold said houses and premises from, &c., and which agreement you are to hand over to me." H. wrote at the foot, "I agree to the foregoing.—H." Afterwards K. wrote to the landlord a letter, in which after stating that he had purchased H.'s interest, he said, "I herewith, on my own part, agree to carry out all the agreements and arrangements entered into by H. in said letter of arrangement with you, a copy of which arrangement is at foot." K. went into possession and paid the rent until his death :—Held, that the former letter did not amount to an assignment of H.'s interest ; that H.'s interest was determined by surrender by operation of law ; that the latter letter contained an express contract by K. to pay the rent for which the assent of the landlord was a sufficient consideration, and which his executor could not get rid of by assigning over. *Doran* v. *Kenny*, Ir. R. 3 Eq. 148.

To constitute an assignment under s. 9 of the Landlord and Tenant Law Amendment Act, 1860, a document must purport to transfer the estate. A mere agreement to transfer is not sufficient. *Ib.*

Of part of Interest only.]—A demise by an assignee of a part of the premises held by him, at a different rent (payable to himself), and for a period longer than his own term, operates in law as an assignment, and may be so treated in pleading. *Wollaston* v. *Hakewill*, 3 Man. & G. 297 ; 3 Scott (N.R.) 593 ; 10 L. J., C. P. 303.

A grant by lessees for lives of all their estate, right, title, interest, &c., in the premises to one and his executors, habendum to him and his executors for ninety-nine years if the lives should so long continue, in as large, ample and beneficial, way, &c., as the grantors, their heirs, &c. :—Held, that it is no assignment of the freehold, and consequently not of the whole interest of the grantors in their lease. *Derby* (*Earl*) v. *Taylor*, 1 East, 502 ; 6 R. R. 337.

—— **Covenant to Pay Rent, whether Divisible —Apportionment.**]—The defendant, being tenant of land under a lease for years granted by the plaintiffs, and containing the usual lessee's covenant to pay rent, assigned all her interest in the term. Subsequently the plaintiffs granted their reversion in part of the demised premises. No rent having been paid by the assignees of the defendant, the plaintiffs sued her for arrears of rent accrued due since the grant of their reversion in part of the premises, the sum claimed being a fair apportionment of the rent in respect of the other part, the reversion of which remained in the plaintiffs :—Held, that the covenant to pay rent was divisible ; that the rent could be apportioned, although the action was founded on a privity of contract only ; and therefore that the plaintiffs were entitled to recover. *Stevenson* v. *Lambard* (2 East, 575 ; 6 R. R. 511) considered. *Swansea Corporation* v. *Thomas*, 52 L. J., Q. B. 340 ; 10 Q. B. D. 48 ; 47 L. T. 657 ; 31 W. R. 506 ; 47 J. P. 135.

Effect of.]—When a lease is held at a full or substantial rent, and contains onerous covenants on the part of the lessee, an assignment (free from actual fraud) to an assignee, who subjects himself to the performance of the covenants, is not voluntary. *Greer, In re*, Ir. R. 11 Eq. 502.

For Immoral Purpose.]—A lessee of a house which, to his knowledge, had for many years been used as a brothel, assigned the lease absolutely, knowing that the assignee intended to use the house for the same purpose. The original lease contained covenants to deliver up at the

end of the term, in good repair, and not to use the house as a brothel; and the assignment contained a covenant to indemnify the lessee from the covenants in the lease. The lessee, having been compelled to pay for dilapidations at the end of the lease, sought to recover the amount from the estate of the assignee, which was being administered in equity:—Held, that the assignment, and everything arising out of it, were so tainted with the immoral purpose, that the lessee could not recover. *Smith* v. *White*, 35 L. J., Ch. 454; L. R. 1 Eq. 626; 14 L. T. 350; 14 W. R. 510.

Evidence of Indorsement on Lease.]—An assignment of a term to the defendant of certain premises indorsed on the back of the lease, which was executed by the plaintiff, but not by the defendant, is evidence for the plaintiff to shew that he has performed his part of an agreement to assign the lease. *Hawkins* v. *Sherman*, 3 Car. & P. 459.

Condition Precedent.]—A., the defendant in an action as alien, in consideration of B.'s withdrawing the record, undertook to pay B. certain moneys, B. undertaking to discharge A. from liability to the covenants of the lease, upon his assigning all his interest in the lease:—Held, that the assignment of the lease was not a condition precedent to the discharge; and that, therefore, in an action against B. on the contract, it was not necessary to aver that the defendant had assigned. *Phelps* v. *Protheroe*, 16 C. B. 779; 3 C. L. R. 906; 24 L. J., C. P. 225; 1 Jur. (N.S.) 1170.

c. On Death.

Personal Representatives.] — In a case of tenancy from year to year, the personal representatives of the tenant have the same interest in the land which he had. *Doe* d. *Shore* v. *Porter*, 3 Term Rep. 13; 1 R. R. 626. S. P., *James* v. *Dean*, 15 Ves. 241; 8 R. R. 171.

Where a tenant is in possession under an agreement, which is a mere agreement for a lease until his death, his interest is then determined; and the lessor may maintain ejectment against his executrix, who has possessed herself of the premises. *Doe* d. *Bromfield* v. *Smith*, 6 East, 530; 2 Smith, 570.

The executor of a lessee cannot be made liable as assignee of a term without an entry and an actual taking possession by him of the demised premises; but if he enter and take possession he may be made liable as assignee, though, by proper pleading, he may limit such liability for rent to the yearly value which the premises might have yielded. *Rendall* v. *Andrew*, 61 L. J., Q. B. 630.

In an action charging the defendant in his own character, who was an administrator of the original lessee, for rent due after the intestate's death:—Held, that although the defendant had taken possession, yet, having proved that the premises had been productive of no profit to him and that, eight months after the death of the intestate, he had offered by parol to surrender them to the plaintiff, such proof constituted a good defence to the action. *Remnant* v. *Bremridge*, 2 Moore, 94; 8 Taunt. 191; 19 R. R. 495.

An executor who has occupied premises held by his testator under a lease, which covenants for payment of rent and taxes, and to keep the premises in repair, sued as assignee, in respect of the privity of estate, is liable on the covenant for payment of rent and taxes to the extent only of the profits, but, for a breach of the covenant to repair, he is liable to the same extent that any other assignee is liable. *Tremeere* v. *Morrison*, 4 M. & Scott, 603; 1 Bing. (N.C.) 89; 3 L. J., C. P. 260.

Semble, that an offer by an executor to a lessor to surrender to him a lease granted to his testator is an answer to an action against him as assignee for breaches of a covenant to repair, as to all breaches accruing after that offer. *Reid* v. *Tenterden* (*Lord*), 4 Tyr. 111.

To an action for rent against an assignee of a term, he pleaded that he was administrator; that the premises were of less value, and had yielded less profit than the arrears of rent; that he had paid over to the plaintiff all the profit received from them, and had offered to surrender before any rent became due, and had fully administered:—Held, that the averment in the plea as to the value of the premises was not supported by showing that the intestate had underlet them, and that the defendant had been unable to get the rent from the under-tenant; or by proof that they were out of repair, as the lease to the intestate contained a covenant to repair, and it was therefore the defendant's duty to repair them. *Hornidge* v. *Wilson*, 3 P. & D. 641; 11 A. & E. 645; 9 L. J., Q. B. 72.

Where a lease for years, by which the rent reserved is more than the value of the premises, vests in an executor, the executor is liable as assignee, for the amount of rent for which the premises could have been let. *Hopwood* v. *Whaley*, 6 C. B. 744; 6 D. & L. 342; 18 L. J., C. P. 43; 12 Jur. 1088.

A bill for an account of dilapidations was filed by the reversioner of a lease against the personal representatives of a person whose interest in the lease appeared to be that of equitable tenant for life, with remainders over, alleging that such person in his lifetime was in possession, during which time the dilapidations accrued; that he paid rent, and was liable to the covenants in the lease, and that on his death the defendant entered into possession as his administrator, paid rent, and became liable under the covenants:—Held, that there was not a sufficient allegation of debt to support the bill. *Arkwright* v. *Colt*, 2 Y. & Coll. C. C. 4; 6 Jur. 941.

Executor de son tort.]—Where a lessee died intestate during the term, and his widow entered and paid rent, and afterwards her son-in-law took the premises with the assent of the landlord, and paid rent, and continued to occupy during the remainder of the term:—Held, first, that, there being no assignment in writing, he was not chargeable as assignee in fact. *Paull* v. *Simpson*, 9 Q. B. 365; 15 L. J., Q. B. 382; 11 Jur. 13.

Held, secondly, that he could not be considered an assignee in law, for, though the widow might have been chargeable as executrix de son tort, the defendant had not made himself executor de son tort by taking the premises after her. *Ib.*

Plene administravit.]—In an action by the plaintiff, as executor of an original lessee, against the executor of the assignee of the lease, upon a covenant by the assignee to indemnify the lessee against breaches of the covenants in the original lease, the defendant, under plene administravit, is protected by proof that he sold the lease in

question, and had exhausted all the assets in his hands, by payment of simple contract debts, before the breaches of covenant declared on were committed. *Collins* v. *Crouch*, 13 Q. B. 542 ; 18 L. J., Q. B. 209 ; 13 Jur. 361.

Assignment by Executors—Premium — Personal Liability.]—When executors received a premium upon the assignment of a lease and paid the amount into their testator's estate :—Held, that they were not personally liable for rent accrued due after the assignment in respect of the premium so paid in. *Goodland* v. *Ewing*, 1 Cab. & E. 43.

d. Liabilities Under.

i. *Of Lessee.*

For Rent and on Covenants.]—The lessee under express covenant to pay the rent and perform the covenants is liable during the whole term, notwithstanding assignments. *Staines* v. *Morris*, 1 Ves. & B. 9.

A common assignment by a lessee without acceptance of rent from the assignee to the lessor, or some other evidence of his assent, is not sufficient (though the lessor has notice) to discharge the lessee from an action of debt. *Wadham* v. *Marlowe*, 4 Dougl. 54 ; 1 H. Bl. 438, n. ; 2 Chit. 600 ; 8 East, 314 ; 9 R. R. 456.

A lessee cannot plead to an action on a covenant for rent an assignment and tender by the assignee. *Orgill* v. *Kemshead*, 4 Taunt. 642 ; 13 R. R. 712.

It is no defence to an action on an indenture of lease by the trustee of a party who has become bankrupt, that the lessees have performed their covenants with the assignees of the cestui que trust. *Britten* v. *Perrott*, 2 C. & M. 597 ; 4 Tyr. 473 ; 3 L. J., Ex. 181.

A lessee of a messuage and premises for a term of years assigned the unexpired residue to one who was afterwards adjudicated bankrupt under the act of 1869. The trustee in bankruptcy disclaimed the lease :—Held, that the lessor could maintain an action on the covenants in the lease against the lessee for the rent which became due between the adjudication and the disclaimer. *Smyth* v. *North*, 41 L. J., Ex. 103 ; L. R. 7 Ex. 242 ; 20 W. R. 683.

An account of rent decreed, under the circumstances, against the personal representatives of a lessee who had assigned his interest. *Trant* v. *Bury*, Ll. & G. t. Sugd. 78.

No equity in favour of a lessee of a house liable to repair, with the exception of damage by fire, for an injunction against an action under the contract for payment of rent upon the destruction of the house by fire. *Holtzapffel* v. *Baker*, 18 Ves. 115.

A lessee, by his lease had covenanted to pay rent, to insure, repair, &c., and died, leaving several years of his lease to run, but none of the covenants had been hitherto broken :—Held, that the lessor was not entitled to have any portion of the assets brought into court as a security for the performance of the covenants in the lease. *King* v. *Malleott*, 16 Jur. 237.

—— **Surrender of Part of Premises by Assignee.**]—The plaintiff demised premises to the defendant for a term of years by deed containing a covenant by the defendant for the payment of the rent reserved. The defendant assigned the term, and his assignee surrendered a portion of the premises to the plaintiff. In an action on the covenant the plaintiff claimed to recover the amount of the apportioned rent for the part of the premises not surrendered :—Held, that the liability of the defendant on the covenant was not extinguished by the surrender of part of the demised premises, but he still remained liable thereon, at any rate to the amount claimed. Quære, whether he remained liable to the extent of the whole of the rent originally reserved. *Baynton* v. *Morgan*, 58 L. J., Q. B. 139 ; 22 Q. B. D. 74 ; 37 W. R. 148 ; 53 J. P. 166—C. A.

—— **Non-execution of Lease by Lessor — Assignment before Accrual of Rent due.**]—In March, 1884, a lease from the plaintiff to the defendants, of premises at the yearly rent of 60*l.*, and containing a covenant to pay such rent, was executed by the defendants, but not by the plaintiff, in whose possession the document remained. The defendants went into possession under the lease, and paid two quarters' rent up to the 29th September, 1884. The defendants afterwards proposed to surrender the lease, or to assign their interest in it to one P., and that he should be accepted as tenant in their stead, and that they should be discharged from further liability under the lease. Both these propositions were rejected by the plaintiff. It was, however, agreed that the lease should be altered by making the rent payable in advance, and it was re-engrossed, expressed to bear date the 18th October, 1884, and executed by the defendants on the 11th December, 1884, on which day they executed an assignment of it to P., who paid rent up to the 25th March, 1885. The plaintiff did not execute the lease till the 26th April, 1886, when he executed it in the absence of the defendants, and the lease remained throughout in the plaintiff's possession. In an action to recover one year's rent, up to the 25th March, 1886, sued for upon the covenants in the lease of the 18th October, 1884, and in the alternative upon a yearly tenancy, the jury found that the plaintiff had not agreed to discharge the defendants from rent to accrue after the assignment to P., and that the alteration in the lease, making the rent payable in advance, had been made with P.'s consent. The judge at the trial thereupon directed a verdict for the plaintiff :—Held, that the direction was right. *Babington* v. *O'Connor*, 20 L. R., Ir. 246.

—— **Assignment of Term and of Reversion —Privity.**]—S. made a parol demise of a tenement to M. from year to year at a rent. M. by deed assigned all his estate, interest, and term in the tenement to a third party, but S. refused to accept the third party as his tenant. Afterwards S. assigned his reversion to the plaintiffs, who never accepted the third party as their tenant, and brought an action against M. for rent in arrear : — Held, that as no estate remained in M. after his assignment of his yearly tenancy, the statute 4 Anne, c. 16, s. 9, did not apply ; that there was no privity of estate or of contract between the plaintiffs and M., and therefore the action could not be maintained. *Allcock* v. *Moorhouse*, 9 Q. B. D. 366 ; 47 L. T. 404 ; 30 W. R. 871 ; 47 J. P. 85—C. A.

Duty to deliver Lease.]—On a contract in a letter of the defendant assented to by the plaintiffs, to take a farm off their hands, provided he was accepted by their landlord on the covenants

in their lease :—Held, that they were bound to procure and deliver to him the lease, and it having been deposited as security for a loan, and they not having procured it, the plaintiffs were nonsuited. *Barton* v. *Banks*, 2 F. & F. 213.

ii. *Of Assignee.*

Generally.]—The executor of an executor de son tort may become himself executor de son tort in respect of the estate of the original intestate ; and where the father was executor de son tort with regard to a lease, and the son upon his death acted as agent to the mother till her death, and then continued in possession of the lease for the benefit of himself and the other children :—Held, that he became assignee of the lease, and liable upon the covenants therein. *Williams* v. *Heales*, 43 L. J., C. P. 80 ; L. R. 9 C. P. 177 ; 30 L. T. 20 ; 22 W. R. 317.

The plaintiff, in consideration of 530*l.* to be paid by A., demised to him premises for the term of fifty-five years at the yearly rent of 84*l.*, and subject to covenants to repair, &c. The consideration not having been paid, A. assigned to the plaintiff the residue of the term then unexpired, subject to the rent and covenants, and with a power of sale. In pursuance of that power the plaintiff, in consideration of 500*l.*, "bargained, sold, assigned, transferred and set over to the defendant the premises, to hold for the residue of the term of fifty-five years," subject to the yearly rent of 84*l.*, and the covenants contained in the lease, to A. ; and the defendant covenanted to pay the rent and perform the covenants. The defendant having entered on the premises :—Held, that, although the mortgage by A. operated as a merger of the term originally granted, yet the assignment by the plaintiff to the defendant created a new lease for the residue of the unexpired term, and consequently the defendant was liable on the covenants. *Cottee* v. *Richardson*, 7 Ex. 143 ; 21 L. J., Ex. 52.

The plaintiff being the lessee of premises assigned to A. B., who assigned to the defendants, who committed breaches of the covenant in the lease, and then assigned over. The plaintiff was subsequently sued by the lessor for the breaches of covenant committed while the defendants were assignees. He sued defendants for the amount which he had had to pay the lessor in respect thereof :—Held, per Channell, B., and Pigott, B. (dissentiente Cleasby, B.), that he was entitled to recover. Per Cleasby, B.—That he was not entitled to recover, there being no privity between him and the defendants. *Mule* or *Moule* v. *Garrett*, 39 L. J., Ex. 69 ; L. R. 5 Ex. 132 ; 22 L. T. 343 ; 18 W. R. 697. Affirmed, 41 L. J., Ex. 62 ; L. R. 7 Ex. 101 ; 26 L. T. 367 ; 20 W. R. 416—Ex. Ch.

An assignee of a lease, containing covenants running with the land, is liable, after he has assigned over, for a breach incurred after the assignment to him, and before his assignment over. *Harley* v. *King*, 2 C. M. & R. 18 ; 1 Gale, 100 ; 5 Tyr. 692 ; 4 L. J., Ex. 144.

In an action against an assignee of a lease, the locality of the premises not being stated in the declaration, the question of venue does not arise at the trial on a denial of the lease. Some only of the lessees having executed the assignment, but the defendant and another assignee having executed, and the other having entered :—Held, that the defendant, on a plea denying that the estate of the lessees had come to him, was liable as assignee. *Electric Telegraph Co.* v. *Moore*, 2 F. & F. 363.

There is no fraud in the assignee of a term assigning over his interest to whom he pleases, with a view to get rid of a lease, although such person neither takes actual possession nor receives the lease. *Taylor* v. *Shum*, 1 Bos. & P. 21 ; 4 R. R. 759.

In 1762 a lessor, having only an equitable estate in a field, demised a portion of the field to a lessee for 99 years. In 1773 the lessor, having acquired the legal estate in the field, demised the residue of the field to the lessee for the same term, by an indenture, which recited the former lease, stipulated for its continuing in force, but provided that no more rent should be paid for the entire field than was paid for the first portion, and that the rent to be paid for the entire field was meant to be the same as that reserved for the first portion :—Held, that the assignee of the reservation could not sue the assignee of the lessee upon the covenants in the lease of 1762. *Whitton* v. *Peacock*, 2 Scott, 630 ; 2 Bing. (N.C.) 411 ; 5 L. J., C. P. 124.

Covenants which wait on the estate are void in their creation if no estate passes by the deed ; so if the estate be evicted or surrendered they become void ; and of this description are all covenants in leases, which in any way relate to the land demised. By 32 Hen. 8, c. 34, and 10 Car. 1, c. 4, s. 2, it is now clearly settled, that to charge any person in covenant as an assignee, 1. The covenant must relate to the land demised, and 2. There must be a privity of estate between the assignee and the covenantee, and if he is to be charged as assignee of the lessee, he must have in him the whole term and interest of the lease. So, if the subject-matter of a covenant running with the land has existence at the time of the demise, the assignee is bound, though he be not named ; but a covenant in a lease can only affect assignees claiming subsequent to the lease. *Chandos* v. *Brownlow*, 2 Ridgw. P. C. 406, 412.

The lessees of a colliery having agreed to grant to the lessee of a neighbouring colliery, licence to use a right of way enjoyed by the former, and the owner of the first colliery having granted to the second lessees the same right of way during a term of years, and afterwards, by assignment from the first lessees, become possessed of the first colliery, and the right of way, an injunction was granted to restrain removing the materials, and destroying the way. *Newmarch* v. *Brandling*, 3 Swanst. 99.

Assignee of leaseholds accepting the benefit of an assignment, held in equity liable to the covenants on his part contained in the assignment, though he did not execute it. *Willson* v. *Leonard*, 3 Beav. 373.

The motive which may have induced the assignee of a lease to part with his interest is not sufficient to make the assignment by him fraudulent, if that assignment be real, and intended to operate as it appears to operate. Thus where the assignee of an equitable term, which had been granted subject to the repayment on a certain day of a sum chargeable on the lessee by the original agreement, and which it seemed might have been claimed against the assignee in possession, assigned it before such day arrived to a person in poor circumstances :—Held, that such assignment was valid, and that the first assignee was discharged from liability. *Fagg* v. *Dobie*, 3 Y. & Coll. 96 ; 2 Jur. 681.

—— **Pleading.**]—Semble, that in a declaration charging the assignee of a lease at the suit of the lessor, the entry of the lessee is a material averment and traversable. *Wiggins* v. *Masson*, 6 L. J. (O.S.) K. B. 93.

In a declaration by the executors of one of several lessors against the assignee of the lease, it is necessary for the plaintiffs to shew what estate their testator had in the premises, although the covenant was with their testator alone; for the assignee is chargeable only by reason of the privity of estate and not by reason of any privity of contract. *Ib.*

For Rent.]—In an action against the assignee of a lessee pur autre vie for rent which accrued due after the assignment, if the defendant is entitled to plead that he is only as heir, and that the estate of the lessee was of less value than the rent reserved, he ought to aver that this was so down to the time of the commencement of the action. *De la Poer* v. *Kirwan*, Ir. R. 9 C. L. 519.

In an action for rent against an assignee, he traversed an averment in the plaint that all the estate of the original lessee in the premises vested in him; and, issue having been joined on that traverse, he proved that he was assignee of part of the demised premises in severalty and of part as tenant in common with another person: —Held, that the verdict on such an issue should be entered for him. *Orme* v. *Wills*, 2 L. R., Ir. 124.

The assignee of a lease for years, who has assigned over, is discharged from the covenant to pay rent before the entry of his assignee. *Walker* v. *Reeve*, 3 Dougl. 19; 2 Dougl. 461, n.

An assignee is not liable for rent accruing after an assignment, even though such assignment is wrongful. *Paul* v. *Nurse*, 2 M. & Ry. 525; 8 B. & C. 486; 7 L. J. (O.S.) K. B. 12.

In an action on a covenant for rent against an assignee, an assignment to a feme covert before the rent accrued is a good plea in bar. *Barnfather* v. *Jordan*, 2 Dougl. 452.

A. being assignee of a lease, put it up by auction; B. became the purchaser, paid a deposit, and ordered an assignment to him to be prepared by A.'s solicitor, which was accordingly prepared and executed by A.; but, instead of its being delivered to B., it remained in the possession of the solicitor, who claimed a lien for the expense of preparing it:—Held, that to an action against A. as assignee of the term, for rent accruing due after he had executed the assignment, these facts were sufficient to support a plea, that before the rent became due he had assigned to B. *Odell* v. *Wake*, 3 Camp. 394; 14 R. R. 763.

An assignee who takes leasehold premises by an indenture indorsed on the lease, subject to the payment of the rent and the performance of the covenants and agreements reserved and contained in the lease, is not liable in covenant to the lessee, for rent which the lessee has been called on by the lessor to pay after the assignee has assigned over. *Wolveridge* v. *Steward*, 1 C. & M. 644; 3 Tyr. 637; 3 M. & Scott, 561; 3 L. J., Ex. 360—Ex. Ch.

If the original lessee is obliged to pay ground-rent, he may recover it from the assignee in possession. *Stone* v. *Evans*, Peake, Ad. C. 94.

An annuitant, taking an assignment of a lease of the lands on which the annuity is charged, cannot, in an ejectment brought by the landlord, the grantor of the annuity, for nonpayment of rent, offer his annuity deed as evidence of payment of the rent, nor set off arrears of the annuity against the rent due. *Irnham* (*Lord*) v. *Luttrell*, Wall. Lyn. 243.

Assignee of lease rendering rent assigns over; he is liable in equity for rent during time he enjoyed the land. *Treackle* v. *Coke*, 1 Vern. 165. And see *Close* v. *Wilberforce*, 1 Beav. 112.

Equity will decree the assignee of a lease to pay the rent become due since his assignment, and which shall become due while he continues in possession, but not during the continuance of the lease; for he may, if he can, get rid of the lease, by assigning it to another. *Richmond* v. *London City*, 1 Bro. P. C. 516.

As at law an assignee of a term may assign, and thereby get rid of his subsequent rent and the covenants which run with the land, a fortiori he may do so in equity. *Valliant* v. *Dodemede*, 2 Atk. 546.

Where assignees have accepted the lease, they may, by assigning it to an insolvent person, exonerate themselves from future claim for rent, their liability ceasing with their possession. *Onslow* v. *Corrie*, 2 Madd. 330.

The assignee of a lease may get rid of his liability by assigning it again. *Rowley* v. *Adams*, 4 Myl. & C. 534; 9 L. J., Ch. 34; 2 Jur. 915; 3 Jur. 1069.

—— **Payment of whole Rent by Assignee of Part of Land—Right of Contribution.**]—A lessee of land assigned part of the land to A. for the residue of the term, and other part to B. for the residue of the term, less ten days, at apportioned rents, covenanting in both cases to pay the rent due to the original lessor and to indemnify. The lessee having become bankrupt, A., on the application of the lessor and on threat of distraint, paid the whole rent under the original lease:—Held, that as A. and B. were not liable to a common demand and there being no one entitled to sue B. for his share of the rent, A. had no right of contribution as against B. *Johnson* v. *Wild*, 59 L. J., Ch. 322; 44 Ch. D. 146; 62 L. T. 537; 38 W. R. 500.

For Repairs.]—On a covenant by a lessee, not naming assignee, to repair and yield up in repair all buildings and erections, an assignee is liable in respect of the non-repair of buildings erected during the term. *Minshull* v. *Oakes*, 2 H. & N. 793; 27 L. J., Ex. 194; 4 Jur. (N.S.) 170.

A covenant to yield up in repair at the end of a term runs with the land, and binds an assignee though not named. *Martyn* v. *Clue*, 18 Q. B. 661; 22 L. J., Q. B. 147.

An action cannot be supported against the assignee of a lease, in which the lessee covenanted, from time to time, and at all times during the term, when need should require, sufficiently to repair the premises, with all necessary reparations, and to yield up the same so well repaired at the end of the term, in as good condition as the same should be in when finished under the direction of M., upon a breach that he suffered the premises to become and be in decay and ruinous during a large part of the term, and after the term wrongfully yielded them up in much worse order and condition than when the same were finished under the direction of M. *Jones* v. *Hill*, 7 Taunt. 392; 1 Moore, 100.

Where, in an action of covenant against an assignee of a lease, the plaintiff declared that all the right, &c., vested in the defendant by assignment, and that afterwards the premises

were out of repair, and the defendant pleaded that for one period he was possessed of one-sixth of the premises as tenant in common with A., B. and C., and for another period of one-third as tenant in common with B. and C., and that no more or greater interest in the premises ever came to him by assignment:—Held, that the plea was bad in substance, as it could not be a bar to the whole action. *Merceron* v. *Dowson*, 5 B. & C. 479; 8 D. & R. 264; 4 L. J. (O.S.) K. B. 211.

A lessee by deed-poll assigned his interest in the demised premises to A., subject to the payment of rent and the performance of the covenants contained in the lease. A. took possession, and occupied the premises under this assignment, and before the expiration of the term assigned to a third person. The lessor sued the lessee for breaches of covenant committed during the time that A. continued assignee of the premises, and recovered damages against the lessee:—Held, that the lessee might maintain an action upon the case founded in tort against A. for having neglected to perform the covenants during the time he continued assignee, whereby the lessee sustained damage. *Burnett* v. *Lynch*, 5 B. & C. 539; 8 D. & R. 368; 4 L. J. (O.S.) K. B. 274; 29 R. R. 343.

Baron and feme granted a watercourse through the feme's lands, with covenants for them, their heirs and assigns, to cleanse and keep it in repair, and suffer a common recovery to establish the grant:—Held, not a personal covenant as to the baron and feme, but a covenant which runs with the lands, and shall bind the assignees, being made good by the recovery. *Holmes* v. *Buckley*, Pre. Ch. 39.

Where a lessee, who was bound by a covenant to repair premises demised to him, underlet part of them with a similar obligation by his tenant to repair them within three months after notice given to him for that purpose; and the premises underlet becoming out of repair, the superior landlord gave notice to his immediate tenant to repair them at the peril of forfeiting his lease; and the under-tenant, after receiving notice to repair, neglected to do so within three months, whereupon the lessee, in order to avoid a forfeiture of his whole estate, entered on the premises, and put them into a tenantable repair:—Held that his under-tenant was liable to pay him the whole expense so incurred, although the former had sold his interest in the premises to a purchaser, who had entirely rebuilt them before the action for the recovery of such expense was brought. *Colley* v. *Streeton*, 3 D. & R. 522; 2 B. & C. 273; 2 L. J. (O.S.) K. B. 25; 26 R. R. 350.

Where an assignee of an under-lease containing a covenant to repair, suffered the premises to go out of repair, and the original lessor brought an action against the original lessee for the breach of a similar covenant contained in his lease:—Held, that the damages and costs of that action, and also the costs of defending it, might be recovered as special damages, in an action against the under-tenant for the breach of his covenant to repair; because, during the term of the under-lessee, he could not have entered for the purpose of repairing without making himself a trespasser. *Neale* v. *Wyllie*, 5 D. & R. 442; 3 B. & C. 533; 27 R. R. 418.

A. agreed to take an assignment of a lease of a house which was out of repair from B., and it was stipulated that all outgoings should be paid by B. up to the 23rd April; and by an assignment indorsed on the lease (executed by B. but not by A.), B. assigned the residue of the term, subject to the performance of all the covenants in the lease, which, from the 22nd day of April, ought to be observed on the part of the tenant. The lease contained a covenant to keep the premises in repair, and so to deliver them up; and after the assignment the reversioner sued B., and recovered for dilapidations which occurred before April 22nd:—Held, that B. could not maintain an action against A. for these dilapidations, even though it could be proved that A. gave a smaller price, because the premises were out of repair. *Hawkins* v. *Sherman*, 3 Car. & P. 459.

As to measure of Damages *see further*, post, M. 3, *g.* (cols. 1129 et seq.)

On Covenants not Running with the Land.]—The assignee of a lease is not liable to the original lessor for the breach of a covenant which does not run with the land, unless he is expressly named in the lease as a covenantor. *Grey* v. *Cuthbertson*, 2 Chit. 482; 4 Dougl. 351.

Nor is he liable for a breach in the lessee's time when he comes into possession afterwards. *St. Saviour's, Southwark*, v. *Smith*, 3 Burr. 1271; 1 W. Bl. 351.

On Covenant to Indemnify.]—The lessee of coal mines, for a term of years, by indenture assigned the same for the residue unexpired of the term to the defendant, who thereby covenanted with the lessee to pay the rents, &c., by the original indenture reserved, so long as the defendant should be in possession, or receipt of the rents, produce and profits of the premises, and at all times effectually to keep harmless and indemnified the lessee from and against all the rents, covenants, &c., of the original lease, and against all actions in respect of the same. To a declaration assigning as a breach nonpayment by the defendant of rents due whilst he was in possession or receipt of the rents, produce and profits, per quod the lessee was forced to and did pay the rents, and was put to great charges together with a breach of the covenant to indemnify the lessee against the consequences of such nonpayment by the defendant; plea, that the defendant was not in possession when the rents became due:—Held, that the restrictive words "so long as the defendant should be in possession or receipt of the rents, produce and profits," contained in the first covenant, did not extend to the covenant to indemnify, and that such a plea was no answer to the breach to that covenant. *Crossfield* v. *Morrison*, 7 C. B. 286; 18 L. J., C. P. 135; 13 Jur. 565.

In a suit by an assignor of a lease claiming from his assignee indemnity in respect of breaches of the covenants in the lease, the court will direct merely payment on account of breaches of covenant already committed, and will not make a general declaration of the assignor's right to indemnity, giving liberty to apply from time to time in case of future breach. *Lloyd* v. *Dimmack*, 47 L. J., Ch. 398; 7 Ch. D. 398; 38 L. T. 173; 26 W. R. 458.

Under a covenant to indemnify against all claims in respect of the covenants of a lease, costs properly incurred in reasonably defending an action brought for a breach of one of the covenants are recoverable as damages. *Murrell* v. *Fysh*, 1 Cab. & E. 80.

Assignee or Under-tenant—Question for Jury.]—If a person has held under the terms of a lease, and holds over after the lease is at an end, he is bound by the terms of it, although no new bargain to that effect is entered into between the parties; but if he comes in as an under-tenant, before any lease was granted to the person of whom he took the premises, and that person afterwards takes a lease, if there is no evidence that he knew of the lease, it will be for the jury to say whether he is an under-tenant, and not an assignee of the lease. *Torriano* v. *Young*, 6 Car. & P. 8.

An under-tenant of a part of the lands demised, subject to the payment of rent to the immediate lessee, is not in the eye of the law an assignee of such immediate lessee. *Berney* v. *Moore*, 2 Ridgw. P. C. 323.

Assignee or Owner.]—A railway company, having purchased and taken an assignment of the interest of a leaseholder in premises, also took, under their compulsory powers, the interest of the freeholder in the same premises, and paid the amount of the valuation of such interest, and compensation for injuriously affecting the other adjacent property of the freeholder, into court. The freeholder, afterwards objecting to the formation of a coal depôt on the premises which had been so taken, not having executed any conveyance of the property to the company, brought an action against the company, treating the company as assignees of the lease, for damages, upon the covenants therein; but the court restrained the action, without prejudice to any proceedings against the company, in which their title as owners of the land should be admitted. *East and West India Docks and Birmingham Junction Ry.* v. *Dawes*, 11 Hare, 363.

iii. *Equitable Assignee.*

On Covenants.]—The equitable assignee of an under-lease is clothed with the obligation to perform the covenants in the under-lease, though he is himself the original lessor, and cannot set up the non-performance of those covenants against his lessee, as a ground for refusing the performance of a covenant in the original lease. *Jenkins* v. *Portman*, 1 Keen, 435; 5 L. J., Ch. 313.

Assignee of a personal contract for a liberty of bringing water to the city of London chargeable in equity with the covenants in the original lease or contract, as an equitable assignee upon an equitable privity of estate, like the assignee of a bond. *London City* v. *Richmond*, Pre. Ch. 156; 2 Vern. 421.

Equitable assignee of leaseholds held liable at the suit of the lessee, after the expiration of the term, to the breaches of covenant committed during his possession, although such lessee was no party to the contract for purchase, and it was stipulated that the purchaser should not be entitled to an assignment. *Close* v. *Wilberforce*, 1 Beav. 112; 8 L. J., Ch. 101; 3 Jur. 35.

Parties acquiring under the Enfranchisement Acts copyhold lands under lease shall be deemed to have acquired the reversion thereon and be entitled to distrain and sue upon the covenants. *See* 6 & 7 Vict. c. 23, ss. 9 & 10. Liability of an equitable assignee of leaseholds, in possession, to the covenants in the lease. *Sanders* v. *Benson*, 4 Beav. 350.

The liability of an equitable assignee of leaseholds is that of simple contract, and the Statute of Limitations limits his liability to six years after the cause of suit. *Ib.*

The bill, which was a creditor's bill, stated that A. had been in possession, as equitable tenant for life under a settlement, of a leasehold estate, of which the reversion was in the plaintiff, that A. had paid rent during his life, and had become liable for the covenants in the lease, without saying how, and that his administrator had since his death entered into possession of the leasehold, and had paid rent. The bill asked for payment of dilapidations, out of A.'s estate:—Held, on demurrer, that there was no sufficient allegation of debt. *Arkwright* v. *Colt*, 2 Y. & Coll. C. C. 4; 6 Jur. 941.

An agreement to take an assignment of a lease followed by possession on the part of the equitable assignee is not sufficient to give the lessor any right to sue the equitable assignee in equity on the covenants in the lease. *Cox* v. *Bishop*, 8 De G. M. & G. 815; 26 L. J., Ch. 389; 3 Jur. (N.S.) 499; 5 W. R. 437.

The relation between landlord and tenant is legal and not equitable. *Ib.*

Assignee of leasehold accepting the benefit of an assignment:—Held, in equity liable to the covenants on his part contained in the assignment, though he did not execute it. *Wilson* v. *Leonard*, 3 Beav. 373.

—— **Indemnity to Assignor.**]—The equitable assignee of a lease by contract with a prior assignee, to which the original lessee was not a party, and which stipulated that the purchaser under it should not be entitled to call for a legal assignment having been in possession under such contract:—Held, liable to indemnify the lessee, after the expiration of the term, for breach of covenant committed whilst he, the equitable assignee, was in possession. *Close* v. *Wilberforce*, 1 Beav. 112; 8 L. J., Ch. 101; 3 Jur. 35.

For Rent.]—Lease of a coal mine to A., reserving a rent. A., the lessee, declares himself a trustee for five persons, to each a fifth. The five partners enter upon, work, and take the profits of the mine, which afterwards becomes unprofitable and the lessee insolvent. The cestuis que trustent not liable but for the time during which they took the profits. *Clavering* v. *Westley*, 3 P. W. 402.

Legal Assignment of Premises to.]—The defendant having taken a deposit of a lease as a collateral security, decreed to take an assignment. *Lucas* v. *Comerford*, 3 Bro. C. C. 166; 1 Ves. J. 235. *But see* 8 Sim. 499.

iv. *Mortgagee.*

An action of covenant for nonpayment of rent lies against an assignee of a lease to whom an assignment has been made by way of mortgage security, although he has never entered nor taken actual possession. *Williams* v. *Bosanquet*, 3 Moore, 500; 1 Br. & B. 238; 21 R. R. 585.

A mortgagee of a leasehold estate by assignment is liable, so long as he has the legal estate, to perform the covenants of the lease, although he does not take possession. *Stone* v. *Evans*, Peake, Ad. C. 94.

Although it was once held, that if a term was assigned by way of mortgage, with a clause of redemption, the lessor could not sue the mortgagee as assignee of all the estate, right, title, interest, &c., of the mortgagor, even after the

mortgage had been forfeited, unless the mortgagee had taken actual possession. *Eaton* v. *Jacques*, 2 Dougl. 455.

A termor of years in premises belonging to B., mortgaged to C. by way of security for debt, the furniture on the premises with all the freehold hereditaments, goods, and personal property, to which the termor was or might be entitled, except any leaseholds or any portion of the term or terms for which such leaseholds might be holden, which C., by indorsement on the deed, should declare not to be therein included. The mortgage deed was dated 11th March, 1869. A quarter's rent on the premises became due 25th March. C. was apprised for the first time of the lease held by the termor on the 8th July, and at once indorsed the deed to the effect that the lease was not included in it :—Held, in an action for rent by B., that the lease passed under personal property ; that, moreover, the words of the exception evidenced such intention ; that the lease at once on execution of the deed vested in C. ; that C. could not by the indorsement divest himself of it, and so defeat the rights of B., a stranger to the deed. *Debenham* v. *Digby*, 28 L. T. 170 ; 21 W. R. 359.

If a leasehold interest is assigned by way of mortgage, the assignee, unless there is a special provision to the contrary, takes the interest subject to all the covenants and obligations of the original lessee. *Haig* v. *Homan*, 4 Bligh (N.S.) 380.

B. demised, by an instrument not under seal, three windows in a factory to the plaintiff, and stipulated to supply steam power. B. at the time of the demise was mortgagor in possession. His mortgagees sold to the defendant, who did not accept rent from the plaintiff, but continued to supply steam power. Subsequently a dispute arose as to the terms upon which the plaintiff should continue tenant of the defendant, who thereupon cut off the steam power. The plaintiff having sued the defendant for cutting off the steam power :—Held, that no action would lie against him. *Ib.*

A. having taken a lease of a brewhouse, and covenanted to repair, assigns it by way of mortgage to B. ; the premises being out of repair, the lessor brings his bill against B., to compel him to perform the covenant ; B. having never been in possession, the court will not decree him to perform the covenant in specie, but left the plaintiff to recover at law as he could. *Sparkes* v. *Smith*, 2 Vern. 275.

Lease for years, subject to a ground rent, is assigned over by way of mortgage to J. for 100*l.* The mortgagee never entered, and lost the 100*l.* mortgage money, and is sued by the lessor for the ground rent. No relief, it being his own fault to take the mortgage by way of assignment, and not by way of under-lease. *Pilkington* v. *Shaller*, 2 Vern. 374.

If the mortgagee enters into possession, he becomes liable to all covenants that run with the land, for he takes it cum onere ; and enjoying the profits he must submit to the losses. *Traherne* v. *Sadleir*, 5 Bro. P. C. 179.

Mortgagee of a building lease, when the lessee died insolvent, was decreed to build on the ground and not to quit the lease, though content to lose his money. *Anon.*, 2 Freem. 253.

Property described as "all that piece of land, &c., with the messuages and buildings thereon erected," was demised to Z., who covenanted to keep the messuages, &c. in repair. The lease contained a clause of forfeiture on breach of the covenant. Z. mortgaged this and other property, by way of under-lease, to B. The mortgage deed contained a power of sale, and powers enabling B. to expend all moneys to be received by him under the deed in repairs, and a covenant by Z. to indemnify B. against the covenants in the lease until possession taken by him. At the date of the mortgage the buildings on the demised land consisted of carcases of houses only. B. entered into possession of the property comprised in the lease, but neither sold nor completed the houses, which were taken by the original lessor under the clause of forfeiture. On exception to the master's report :—Held, that in taking the accounts B. was liable to Z., and ought to be charged a sum of money in respect of the forfeiture of the lease through his default. *Perry* v. *Walker*, 24 L. J., Ch. 319 ; 1 Jur. (N.S.) 746 ; 3 Eq. R. 721 ; 3 W. R. 314.

v. *Equitable Mortgagee.*

A deposit of a lease by way of equitable mortgage does not render the depositary liable for the rent and covenants. *Moores* v. *Choat*, 8 Sim. 508 ; 8 L. J., Ch. 128 ; 3 Jur. 220. And see *Lucas* v. *Comerford*, 1 Ves. J. 235 ; 3 Bro. C. C. 166 ; restated, 8 Sim. 499 ; 8 L. J., Ch. 131.

An equitable mortgagee by deposit of a lease is not liable to the lessor upon the covenants, there being no privity between him and the lessor until he has made himself legal assignee. *Moore* v. *Greg*, 2 Ph. 717 ; 18 L. J., Ch. 15 ; 12 Jur. 952. Affirming, 2 De G. & Sm. 304.

A lessee of a factory deposited the lease, by way of equitable mortgage, and upon the landlord distraining for rent in arrear, the depositee of the lease paid the rent in arrear to the landlord, entered into possession of the factory, sold some of the machinery, including some fixed to the freehold, and otherwise acted as the owner of the lease, and was accepted by the landlord as such owner :—Held, that the landlord had no equity to compel the depositee of the lease to take a legal assignment of the lease. *S. C.*, 2 De G. & Sm. 334.

Where equitable mortgagee of leasehold property applied for sale, the court refused to order him to indemnify the assignees in bankruptcy against any breach of covenants in the lease ; but gave assignees time to reject or accept the lease. *Fletcher, Ex parte, Collins, In re*, 1 Deac. & C. 318 ; 1 L. J., Bk. 44.

The depositary of a lease for securing a debt is liable to the rents and covenants, although he has not taken possession of the premises. *Flight* v. *Bentley*, 7 Sim. 149 ; 4 L. J., Ch. 262.

An equitable mortgagee of leasehold property must satisfy a distress for rent out of the proceeds of the sale, and can only prove for the deficiency, although occasioned by the payment of the rent. *Cocks, Ex parte*, 3 Deac. & C. 8.

An equitable mortgagee of a lease in possession is liable to the payment of rent, and performance of the covenants reserved by and contained in the lease. *Malone* v. *Geraghty*, 2 Con. & L. 240 ; 3 Dr. & War. 239 ; 5 Ir. Eq. R. 549.

e. Rights under.

Of Lessee—In Respect of Salvage Payment.] —A., being lessee of certain lands under a lease, containing the ordinary covenant by him as

lessee for payment of the rent, which was payable weekly, and a condition of re-entry in case of nonpayment, assigned his interest under the lease to B., who covenanted with A. to pay the rent, and to keep him indemnified against it. B. mortgaged the premises comprised in the lease to C., by way of sub-demise. An arrear of rent becoming due, the lessor compelled A., under his covenant in the lease, to pay the amount in arrear. In an action against B. and the mortgagee, A. sought for a declaration that the sum so paid by him for rent was a salvage payment, and was charged on the premises in priority to the mortgage to C.:—Held, that A. had no interest in the premises authorising him to make a salvage payment, and he had therefore no lien on the premises for the rent so paid by him, and that his only remedy was a personal one against B. *O'Loughlin* v. *Dwyer*, 13 L. R., Ir. 75.

—— **To enforce Collateral Parol Contract.**]—A plaint in the county court stated that the plaintiff assigned to the defendant the agreement for a lease of certain premises, but it was alleged that there was a parol agreement that part of the premises was to be held by the defendant in trust for the plaintiff. Evidence was given on both sides, but the judge, being of opinion that actual fraud had not been proved against the defendant, and there being no resulting trust in the assignment, decided that the Statute of Frauds was applicable, and dismissed the plaint, without coming to any distinct decision upon the evidence:—Held, that the judge ought to have decided that the Statute of Frauds had no application; and the court, upon a consideration of the evidence, decided that the plaintiff was entitled to relief, and reversed the decree. *Booth* v. *Turle*, L. R. 16 Eq. 182; 21 W. R. 721.

—— **On Covenant not to carry on a Particular Trade.**]—A restrictive covenant in an assignment of a lease may be enforced by the covenantee against persons with constructive notice, though he has no reversion. *Clements* v. *Welles*, 35 L. J., Ch. 265; L. R. 1 Eq. 200; 11 Jur. (N.S.) 991; 13 L. T. 548; 14 W. R. 187.

C., being lessee of a house, assigned the lease to W., by a deed by which he covenanted that he, his executors, administrators or assigns, or under-tenants, would not use the premises as a hairdresser's shop. He afterwards under-leased the house, and assigned his reversion. The defendant, having constructive notice of the covenant, purchased the under-lease, and, with the licence of the reversioner, began to use the house as a hairdresser's shop:—Held, that C. was entitled to an injunction to restrain him from so doing. *Ib.*

Of Assignee—To Indemnity from Assignor—Dilapidations.]—On the dissolution of a partnership between H. and R., H. assigned to R. all his interest in two houses belonging to the partnership, held under sub-leases from C. and D., and R. covenanted to pay the rents and observe the covenants and keep H. indemnified against them. R.'s executors sold the house to B., and B. to a company which went into liquidation. The landlords C. and D. thereupon sued H. for the rent, and he paid it for the whole of the year 1882. D. also made a large demand against H. for breaches of covenants to repair, but H. made no payment. On the 15th of March, 1883, D. assigned his reversion to H., and in May, 1883, H. acquired C.'s reversion. In June, 1883, H. bought the leasehold interest in both houses from the liquidators of the company, and covenanted thenceforth to pay the rent and observe the covenants. H. sought to prove against the estate of R. for the sums paid for rent, for the rent payable at Lady Day, 1883, on D.'s house, and for the amount of the dilapidations in that house:—Held, that the right of H., under R.'s covenant of indemnity, to prove for the rents which he had paid, was not taken away by his covenant in the assignment by the liquidators, which could not be extended to rents already due and paid. Further, this right was not defeated on the ground that the right of R.'s representatives, if they paid rent, to recover it from the owner of the lease for the time being, was interfered with by the assignment from the liquidators to H., for that this assignment could not take away any right of action which R.'s executors might have against the persons entitled to the houses at the end of 1882, and that an assignor who pays rent has no lien on the term, and so cannot be prejudiced by its subsequent assignment. Neither was the right defeated on the ground that H. on paying the rent became entitled to a right of distress from the reversioners, which he had destroyed by taking an assignment of the leases, and had therefore discharged the estate of R. by releasing a remedy to the benefit of which R. as a surety was entitled, for that a right of distress is not a security or remedy to the benefit of which a surety paying rent is entitled under the Mercantile Law Amendment Act (19 & 20 Vict. c. 97), s. 5:—Held, therefore, that H. was entitled to prove against R.'s estate for the rent paid in 1882 on both houses, and that he was entitled to prove for the Lady Day rent on D.'s house; but that H. was not entitled to prove for the amount of dilapidations, for that he had sustained no damage by reason of them, inasmuch as he bought the leases from the liquidators at a less price in consequence of the breaches of the covenant to repair; nor for the Lady Day rent of C.'s house. *Russell, In re, Russell* v. *Shoolbred*, 29 Ch. D. 254; 53 L. T. 365—C. A.

—— **On Covenant for Quiet Enjoyment.**]—An action on a covenant for quiet enjoyment may be maintained by the assignee of an assignee of a lessee of a term of years, entered into by the lessee with the first assignee and his assigns, upon the assignment of the term to him. *Lewis* v. *Campbell*, 8 Taunt. 715; 21 R. R. 516.

—— **On Covenant not Running with the Land.**]—When in a lease, the lessee having covenanted to use the demised premises as a public-house, the lessor covenants not to build or keep any house for the sale of spirits or beer within half a mile of the demised premises, the lessor's covenant does not run with the land so as to enable the assignee of the lease to sue him upon it. *Thomas* v. *Hayward*, 38 L. J., Ex. 175; L. R. 4 Ex. 311; 20 L. T. 814.

—— **On Covenant to Repair.**]—*See* post, M. 3.

—— **In Ejectment for Alleged Breach of Covenant.**]—The lessor covenanted, at any time, upon request of the lessee, to cause any quantity of square oak wood to be set out within some part of the lands, that should be wanted for the benefit of the lessee, and to be used in the buildings intended to be made on the demised

premises. And the lessee covenanted to pay and allow to the lessor interest for the total amount or value thereof, after the rate of 4*l.* for the value of every 100*l.*, and so in proportion for a greater or less quantity. On a bill by the assignees of the lease, for an account of what was due to the defendant in respect of the breach of that covenant, and for an injunction to restrain proceedings in ejectment for the recovery of the premises, on the ground of a breach of covenant, a general demurrer for want of equity was over-ruled. *Pearson* v. *Hoghton*, 3 Y. & J. 413.

f. Proof of Assignment.

The plaintiffs declared upon an indenture made by H. to S. of premises, to hold from Midsummer, 1786, for ninety-nine years, deducing their title to the reversion from the lessor by various mesne assignments, and alleging that "all the estate of S., of and in a great part of the premises, with the appurtenances, by asssignment, came to and vested in the defendant, whereupon and whereby the defendant became and was possessed of that part of the premises, and continued so possessed until the commencement of the suit:" and assigned breaches of covenant. The defendant traversed "that all the estate of S. of and in that part of the premises, by assignment, came to and vested in her, as alleged," upon which issue was joined:—Held, that the affirmative of this issue was sustained by proof that the defendant was the executrix of an assignee, though she had never entered or taken the profits. *Wollaston* v. *Hakewill*, 3 Scott (N.R.) 593; 3 Man. & G. 297; 10 L. J., C. P. 303.

Variance in Pleading and Proof.]—In an action for rent on a lease, by the lessor against the assignee of the lessee, the declaration stated that all the estate of the lessee came to and vested in the defendant, which allegation the defendant traversed. The defendant was assignee of only a part of the demised premises:—Held, that there was a fatal variance, and that the issue must be found for the defendant. *Curtis* v. *Spitty*, 1 Scott, 737; 1 Bing. (N.C.) 756; 1 Hodges, 153; 4 L. J., C. P. 236.

2. Of Reversion.

Nature of Estate—reversion by Estoppel.]—The assignees of a lessor in a lease by deed, who have no estate in the land, have a reversion by estoppel as against the lessee, and may sue him on the covenants accordingly; and this applies to the case where a mortgagor makes a lease by deed, and assigns his equity of redemption with words that would pass a legal reversion in fee. *Cuthbertson* v. *Irving*, 4 H. & N. 742; 28 L. J., Ex. 306; 5 Jur. (N.S.) 740. Affirmed, 6 H. & N. 135; 29 L. J., Ex. 485; 6 Jur. (N.S.) 1211; 3 L. T. 335—Ex. Ch.

It makes no difference in this respect that the estates both of the mortgagor and mortgagee are equitable estates. *Ib.*

—— **Lease subject to Sub-lease for Longer Term.**]—By an indenture dated the 1st of February, 1893, B. demised to W. certain premises for a term of twenty-one years. On February 15, 1893, W. demised the premises to the defendant for a term of forty years, less three days. On January 16, 1894, W. assigned to the plaintiff the premises to hold for the residue of the term of twenty-one years, subject to the underlease of February 15, 1893, by W. to the defendant. In an action brought by the plaintiff against the defendant to recover rent due at Lady Day, 1894, the plaintiff was non-suited:—Held, that the nonsuit was right. Assuming that W. had a reversion by estoppel, subject to the lease of forty years, less three days, that reversion was not assigned to the plaintiff by the deed of January 16, 1894, because that deed only assigned to the plaintiff W.'s interest in the lease of February 1, 1894. *Norris* v. *Craig*, 64 L. J., Q. B. 432; 43 W. R. 480; 59 J. P. 264.

A termor of mines granted a lease at a rent for a longer term than his term. During the continuance of the original term, he assigned by deed the rent and his estate in the premises:—Held, that his assignee could maintain an action for rent in arrear, after the assignment and during the continuance of the original term. *Williams* v. *Hayward*, 1 El. & El. 1040; 28 L. J., Q. B. 374; 5 Jur. (N.S.) 1417; 7 W. R. 563.

What amounts to.]—Quære, whether the assignment of rent by a reversioner in a lease carries the reversion. *Taylor* v. *Martindale*, 1 Y. & Coll. C. C. 658.

By Deed.]—A reversion of a tenancy from year to year cannot pass without deed. *Brawley* v. *Wade*, M'Clel. 664.

Assignee, who is.]—A grantee of part of the grantor's reversionary interest in the whole of the property in which a particular estate, as a term of years, has been created, is an assignee of the reversion within 32 Hen. 8, c. 31; but the grantee of the whole reversionary interest in part of the property is not such an assignee. *Wright* v. *Burroughes*, 3 C. B. 685; 4 D. & L. 438; 16 L. J., C. P. 6; 12 Jur. 968.

The surrenderee of a copyhold is an assignee of a reversion, within the statute of 32 Hen. 8, c. 34, and may maintain an action of covenant upon a lease made by his surrenderor, and the defendant in such action cannot protect himself by alleging the invalidity of the lease. *Whitton* v. *Peacock*, 3 Myl. & K. 325.

Parties acquiring under the Enfranchisement Acts copyhold lands under lease shall be deemed to have acquired the reversion thereon and be entitled to distrain and sue upon the covenants. *See* 6 & 7 Vict. c. 23, ss. 9 and 10. *Sanders* v. *Benson*, 4 Beav. 350.

Rights of Assignee — On Non-payment of Rent.]—The assignee of a reversion is not entitled under 32 Hen. 8, c. 34, to arrears of rent which became due prior to the assignment. *Flight* v. *Bentley*, 7 Sim. 149; 4 L. J., Ch. 262.

After a purchase, the tenant holds of the purchaser on the same terms as he previously held of the vendor, and the holding continues until the tenancy has been regularly determined, either by the landlord or tenant. *Greenwood* v. *Bairstow*, 5 L. J., Ch. 179.

A mortgagor in possession let the mortgaged property without the concurrence of the mortgagees. The lease was one authorised by s. 18 of the Conveyancing Act, 1881. The lessee then advanced certain moneys to the mortgagor upon the terms that the lessee should retain the rent as it became due until the moneys were repaid. Subsequently the mortgagees gave notice to the

lessee informing him of the mortgage, and requiring him to pay them the rent thereafter to become due, and not to pay it to the mortgagor. The lessee having refused to comply with the notice, the mortgagees brought an action to recover possession under a condition of re-entry upon nonpayment of rent contained in the lease:—Held, that, by the combined effect of ss. 10 and 18 of the Conveyancing Act, 1881, the mortgagees, after giving the above notice to the lessee, were entitled as reversioners to enforce the covenants and provisions in the lease, and were therefore entitled to recover possession of the property under the condition of re-entry; and, further, that the agreement between the mortgagor and lessee as to the retention of the rent was not binding upon the mortgagees. *Municipal Permanent Building Society* v. *Smith*, 58 L. J., Q. B. 61; 22 Q. B. D. 70; 37 W. R. 42.

In July, 1864, L. demised premises to the defendant for five years at a rent of 55*l.* per annum, payable quarterly. Immediately after the grant of the lease the defendant advanced to L. 170*l.* on account of rent; and in September, 1865, L. mortgaged the premises to the plaintiff. In May, 1866, B., who claimed under a prior mortgage from L., dated in September, 1858, through C., his attorney, commenced an ejectment against the defendant to recover possession of the premises, but did not proceed with it; and on the 1st November, 1866, the plaintiff's attorney wrote to the defendant: "Mr. C. has written to say his clients are no longer entitled to receive your rent. I therefore request that you will have the kindness to pay the same here by Monday next":—Held, that the pre-payment of rent was no bar to his claim to the rent accruing after the defendant had notice that the plaintiff was grantee of the reversion; and that the letter, coupled with the circumstances known to the defendant, that he was raising money by mortgaging his reversion, and that the plaintiff's claim for rent could hardly be founded upon any other alleged right than one resulting from a grant of the reversion, would warrant a jury in inferring that the defendant had notice that the plaintiff was such grantee. *Cook* v. *Guerra*, 41 L. J., C. P. 89; L. R. 7 C. P. 132; 26 L. T. 97; 20 W. R. 367.

See also *Norris* v. *Craig*, and *Williams* v. *Hayward*, supra; *Allcock* v. *Moorhouse*, ante, col. 1068; *and cases* ante, H. 2, cols. 912 et seq.

—— **On Breach of Covenant.**]—Tenants in common, assignees of the reversion of a lease, may join in suing on covenants therein. *Womersley* v. *Dally*, 26 L. J., Ex. 219.

C. granted and demised the exclusive right and licence to take and kill game on land, with the use of a cottage to the defendant for a term; and the defendant covenanted to leave the land at the end of the term as well stocked with game as at the time of the demise. C. assigned his reversion in the land and hereditaments to the plaintiffs, and they brought an action, at the end of the term, against the defendant for a breach of his covenant: Held, that the demise was not a mere licence, but the grant of an incorporeal hereditament; that the covenant touched the hereditament demised, and by virtue of 32 Hen. 8, c. 34, the assignees of the reversion could sue upon it. *Hooper* v. *Clark*, 8 B. & S. 150; 36 L. J., Q. B. 79; L. R. 2 Q. B. 200; 16 L. T. 152; 15 W. R. 347.

After twenty years' use of premises, converted into a shop, without licence, contrary to a covenant in a lease, an assignee of the reversion cannot take advantage of a condition of re-entry for such use, subsequent to the assignment. *Gibson* v. *Doey*, 2 H. & N. 615; 27 L. J., Ex. 37; 6 W. R. 107.

Whether the benefit of such a condition runs with the land, and can be taken advantage of by the assignees of a reversioner, depends on the nature and character of the covenant, and whether it affects the use and enjoyment of the premises, and not whether it has, in fact, deteriorated the value. *Ib.*

An assignment by the lessor of the reversion in one of two farms, comprised in the same lease, to the lessee himself, does not destroy the lessor's right of re-entry over the other farm. *Hyde* v. *Warden*, 47 L. J., Ex. 121; 3 Ex. D. 72; 37 L. T. 567; 26 W. R. 201—C. A.

Building lease from A. to B.; B. underlet to C.; C. was to build houses; but by his inability to do so, his lease became forfeited to B., and B.'s lease also became forfeited to A. B. assigned all his interest to D., who applied to A. for an extension of time to complete the original contract, which was granted. *Hillier* v. *Parkinson*, 9 L. J. (o.s.) Ch. 156.

D. brought an ejectment against C. for his breach of covenant, and recovered a verdict. *Ib.*

Motion for an injunction to stay execution of the writ of possession refused. *Ib.*

The right of entry for a breach of covenant does not pass to the assignee of the lessor when such breach is committed during the continuance of the lessor's estate. Where B., the lessee, covenanted to insure in such office as H., the lessor should appoint in the joint names of H. and his assigns and B. and his assigns, and before assignment H. indicated the office to B., but B. did not insure and H. afterwards assigned to C. without notice to B.:—Held, that C., who after the assignment, the premises still remaining uninsured, did not before action brought appoint any office in which B. should insure in their joint names, could not maintain an action against B. for forfeiture for a breach of covenant accruing since the assignment to C. *Crane* v. *Batten*, 2 W. R. 550.

As to Covenants to Repair, *see* post, M. 3, *a.* ix., cols. 1117—1119.

Liabilities of Assignee.]—The principle, that the assignee of a reversion is not bound by the terms in a lease not under seal, applies where the demise is of three windows in a factory, with the stipulation that the lessor shall provide steam power. *Smith* v. *Eggington*, 43 L. J., C. P. 140; L. R. 9 C. P. 145; 30 L. T. 521.

The question, whether the assignee of a reversion has adopted the terms of the demise entered into by his assignor, is one of fact, and is to be disposed of by the jury. *Ib.*

Tenants in common, assignees of the reversion of a lease, may be jointly sued, on covenants therein. *Womersley* v. *Dally*, 26 L. J., Ex. 219.

Rights of Assignor.]—Where a reversioner conveys his legal title, he cannot maintain an ejectment for nonpayment of rent for arrears due in his own time, but there being some doubts when the deed conveying the reversion was delivered, an inquiry to ascertain the fact was directed. *Blennerhassett* v. *Day*, 2 Ball & B. 104.

L. ATTORNMENT.

What amounts to.]—Where rent is paid by succeeding tenants, after an adverse possession of twenty-three years, it does not amount to an attornment, unless the consent, or at least the knowledge, of the landlord can be shown. *Meredith* v. *Gilpin*, 6 Price, 146.

Pending a demise by deed from A. to B., a sequestration issued out of chancery against A.; B. signed an unstamped paper, purporting that he attorned, and became tenant to the sequestrators, to hold on such terms as might be afterwards agreed on:—Held, first, that the sequestrators could not maintain use and occupation against B., because an attornment infers a continuance of a subsisting tenancy, which here would be created anew by the deed; secondly, that the sequestrators could take no estate, and consequently they had no estate to which an attornment would apply; thirdly, that the instrument, if it had any operation, would operate as a new demise, and could not be read without a stamp. *Cornish* v. *Searell*, 1 M. & Ry. 703; 8 B. & C. 471; 6 L. J. (o.s.) K. B. 255.

An attornment where a tenant merely puts one person in the place of another as his landlord, but continues to hold under the same terms and conditions as before, is a mere acknowledgment that the person making it is tenant, and it requires no stamp. *Doe* d. *Linsey* v. *Edwards*, 5 A & E. 95; 6 N. & M. 633; 2 H. & W. 139; 5 L. J., K. B. 238. S. P., *Doe* d. *Wright* v. *Smith*, 3 N. & P. 335; 8 A. & E. 255; 7 L. J., Q. B. 158; 2 Jur. 854.

A lessee, desiring to secure his premises for himself at the end of his lease, and being a bankrupt without a certificate, procured a friend to take the conveyance as trustee for him. This conveyance shewed the legal estate to be outstanding in a person who could not be found. The lessee continued to occupy. The creditors' assignees, becoming aware of the circumstances, induced the trustee to convey his interest to them, and forced the lessee to attorn to them, and brought ejectment:—Held, that the assignees had a sufficient title. *Cooper* v. *Lands*, 14 L. T. 287; 14 W. R. 610.

A., in 1861, granted an under-lease to B. for twenty-one years from Michaelmas, 1861, at the yearly rent of 50*l*. In 1864 he granted an underlease of the same premises to C. for twenty-one years from Michaelmas, 1863, at the same rent. B. never attorned to C.:—Held, inasmuch as there was no attornment, that the demise to C. did not pass the reversion to him, but only an interesse termini, and that, in order to establish C.'s under-lease, a surrender by B. to A., and not to C., was the effectual and proper course. *Edwards* v. *Wickwar*, L. R. 1 Eq. 403.

——**Payments by Assignee.**]—When a lease has been assigned in consideration of certain quarterly payments during the remainder of the term, the assignee by making one such payment does not attorn to the assignor so as to give him a right of distress for sums subsequently becoming due. *Hazeldine* v. *Heaton*, 1 Cab. & E. 40.

Unnecessary—4 Ann. c. 16, s. 9.]—A demise by way of grant for a term of years to commence immediately, made by a person entitled to an estate in tail in remainder, expectant upon the determination of a life estate during the lifetime of the tenant for life, operates as a conveyance of an estate for years carved out of the remainder, and vests the estate immediately in the grantee, without entry, by virtue of 4 Ann. c. 16, s. 9, which makes such a conveyance effectual without any actual attornment of the tenant of the particular estate upon which the remainder is expectant. *Doe* d. *Agar* v. *Brown*, 2 El. & Bl. 331; 22 L. J., Q. B. 432.

Replevin. Avowry, that Henry 8 was seised in fee of the shop in which, &c., and, by letters-patent enrolled, granted it to W., and the heirs male of his body, paying annually to the king a certain rent at Michaelmas. It then deduced title to the rent to Charles 2, and stated that he, by letters-patent enrolled, after referring therein to 22 Car. 2, c. 6, granted the rent to trustees mentioned in the statute, and their heirs, upon trust, for Charles 2; that the trustees, by indenture, for consideration therein expressed, conveyed the rent to the dean and chapter of St. Paul's, whereupon and whereby the dean and chapter became and were seised as of fee in the rent, and they and their successors continued to be so seised until and at Michaelmas, 1845; an avowry was then made for six years' arrears of rent due to the defendants at the time when, &c.:—Held, that an express averment of attornment by the terre-tenant, upon the conveyance of the rent by the trustees, or some equivalent allegation, was necessary, because it could not be presumed that the conveyance was made after 4 Ann. c. 16, s. 9; and that the avowment that the rent was duly paid for a certain time, and that it was due and in arrear to the dean and chapter, was not an equivalent allegation, because, to make the payment of rent an attornment in law, it must be made to the grantee of the rent, and an attornment must be in the life of the grantee; and that an attornment could not be implied. *Vigers* v. *St. Paul's (Dean and Chapter)*, 14 Q. B. 909; 19 L. J., Q. B. 84; 14 Jur. 1017—Ex. Ch.

A. granted to B. a leasehold interest in premises for a term of thirty years, to be computed from the 10th of March, 1839. On the 10th November, 1846, B. demised to the defendant the same premises for the term of twenty-three years, reserving a rent, and afterwards assigned his interest to the plaintiff:—Held, first, that by the deed a rent was created, and that it was assignable; secondly, that the plaintiff, who was the assignee of the party to whom the rent was reserved, could maintain an action for the recovery of it; and thirdly, that a privity was created between the plaintiff and the defendant, the same as if the defendant had actually attorned to the plaintiff, for, by the 4 Ann. c. 16, s. 9, attornment is unnecessary. *Williams* v. *Hayward*, 1 El. & El. 1040; 28 L. J., Q. B. 374; 5 Jur. (N.S.) 1417; 7 W. R. 563.

Evidence as to.]—An avowry stated a demise for two years, ending on the 29th of September, 1842. On the trial an attornment in writing, dated the 14th of October, 1842, was given in evidence, by which the plaintiff and others attorned tenants to the defendant for such parts of the premises as were in their occupation, and agreed to pay the rent set opposite to their names. Opposite to the defendant's name was written, "Rent 55*l*., from Michaelmas, 1840":—Held, that the avowry was supported by the evidence. *Gladman* v. *Plumer*, 15 L. J., Q. B. 79; 10 Jur. 109.

Distress—Tenant by Elegit.]—A tenant by elegit may distrain without attornment. *Lloyd* v. *Davies*, 2 Ex. 103.

Equitable Jurisdiction.]—Equity will not compel a man to attorn who is at liberty at the common law. *Wyndham's (Sir John) Case*, Cary, 4.

Attornment denied but in some cases. *Philips* v. *Sandford*, Cary, 4.

Lessee for years decreed to admit an attornment. *Natchbolt* v. *Porter*, 2 Vern. 113.

M. COVENANTS.

1. USUAL.

What Reasonable.]—The reasonableness of a covenant by a lessee, in a lease of lands renewable for ever, that he and his heirs shall always live upon the lands, or pay an additional rent, with remedies by distress and entry, is properly triable at law; and a court of equity ought not to interpose or give relief against it. *Ponsonby* v. *Adams*, 2 Bro. P. C. 431.

To Pay Taxes.]—A party contracted for an assignment of a lease of a public-house, which in the agreement was described as holden at a certain net annual rent under usual and common covenants. And the lease contained a covenant by the tenant to pay land-tax, sewers'-rate, and all other taxes, and a proviso for re-entry if any business but that of a victualler should be carried on in the house; and it was proved that a considerable majority of public-house leases contained such a proviso:—Held, that the covenant to pay land-tax, sewers'-rate, and other taxes, was a common covenant in a lease, reserving a net rent; and that the proviso for re-entry must, with reference to a lease of a public-house, also be considered usual and common. *Bennett* v. *Womack*, 7 B. & C. 627; 1 M. & Ry. 644; 3 Car. & P. 96; 6 L. J. (O.S.) K. B. 175; 31 R. R. 270.

To Repair.]—A., who was under an agreement to take the lease of a house, the lease to contain all "usual covenants," agreed to assign all his interest to B., and forwarded him a copy of the agreement for a lease. In answer to inquiries by B., A. stated that the lessee would not have to do substantial repairs:—Held, first, that A.'s statement was a misrepresentation of a matter of law, and not of fact, and that A. was not bound by it. *Kendall* v. *Hill*, 6 Jur. (N.S.) 968.

Held, secondly, that B. was bound to repair the house in the event of damage by fire. *Ib.*

Under a contract for a lease of a mill, to contain "all usual and necessary covenants and provisoes," and particularly a covenant on the part of the lessee to keep the mill in good tenantable repair:—Held, that the lessee was not entitled to have introduced into the covenant the words "damages by fire or tempest only excepted." *Sharp* v. *Milligan*, 23 Beav. 419. *S. C.*, nom. *Thorpe* v. *Milligan*, 5 W. R. 336.

To Rebuild.]—Under a power to a tenant for life to lease for years, reserving the usual covenants, a lease made by him, containing a proviso, that in case the premises were blown down or burned, the lessor should rebuild, otherwise the rent should cease, is void; the court finding that such covenant is unusual. *Doe* d. *Ellis* v. *Sandham*, 1 Term Rep. 705; 1 R. R. 369.

Not to Assign.]—A covenant not to assign without the leave of the landlord, is a fair and usual covenant. *Morgan* v. *Slaughter*, 1 Esp. 8; 5 R. R. 715.

Agreement to accept a lease of a dwelling-house in London "to contain all usual covenants and provisoes." The lease contained a covenant not to assign without the lessor's consent. In an action to compel specific performance of the agreement:—Held, that the covenant was not a "usual covenant," and that the agreement could not be enforced. *Hampshire* v. *Wickens*, 47 L. J., Ch. 243; 7 Ch. D. 555; 38 L. T. 408; 26 W. R. 491.

A judge cannot of his own authority say what should be "usual covenants," nor should the locality, nature or tenure of the property be, except under special circumstances, regarded. *Ib.*

There is nothing unreasonable in a covenant not to sub-let without licence, or in a proviso for re-entry on the whole premises on breach of any covenant in the lease. *Haberdashers' Co.* v. *Isaac*, 3 Jur. (N.S.) 611. Affirmed, 5 W. R. 855—L.JJ.

An agreement that all "usual covenants" should be inserted in a proposed lease does not include a covenant against assignment. *Buckland* v. *Papillon*, L. R. 1 Eq. 477; 12 Jur. (N.S.) 155. Affirmed, 36 L. J., Ch. 81; L. R. 2 Ch. 67; 12 Jur. (N.S.) 992; 15 L. T. 378; 15 W. R. 92.

Whether an agreement for a lease with usual covenants, includes a covenant against assigning or under-letting, without licence, quære. In this instance, upon the particular construction of the agreement for the lease of a farm, the words "such other clauses as are usual in such cases," has not that effect. *Vere* v. *Loreden*, 12 Ves. 179; 10 R. R. 77, n. S. P., *Jones* v. *Jones*, id. 186.

On an agreement for a lease, "with all usual and reasonable covenants," a covenant not to under-lease or assign is implied, where the custom of the place is not generally against it. *Folkingham* v. *Croft*, 3 Anstr. 700; 4 R. R. 844.

Under an agreement for a lease, "with usual covenants," the lessor is not entitled to a covenant against assigning or under-letting without licence. *Browne* v. *Raban*, 15 Ves. 528.

A., before his bankruptcy, agrees to take a lease of a cotton mill, and enters into possession. After his bankruptcy, one of his assignees takes possession, and agrees to accept the lease, a draft of which was sent to the assignees, containing covenants personally binding on them, and one in particular, to prevent them from assigning without the licence of the lessor:—Held, that the assignees were not bound to accept of such a lease; and even if they were, that the Court of Review had no jurisdiction to compel a specific performance of the agreement. *Lucas, Ex parte*, 3 Deac. & C. 144; 1 Mont. & Ayr. 93; 3 L. J., Bk. 66.

A. granted B. a lease containing a covenant against assignment. A. afterwards agreed to cancel the lease, and to grant B. a much more beneficial one, "as a reward for the great improvement he had made in the estate, and as an encouragement for his general industry." A. died before executing the second lease, and B. filed a bill for specific performance against his representatives. A compromise was effected for granting a lease for a reduced term, "the lease to contain all covenants usual and ordinary in farming leases." It was insisted by the tenant, that under the compromise there should be no restriction against assignment:—Held, that the master, in settling the lease, was to have regard to the original lease, and to the custom as to farming leases, if any. *Bell* v. *Barchard*, 16 Beav. 8; 21 L. J., Ch. 411.

A. agrees for a lease of certain lands for three

lives. The lease is prepared according to the agreement, except the inserting a clause to restrain the tenant from alienation, without the consent of the landlord; this clause being no part of the agreement, the landlord is bound to execute a lease without it. *Blacker* v. *Mathers*, 6 Bro. P. C. 334.

A contract to grant a lease, with common and usual covenants, does not comprise a covenant not to assign without a licence. *Henderson* v. *Hay*, 3 Bro. C. C. 632.

A purchaser objected to complete the purchase of a term in leasehold premises upon the ground that the lease contained a covenant which had not been disclosed to him, that the lessee was not to assign or part with possession of the premises without the consent of the lessor, such consent not to be unreasonably withheld:—Held, that this was not a "usual covenant," and that the purchaser was entitled to repudiate his contract. *Hampshire* v. *Wickens* (7 Ch. D. 555) followed. *Bishop* v. *Taylor*, 60 L. J., Q. B. 556; 64 L. T. 529; 39 W. R. 542; 55 J. P. 695.

An agreement for the lease of a public-house, provided for a term of three years, with an option to renew for another seven years, but contained no reference as to the covenants to be inserted in the lease. The lessor insisted upon covenants by the lessee: (1) To reside on the premises and personally conduct the business; (2) Not to assign without consent; and that the proviso for re-entry should extend to the breach of any covenant. The lessee objected that these were not "usual" clauses:—Held, that covenants 1 and 2 could not be insisted upon as usual covenants; and, on this point, the fact that the subject-matter of the lease was a public-house made no difference, and that the proviso for re-entry must be limited to the case of nonpayment of rent. *Henderson* v. *Hay* (3 Bro. C. C. 632) followed. *Lander and Bagley's Contract, In re*, 61 L. J., Ch. 707; [1892] 3 Ch. 41; 67 L. T. 521.

—— **"Proper Clauses."**]—By an agreement in writing (contained in two letters) the defendant agreed to grant to the plaintiff, a brewer, a lease of a public-house for a certain term, at a certain rent, "a proper lease to be drawn up with all proper clauses, and approved of by" the defendant and his solicitor. Afterwards the defendant refused to grant a lease unless it contained a clause against underletting. In an action to enforce specific performance of the agreement:—Held, that the clause was not a "proper clause"; that the defendant was bound to grant a lease without putting in any such clause; and specific performance decreed. *Eadie* v. *Addison*, 52 L. J., Ch. 80; 47 L. T. 533; 31 W. R. 320.

In Restraint of Trade.]—Covenants in restraint of trade in a trading locality are not considered usual covenants. *Wilbraham* v. *Livesey*, 18 Beav. 206; 2 W. R. 281.

If an agreement for a lease contains no stipulation as to covenants, the party agreeing to take the lease has a right to a lease containing only usual covenants, and a restriction against particular trades, not being a usual covenant, cannot be introduced into the lease. *Propert* v. *Parker*, 3 Mylne & K. 280.

The usual covenants between landlord and tenant will not extend to covenants in restraint of trade. *Van* v. *Corpe*, 3 Myl. & K. 269; 6 L. J., Ch. 208; 1 Jur. 101, 149.

Upon a negotiation between A. and B. for the grant of a lease, B., the proposed lessee, informed the agent of A. that he wanted the premises for the purpose of carrying on therein the business of a retailer of beer, and inquired whether there was anything in the original lease to restrain the tenant from carrying on such business therein, to which inquiry the agent, being ignorant of the contents of the lease, but knowing that such trade had been carried on upon the premises for some years, replied that there was nothing, so far as he knew, to prevent the tenant from carrying on the proposed trade. B. therefore consented to take a lease, and a memorandum to the following effect was drawn up and signed by the parties:—"Lease, twenty-one years from Lady-day, 1853. Lease and counterpart to contain all usual and proper covenants, and particularly those contained in the lease under which the premises are held, so that the same in no way restricts the trade of a retailer of beer. Lessee not to require production of the lessor's title":—Held, that A. duly performed his contract by being ready to grant a lease without a covenant to restrict the lessee from using the premises as a beershop, notwithstanding that there was such restrictive words in the lease under which he himself held. *Hayward* v. *Parke*, 16 C. B. 295; 24 L. J., C. P. 217; 1 Jur. (N.S.) 781.

Not to convert House into a School.]—Where in an agreement for the lease of a house to be granted by the defendant to the plaintiff it was stipulated that the lease should contain the usual covenants between landlord and tenant, and that the house should not be converted into a school, it is immaterial whether the plaintiff had or had not notice that the defendant derived his title under a lease from another person; because the agreement amounts to a representation on the part of the defendant that he was at liberty to grant a lease conformably to the terms of the agreement. *Van* v. *Corpe*, supra.

To Carry on Particular Trade.]—A. agreed to let, and B. to take, a piece of land, with liberty to build thereon such warehouses, glasshouses, kilns, houses for workmen, and erections necessary for carrying on the business of a glass manufactory, as he should think fit, for sixty-one years, at a certain rent; and B. agreed to pay the rent, to build in a substantial manner, and not to use the premises for any other purpose than a glass manufactory during the term. A lease and counterpart to be executed in conformity with the agreement, in which should be inserted all usual covenants:—Held, that this agreement did not warrant the insertion in the lease of an affirmative covenant by the lessee that he would carry on the business of a glass manufactory on the premises during the term. *Doe* d. *Bute* (*Marquis*) v. *Guest*, 15 M. & W. 160.

To Pay Fines.]—Under a power to make leases for years, determinable on lives, of premises usually so leased, reserving the usual rents and heriots, and so as there should be contained usual and reasonable covenants, a lease was granted in 1831. This lease contained a covenant to do suit and service at the courts of the manor of W., but no covenant to pay fines. In what was taken as the pattern lease, executed in 1749, there was a covenant to pay fines, as well as to

do suit and service. It appeared, that, from a date prior to 1749, there had been no courts baron or customary courts held for the manor, and no evidence was given of the existence of any freehold or copyhold tenants:—Held, that the covenant to pay fines was not a usual or reasonable covenant, the omission of which avoided the lease. *Doe* d. *Egremont* (*Earl*) v. *Williams*, 11 Q. B. 688; 17 L. J., Q. B. 154; 12 Jur. 455.

Proviso for Re-entry.]—Under an executory agreement to grant a lease of an hotel, with general and usual covenants:—Held, under the circumstances, that the lease ought to contain a power of re-entry on the lessee's becoming bankrupt or taking the benefit of the Insolvent Debtors Act. *Haines* v. *Burnett*, 27 Beav. 500; 29 L. J., Ch. 289; 5 Jur. (N.S.) 1279; 1 L. T. 18; 8 W. R. 130.

Under an agreement for a lease to contain "all usual and customary mining clauses," the landlord is not entitled to have inserted in the lease a proviso for re-entry on breach of any of the covenants by the lessee, or otherwise than on nonpayment of rent. *Hodgkinson* v. *Crowe*, 44 L. J., Ch. 680; L. R. 10 Ch. 622; 33 L. T. 388; 23 W. R. 885.

Semble, that the rule is not limited to mining leases. *Ib.*

Under an agreement for a lease to contain usual and proper covenants, the landlord is not entitled to have inserted in the lease a proviso for re-entry upon breach of any of the covenants by the lessee or otherwise than on nonpayment of rent. *Hodgkinson* v. *Crowe* (L. R. 10 Ch. 622) is not affected by s. 14 of the Conveyancing Act, 1881. *Anderton and Milner, In re*, 59 L. J., Ch. 765; 45 Ch. D. 476; 63 L. T. 332; 39 W. R. 44.

A power of re-entry in a lease, if the lessee and his assigns become bankrupt, or make a composition with creditors, or if execution should issue against either of them, is unusual, and an intended assignee is not bound to accept an assignment of a lease containing such a covenant. *Hyde* v. *Warden*, 47 L. J., Ex. 121; 3 Ex. D. 72; 37 L. T. 567; 26 W. R. 201—C. A.

Mowing Meadow Land.]—In a lease of a farm a covenant not to mow meadow land more than once a year is not an unusual covenant, so as to excuse an intended assignee from accepting the title. *Ib.*

To Indemnify.]—For indemnity against payment of rent and performance of covenants, a usual covenant. *Staines* v. *Morris*, 1 Ves. & B. 8.

2. That Run with the Land.

To Insure.]—A covenant to insure premises against fire, which are situated within the weekly bills of mortality, as specified in the 14 Geo. 3, c. 78, runs with the land. *Vernon* v. *Smith*, 5 B. & Ald. 1; 24 R. R. 257.

To Supply Water.]—A covenant in a lease, by the lessor, to supply two houses with good water at a rate therein mentioned for each house, runs with the land; for the breach of which the assignee of the lessee may maintain an action gainst the reversioner. *Jourdain* v. *Wilson*, 4 B. & Ald. 266; 23 R. R. 268. S. P., *Athol* v. *Mid. Gt. Western Ry.*, Ir. R. 3 Ch. 333.

Not to Assign.]—A covenant that the lessor, his executors or administrators, will not assign does not bind the assignees. *Doe* d. *Cheere* v. *Smith*, 5 Taunt. 795; 1 Marsh. 359; 15 R. R. 660.

A covenant, in an indenture of lease by which the lessees for themselves, their heirs, executors, administrators and assigns, covenanted that they, their executors, administrators and assigns, would not assign, underlet or otherwise part with the possession of the demised premises without first obtaining the consent in writing of the lessor, is a covenant which touches and concerns the land, and therefore runs with the land, and the lessor can sue an assignee of the lessee for the breach of it. *Williams* v. *Earle*, 9 B. & S. 740; 37 L. J., Q. B. 231; L. R. 3 Q. B. 739; 19 L. T. 238; 16 W. R. 1041. See *West* v. *Dobb*, 9 B. & S. 755; 38 L. J., Q. B. 289; L. R. 4 Q. B. 634; 20 L. T. 737; 17 W. R. 879—See *S. C.*, in Ex. Ch., ante, col. 1162.

Of Indemnity.]—A covenant by the lessee with the lessor, his heirs and assigns, to indemnify the overseers for the time being of the parish in which the premises demised were situated from all costs and charges by reason of the lessee's taking an apprentice or a servant, who should thereby gain a settlement within, or become chargeable to, the parish, is an express covenant with the lessor, which did not run with the land. *Walsh* v. *Fussell*, 3 M. & P. 455; 6 Bing. 163; 7 L. J. (O.S.) C. P. 261.

In Mortgage—To determine Term.]—A mortgagee died seised of the residue of a mortgage term, subject to a proviso that in case the mortgagor should pay him, his executors, administrators or assigns, a certain sum on a given day, the term should determine; the mortgagee bequeathed this sum to the plaintiff, whom he appointed one of his executors:—Held, that he could not maintain an action in his own name, as assignee, although his co-executor had assented to the bequest, as the covenant with the mortgagee was collateral, and did not run with the land, and because it was broken in his lifetime. *Canham* v. *Rust*, 2 Moore, 164; 8 Taunt. 230.

To Pay Rent.]—Where B., being seised in fee, conveyed to the defendant and J., their heirs and assigns, to the use that B., his heirs and assigns, might take to his use a rent certain, to be issuing out of the premises, and subject to the rent to the use of the defendant, his heirs and assigns; and the defendant covenanted with B., his heirs and assigns, to pay to him, his heirs and assigns, the rent; and to build, within one year, one or more messuages on the premises, for better securing the rent; and B., within one year, demised the rent to the plaintiff for 1,000 years:—Held, that covenant would not lie by the plaintiff for nonpayment of the rent, or for not building the messuages, for that the covenant was in gross, and only personal to B. *Milnes* v. *Branch*, 5 M. & S. 411; 17 R. R. 373.

A testator, being seised in fee of lands, and also of a corn-mill, demised the former to a tenant for three lives, covenanting for a money-rent, and in addition thereto, that the lessee should perform certain suits and services; and that he, his heirs and assigns, should do suit to the lessor's mill by grinding therein all such corn as grew upon the

demised land: the testator afterwards devised the mill, and also the reversion of the land, to the same person, who became seised upon the death of the devisor. During the demise of the land, the lessee died intestate, and his wife took out administration of his estate and effects. An action being brought, assigning for a breach a neglect to grind corn at the mill during the lifetime of the lessee, and also since his death: —Held, that the reservation of the suit to the mill was in the nature of a rent, and that the covenant to render it ran with the land, whilst the ownership of the land and the mill remained in the same person, and entitled the latter to maintain an action at common law upon it against the personal representative of the lessee. *Vyvyan* v. *Arthur*, 2 D. & R. 670; 1 B. & C. 410; 1 L. J. (O.S.) K. B. 138; 25 R. R. 437.

To Pay at Valuation at Termination of Tenancy.]—By a deed dated March 1st, 1832, the defendant leased a farm for fourteen years, the lease contained a proviso for re-entry by the lessor if the lessees should assign without his licence and a covenant by the lessees not to assign; also a covenant by the lessor at the expiration of the demise to pay for certain things at a valuation. After the expiration of the term the lessees continued to occupy the farm as tenants from year to year on the terms of the lease. In 1864, they by deed assigned their interest in the farm, with their farming stock and valuations, to the plaintiff, in order to raise a sum of money to be paid to their creditors under a composition deed executed at the same time. The plaintiff entered into occupation of the farm, but never paid rent. On the 18th March the defendant, having no knowledge of the assignment, gave the lessees notice to quit, and the plaintiff, as assignee, gave him a similar notice:—Held, that the plaintiff could not maintain an action against the defendant on the covenant for a valuation. Per Mellor and Lush, JJ., on the ground that there was no new contract between the plaintiff and defendant, and that the right of action did not pass from the lessees to the plaintiff by the assignment of the tenancy created by parol between the lessor and lessees. Per Shee, J., on the ground that the lessees, having no right to assign without the licence of the lessor, could not transfer any interest to the plaintiff. *Elliott* v. *Johnson*, 8 B. & S. 38; 36 L. J., Q. B. 41; L. R. 2 Q. B. 120; 15 W. R. 253.

—— **Incoming and Outgoing Tenant—Valuation of Tenant's Crops, &c.**]—An owner in fee demised a farm for seven years, and agreed at the expiration of the term to pay for the tenant's property in and upon the farm at a valuation. He devised the lands to trustees for a term of 1,000 years upon trust to raise money in aid of his personal estate for payment of debts, funeral and testamentary expenses, and legacies, and subject thereto to the plaintiff for life, with divers remainders over. On the testator's death the plaintiff took possession. On the expiration of the term a new tenant could not be found. The plaintiff paid the outgoing tenant for his property in the farm, and claimed to be repaid the amount out of the testator's estate:—Held, that the liability to pay the outgoing tenant was a liability attaching to the land, and that the landlord for the time being was the person primarily liable; that the plaintiff, being in receipt of the rents and profits, was the landlord of the term, and not the trustees; that he therefore was the person primarily liable, and had no claim to be repaid wholly or in part either, out of the testator's estate or by the persons entitled in remainder. *Mansel* v. *Norton*, 52 L. J., Ch. 357; 22 Ch. D. 769; 48 L. T. 654; 31 W. R. 325—C. A.

By an instrument of demise, after a covenant for payment of rent by the tenant, it was agreed, "that in case the tenant should duly observe and perform the several covenants and agreements thereinbefore contained on his part and behalf," and should peaceably quit the farm in pursuance of notice to do so, he should be entitled to away-going crop, to be taken from lands in seed or turnips the previous summer, such crop being to be left for the landlord, or his incoming tenant, at a valuation to be made by arbitrators or an umpire:—Held, that this clause did not give the tenant the right of possession of the land to the exclusion of the landlord, after the determination of the year's tenancy, but at most only a right to go on the land to improve the crop; and that the landlord might maintain trespass quare clausum fregit, for taking possession of the crop, and hindering him from having the use and occupation of the land, after the year was expired. *Strickland* v. *Maxwell*, 2 C. & M. 539; 4 Tyr. 346; 3 L. J., Ex. 161.

—— **Custom of the Country as to Tillages.**]—Primâ facie the landlord is the person liable to the outgoing tenant, at the expiration of his tenancy, for the seeds, tillages, &c., properly bestowed by him upon a farm. Although, therefore, the ordinary practice (to avoid circuity) is, for the incoming tenant to pay the outgoing tenant for the seeds, tillages, &c., upon a valuation made between them; yet a custom or usage that the outgoing tenant shall look to the incoming tenant for payment, to the exclusion of the landlord's liability, cannot be supported in law, as being unreasonable, uncertain and prejudicial to the interests both of landlords and tenants. *Bradburn* v. *Foley*, 47 L. J., C. P. 331; 3 C. P. D. 129; 38 L. T. 421; 26 W. R. 423.

To pay Interest on Incoming Valuation—Duty on Quitting.]—An agreement was entered into by a tenant under a lease to pay interest at 5 per cent. on the amount of his incoming valuation, and "upon quitting to leave a valuation of tenant rights equal in value, and of the same nature and kind":—Held, not to create a personal debt to the lessor, but to enure for the benefit of a subsequent landlord. *Wagstaff* v. *Clinton*, 1 Cab. & E. 45.

For Compensation.]—Three licencees of a right to dig minerals, jointly and severally covenanted with the grantor of the licence to pay him compensation for injury to surface. Two of them assigned their right under the licence:—Held, that the covenant ran with the land, so as to bind the assignee, and that the covenant of the three licencees being joint and several, the grantor was entitled to recover the whole compensation from the assignee of two of them. *Norval* v. *Pascoe*, 10 Jur. (N.S.) 792; 10 L. T. 809; 12 W. R. 973.

To Pay for Improvements.]—By a lease some print works, and certain articles, matters and things on the premises were demised, with power to the tenant to replace any of the articles,

matters and things when worn out, and to add new ones, and to add improvements on the premises; and it was covenanted, that at the end of the term a valuation of the articles, matters and things, and of the improvements, should be made, and if they exceeded a certain sum the landlord should pay the tenant the difference:—Held, in an action by the tenant against the executor of the landlord to recover the excess, that as this was a covenant relating to chattels it did not run with the reversion, and that the executor was only liable on it in his representative character; and that as it appeared on the record that he was executor, the judgment should be that the plaintiff do recover the debt and costs de bonis testatoris, if the defendant have so much; and if not, then as to the costs de bonis propriis. *Garton* v. *Gregory*, 3 B. & S. 90; 31 L. J., Q. B. 302; 6 L. T. 656; 10 W. R. 713—Ex. Ch.

To Pay for Trees planted by Tenant.]—The assignee of a lease is not liable to the original lessor, for a breach of a covenant not running with the land, unless he is expressly named in the lease as a covenantor. *Grey* v. *Cuthbertson*, 2 Chit. 482; 4 Dougl. 351.

A covenant by the lessee, for himself, his executors and administrators, to pay to the lessor the amount of fruit trees, to be planted by the lessee, according to an appraisement to be made by two persons, one to be chosen by each of the parties, does not run with the land, and the assignee is not bound. *Ib.*

A covenant by the lessor to pay for all trees planted by the lessee does not run with the land. *Ib.*

Covenant to pay Collateral Sum of Money.]—By an underlease, dated in 1869, A. demised the Y. premises, comprised in two original leases, dated in 1848 and 1863, save and except such parts of the premises (Z.) comprised in the lease of 1848 as were comprised in an underlease, dated in 1867, to B. for the residues of the original terms except the last day of each. The underlease to B. of 1869 contained a covenant by B. for himself, his assigns, &c., that he would during the terms granted, pay all future rates, taxes, &c., payable in respect of the Y. premises, and also would, during the said term, pay all such sums (not exceeding 100*l.* in any one year) as should for the time being be payable by the lessor, his assigns, &c., on account of the like rates, taxes, &c., in respect of the Z. premises. The Y. premises were subsequently assigned to C. for the residue of the terms:—Held, that the covenant, as to taxes, &c., in respect of the Z. premises, was a covenant to pay a collateral sum of money, and did not run with the land, and, therefore, that C. was not liable. *Gower* v. *Postmaster-General*, 57 L. T. 527.

To Yield up in Repair.]—A covenant to yield up in repair at the end of a term runs with the land, and binds an assignee, though not named. *Martyn* v. *Clue*, 18 Q. B. 661; 22 L. J., Q. B. 147.

A declaration alleged that F., being seised in fee of an estate, by deed granted to the defendant licence to dig, work and search for China clay, and to raise, get and dispose of the same to his own use, to hold and exercise the liberties for the term of twenty-one years; and the defendant covenanted with F. and his assigns that he would pay compensation to F. and his assigns, and his lessees and tenants, for all inclosed lands which he might injure; the amount of such compensation to be ascertained, in case of difference, by two arbitrators, one to be appointed by the defendant and the other by F. and his assigns, and also that the defendant or his assigns, would deliver up the works in repair at the expiration of the term. That after executing the deed F. conveyed all his estate to the plaintiff; and it alleged, as breaches, first, that though, after the assignment to the plaintiff, the defendant injured certain inclosed lands, and that though the plaintiff appointed an arbitrator, yet the defendant refused to do so; and, secondly, that the defendant, at the expiration of the term, did not deliver up the works in repair:—Held, that the covenant to deliver up the works in repair ran with the interest of the owner of the fee expectant upon the determination of the term in the incorporeal right to enter and take the clay, and that therefore the plaintiff, the alienee of the land, could sue upon it. *Martyn* v. *Williams*, 1 H. & N. 817; 26 L. J., Ex. 117; 5 W. R. 351.

A first count was upon a covenant in a lease that the lessees and their assigns would maintain and keep in repair the forge and buildings demised and all buildings which should be erected during the demise, and all additions and improvements thereto, and would maintain and keep in good working order the fixtures, steam-engines, tools, utensils and other articles demised, and also which might during the demise be brought or set up on the premises, and would replace and make good all such fixtures, engines, tools, utensils and other articles as should be broken or worn out. The second count was upon a covenant that neither the lessees nor their assigns would assign or part with the possession of the demised premises without the consent in writing of the lessor:—Held, first, that so much of the covenant in the first count stated as related to buildings and to machinery, tools and utensils, which were tenant's fixtures, ran with the land. *Williams* v. *Earle*, 9 B. & S. 740; 37 L. J., Q. B. 231; L. R. 3 Q. B. 739; 19 L. T. 238; 16 W. R. 1041.

Held, secondly, that so much of it as related to tools and utensils, which were not fixtures, did not run with the land. *Ib.*

As to Tithes.]—A lessee of tithes covenanted for himself and his assigns that he would not let any of the farmers in the parish have any part of the tithes. This covenant runs with the tithes, and binds the assignee. *Bally* v. *Wells*, 3 Wils. 25.

To Reside.]—A covenant in a lease, that the lessee, his executors and administrators, shall constantly reside upon the demised premises, during the demise, is binding on the assignee of the lease, though not named. *Tatem* v. *Chaplin*, 2 H. Bl. 133; 3 R. R. 360.

To Endeavour to procure Renewal of Letters-patent.]—A covenant in a lease by the lessor, being the grantee of the land under letters-patent, that he will use his best endeavours to procure a renewal of the letters-patent, is a covenant which runs with the land. *Sampson* v. *Clayton*, 4 Bing. (N.C.) 758; 6 Scott, 469; 1 Arn. 299.

To Use as Dwelling-house.]—A covenant in a lease to use a house as a private dwelling-house only runs with the land, though the word "assigns" is not used. *Wilkinson* v. *Rogers*, 10 Jur. (N.S.) 5; 9 L. T. 434; 12 W. R. 119.

Covenant to Repair and Maintain Road.]—The doctrine in *Tulk* v. *Moxhay* (2 Ph. 774) is limited to restrictive stipulations, and will not be extended so as to bind in equity a purchaser taking with notice of a covenant to expend money on repairs or otherwise which does not run with the land at law. Semble, that the burden of a covenant (not involving a grant) never runs with the land at law, except as between landlord and tenant. *Cooke* v. *Chilcott* (3 Ch. D. 694) overruled on this point. *Morland* v. *Cook* (L. R. 6 Eq. 252) explained. *Holmes* v. *Buckley* (1 Eq. C. Ab. 27) discussed. *Austerberry* v. *Oldham Corporation*, 29 Ch. D. 750; 53 L. T. 543; 33 W. R. 807; 49 J. P. 532—C. A.

A. by deed conveyed for value to trustees in fee a piece of land as part of the site of a road intended to be made and maintained by the trustees under the provisions of a contemporaneous trust deed (being a deed of settlement for the benefit as a joint stock company established to raise the necessary capital for making the road); and in the conveyance the trustees covenanted with A., his heirs and assigns, that they, the trustees, their heirs and assigns, would make the road and at all times keep it in repair, and allow the use of it by the public subject to tolls. The piece of land so conveyed was bounded on both sides by other lands belonging to A. The trustees duly made the road, which afforded the necessary access to A.'s adjoining lands. A. afterwards sold his adjoining lands to the plaintiff, and the trustees sold the road to the defendant, both parties taking with notice of the covenant to repair:—Held, that the plaintiff could not enforce the covenant against the defendants. *Ib.*

Consideration of the circumstances under which a covenant will be held to touch or concern the land of the covenantee so that the benefit may run with the land. *Ib.*

Lease of Public House—Act affecting Licence.]—The lessee of a public-house covenanted with the lessor to keep the premises open at all proper and legal hours, and conduct and manage the business of a beerhouse-keeper in such proper and orderly manner as to afford no ground or pretext whatever whereby the licence should be, or should be in danger of being, suspended, discontinued or forfeited. There was a proviso for re-entry in case of breach of covenant. A person in occupation of the premises with the lessee's permission was convicted of selling drink within prohibited hours. The conviction was not indorsed on the licence, and the licence was transferred after the conviction. In an action by an assignee of the reversion to recover possession:—Held, that the covenant run with the land, but that the licence had not been put in danger by the conviction, and that, if it had been, the case was one in which the lessee would have been entitled to relief under s. 14 of the Conveyancing Act, 1881. *Fleetwood* v. *Hull*, 58 L. J., Q. B. 341; 23 Q. B. D. 35; 60 L. T. 790; 37 W. R. 714; 54 J. P. 229. See also *Clegg* v. *Hands*, post, col. 1230.

Giving Right to Distrain.]—A proviso in a lease of a seam of coal under lands empowered the lessor to distrain for rent the chattels, effects, goods, &c., employed upon or under the lands, in connection with the working of the coal, as well within the limits of the lands as also in, under or about any other lands in which there should be any pits or openings, through which the coal demised should be for the time being in course of working by the lessees, their executors, administrators and assigns, and for that purpose to enter into and upon such other lands:—Held, that such a proviso or covenant could not attach to land in which the lessor had no interest, and that he could not by virtue of it distrain on any "such other lands" after an assignment of the lessees' interest therein. *Daniel* v. *Stepney*, 41 L. J., Ex. 208; L. R. 7 Ex. 327; 27 L. T. 380; 21 W. R. 17. See *S. C.*, in Ex. Ch., L. R. 9 Ex. 185; 22 W. R. 662.

Not to Hire Workpeople outside the Parish.] In a lease of ground, with liberty to make a watercourse and erect a mill, the lessee covenanted for himself, his executors, administrators and assigns not to hire persons to work in the mill who were settled in other parishes, without a parish certificate:—Held, that this covenant did not run with the land, nor bind the assignee of the lessee. *Congleton Corporation* v. *Pattison*, 10 East, 130.

To Erect Buildings.]—By a deed B., a lessee for himself, his executors, administrators and assigns, covenanted with the lessor to build four messuages on the land within a specified time from the date of the demise, and to pay rent; and there was a clause for re-entry on nonperformance of this or certain other covenants. By a subsequent deed B. demised to A. (the houses not having been built), and covenanted with A. that B., his heirs, executors or administrators (not adding assigns), would pay the rent reserved by the former deed, and perform or effectually indemnify A. from and against all the covenants therein contained on the lessees' or assignees' part to be performed. B. afterwards assigned to C.:—Held, that the covenant to A. was not such a covenant as would pass with the reversion of the land, and bind assignees not named; and therefore that A. could not recover against C. for not building a wall, or idemnifying A. against eviction for breach of the covenant to build. *Doughty* v. *Bowman*, 11 Q. B. 444; 17 L. J., Q. B. 111; 12 Jur. 182—Ex. Ch.

In a lease from B. to A. of an undivided third part of a mine, A. covenanted with B., C. and D., the other owners of the mine, to erect a smelting mill on a waste not demised, and not shewn to belong to B., or to B., C. and D.:—Held, that such covenant ran with the land, inasmuch as it affected the mode of enjoying the demised premises; and passed to the assignee of the reversion of B.'s share of the mine. *Sampson* v. *Easterby*, 4 M. & Ry. 422; 9 B. & C. 505; 5 L. J. (o.s.) K. B. 291. Affirmed, *S. C.* nom. *Easterby* v. *Sampson*, 6 Bing. 644; 4 M. & P. 601; 1 C. & J. 105.

To continue Channel of River.]—Where a declaration in an action of covenant by the reversioner against A., the assignee of a lease for years (granting licence to B. to continue a channel open through the bank of a navigable river, upon certain conditions), imported that the grantors had absolute possession of the channel, and full power to grant the use of it to B.; and it appeared by the indenture that they were described merely as the persons "who had the greatest proportion or share in the profits of the river; and that they, by virtue of all or any powers and authorities vesting in or enabling

them, granted the licence to B., his executors, administrators and assigns" :—Held, that the grantors had no authority to grant such an hereditament, within the meaning of the 32 Hen. 8, c. 34, as would bind the assignee of the grantee. *Portmore (Earl)* v. *Bunn*, 3 D. & R. 145; 1 B. & C. 694; 1 L. J. (O.S.) K. B. 196.

Covenants as to Game.]—A lease contained a proviso for re-entry if the lessee, his executors, administrators or assigns, or any tenant, undertenant or occupier of the demised premises should be convicted of any offence against the game laws. The occupier under the lessee was convicted of shooting without a licence, not upon the demised premises, and the assignee of the reversion brought ejectment :—Held, that he could not recover the premises under the proviso for re-entry. *Stevens* v. *Copp*, 38 L. J., Ex. 31; L. R. 4 Ex. 20; 19 L. T. 454; 17 W. R. 166.

Held (per Martin, Channell and Cleasby, BB.), that the condition did not touch or concern the land demised so as to run with the reversion. *Ib.*

C. granted and demised the exclusive right and licence to take and kill game on land, with the use of a cottage, to the defendant for a term; and the defendant covenanted to leave the land at the end of the term as well stocked with game as at the time of the demise. C. assigned his reversion in the land and hereditaments to the plaintiffs; and they brought an action, at the end of the term, against the defendant for a breach of his covenant :—Held, that the demise was not a mere licence, but the grant of an incorporeal hereditament; that the covenant touched the hereditament demised, and by virtue of 32 Hen. 8, c. 34, the assignees of the reversion could sue upon it. *Hooper* v. *Clark*, 8 B. & S. 150; 36 L. J., Q. B. 79; L. R. 2 Q. B. 200; 16 L. T. 152; 15 W. R. 347.

See also cases under GAME.

In Restraint of Trade.]—A demise of premises for the purpose of being used as a beershop and public-house contained a covenant by the lessor, for himself and his assigns, not to build, erect or keep, or be interested or concerned in building, erecting or keeping, any house for the sale of spirits or beer within half a mile of the premises :—Held, that the covenant did not run with the land, and could not therefore be sued upon by an assignee of the lease. *Thomas* v. *Hayward*, 38 L. J., Ex. 175; L. R. 4 Ex. 311; 20 L. T. 814.

—— **In Equity.**]—The owner of a freehold house had entered into a covenant with the plaintiff, who was a previous owner, that the building should not be used as a beershop. The house was afterwards let to a tenant from year to year, without express notice of the covenant :—Held, that, although the covenant might not at law run with the land, he was bound by it in equity. *Wilson* v. *Hart*, 35 L. J., Ch. 569; L. R. 1 Ch. 463; 12 Jur. (N.S.) 460; 14 L. T. 499; 14 W. R. 748. S. P., *Fielden* v. *Slater*, 38 L. J., Ch. 379; L. R. 7 Eq. 523; 20 L. T. 112; 17 W. R. 485.

A covenant by a purchaser of land, not naming his assigns, that no building erected on the land shall be used as a beershop does not run with the land. *Ib.*

Mutual Covenants between Adjoining Landowners.]—Where there are mutual covenants by owners of land, their heirs and assigns, with the owners of adjoining land, their heirs and assigns, to comply with certain stipulations, the subsequent lessee of one of the owners is entitled to the benefit of the covenants as an assign, and can sue to restrain a breach. *Taite* v. *Gosling*, 48 L. J., Ch. 397; 11 Ch. D. 273; 40 L. T. 251; 27 W. R. 394.

Effect of Underletting whole Term.]—If the whole of a term is made over by the lessee, although in the deed he reserves the rent and a power of entry for nonpayment to himself, and not to the original lessor, and although he introduces new covenants, the person to whom it is made over may sue the original lessor or his assignees of the reversion, or be sued by them, as assignee of the term, on the respective covenants in the original lease. *Palmer* v. *Edwards*, 1 Dougl. 187, n.

Covenant relating to Land—On whom Binding.]—A covenant relating to but not running with land is binding on an assign with notice. *Luker* v. *Dennis*, 47 L. J., Ch. 174; 7 Ch. D. 227; 37 L. T. 827; 26 W. R. 167.

Action by one Tenant in Common—Severance of Reversion after Demise.]—One tenant in common of a reversion is entitled to maintain an action for injury to the reversion without joining his co-tenants as plaintiffs. An action may be maintained by one tenant in common of a reversion for breach of a covenant running with the land, without joinder of his co-tenants in common as plaintiffs, where the severance of the reversion takes place after the demise. *Roberts* v. *Holland*, 62 L. J., Q. B. 621; [1893] 1 Q. B. 665; 5 R. 370; 41 W. R. 494.

Evidence as to.]—In an action on a covenant which runs with the land, evidence that the defendant is in as heir will support a declaration charging him as assignee. *Derisley* v. *Custance*, 4 Term Rep. 75.

Scots Law—Covenant in Feu Charter against Trade of Publican.]—See *Zetland (Earl)* v. *Hislop*, post, col. 1225.

3. To Repair.

a. The Covenant.

i. *Obligations under.*

Generally.]—On a covenant in a lease of a farm and cottages, to keep and uphold and maintain the premises in good repair, the lessee or assignee is bound to keep up the cottages in situ, and to repair them if ruinous, or so as to replace them, as nearly as might be, in the position in which they were when demised, and is liable, having pulled them down, for their value as they stood, without reference to the result of their removal as regards the general improvement of the farm. *Woolcock* v. *Dew*, 1 F. & F. 337.

A. demised to B. for a term of years two messuages; the lease contained a covenant by B. that he would, during the term, keep the premises in repair, and leave them, at the end of the term, in good repair, and in the same state as they were in at the beginning. At the end of the term the messuages were out of repair, and had been converted into a single house. B. held on without a fresh lease, and C. afterwards

purchased the reversion of A., and B. continued to hold on under C.:—Held, that B. was not liable, on an implied contract, to put the messuages in such repair and in the same state as they were in at the commencement of the term; that, supposing B. so liable, C. had no right of action for breaches of the contract committed before he purchased the reversion. *Johnson* v. *St. Peter's, Hereford, Churchwardens*, 4 A. & E. 520; 4 N. & M. 186; 1 H. & W. 720; 5 L. J., K. B. 116.

Liability of Tenant after Bankruptcy.]—A tenant in possession of premises under an agreement for a lease for twenty-one years, from Michaelmas, 1861 (the lease to contain a covenant to repair and leave in repair) liquidated by arrangement in 1872, and got his discharge in 1880. The trustee took no steps with regard to the premises, which the tenant continued to occupy till Michaelmas, 1882:—Held, that the tenant was bound to leave the premises in the state of repair required by the agreement. *Ponsford* v. *Abbott*, 1 Cab. & E. 225.

How far Usual.]—A., who was under an agreement to take the lease of a house, the lease to contain all "usual covenants," agreed to assign all his interest to B., and forwarded him a copy of the agreement for a lease. In answer to inquiries by B., A. stated that the lessee would not have to do substantial repairs:—Held, first, that A.'s statement was a misrepresentation of a matter of law, and not of fact, and that A. was not bound by it. *Kendall* v. *Hill*, 6 Jur. (N.S.) 968.

Held, secondly, that B. was bound to repair the house in the event of damage by fire. *Ib.*

Under a contract for a lease of a mill, to contain "all usual and necessary covenants and provisoes," and particularly a covenant on the part of the lessee to keep the mill in good tenantable repair:—Held, that the lessee was not entitled to have introduced into the covenant the words "damages by fire or tempest only excepted." *Sharp* v. *Milligan*, 23 Beav. 419. *S. C.* nom. *Thorpe* v. *Milligan*, 5 W. R. 336.

Running with the Land.]—*See* ante, col. 1095.

Parol Agreement.]—An action may be maintained by a tenant against his landlord upon a parol agreement by the landlord to put a house in tenantable repair, although a written agreement for a lease made shortly afterwards is silent as to the terms of such parol agreement. *Mann* v. *Nunn*, 43 L. J., C. P. 241; 30 L. T. 526.

Inside Painting.]—Under a covenant that the tenant "should and would substantially repair, uphold and maintain" a house, he is bound to keep up the inside painting. *Mark* v. *Noyes*, 1 Car. & P. 265.

Extent of Liability under.]—A tenant under a covenant to repair is liable for repairs only, and is not liable for the extra expense of laying a new floor on an improved plan, or the like. *Soward* v. *Leggatt*, 7 Car. & P. 613.

—— **Of Assignee.**]—*See* ante, cols. 1069 et seq.

Habitable Repair.]—The term "habitable repair" means a state of repair reasonably fit for occupation of an inhabitant. *Belcher* v. *M'Intosh*, 8 Car. & P. 720; 2 M. & Rob. 186.

Where a tenant takes premises which are out of repair, and agrees "to put the premises into habitable repair," this implies that he is to put them into a better state than that in which he found them; and, regard being had to the state of the premises at the time of the agreement, and of their situation, and to the class of persons likely to inhabit them, he is to put them into a condition fit for a tenant to inhabit. *Ib.*

A direction to keep buildings in good repair means, not the state of repair in which they were at the testator's death, but in habitable repair. "Farming buildings" include "farm-houses." *Cooke* v. *Cholmondeley*, 4 Drew. 326; 6 W. R. 802.

Tenantable Repair.]—Under an agreement to keep a house in "good tenantable repair," and so leave the same at the expiration of the term, the tenant's obligation is to put and keep the premises in such repair as, having regard to the age, character and locality of the house, would make it reasonably fit for the occupation of a tenant of the class who would be likely to take it. *Proudfoot* v. *Hart*, 59 L. J., Q. B. 389; 25 Q. B. D. 42; 63 L. T. 171; 38 W. R. 730; 55 J. P. 20—C. A.

Under an agreement for a lease for five years of a dwelling-house, the tenant was to leave the house in tenantable repair. In an action by the landlord at the end of the tenancy (which continued for seventeen years) for damages, upon the footing that the tenant was liable to paper and paint, and leave the house in the same condition as when he took it:—Held, that the landlord was not entitled to damages on that footing, but that he was entitled to compensation for waste, the tenant being liable to paint sufficiently to preserve the woodwork, but not to do papering or decorative painting. *Crawford* v. *Newton*, 36 W. R. 54—C. A.

An agreement to leave a farm as he found it is an agreement to leave it in tenantable repair, if he found it so. *Winn* v. *White*, 2 W. Bl. 840.

As to Time when Premises should be Repaired.]—A covenant by the lessee to repair the premises at all times (as often as need or occasion should require), and at farthest within three months after notice, is one entire covenant, the former part of which is qualified by the latter. *Horsfall* v. *Testar*, 1 Moore, 89; 7 Taunt. 385.

—— **"Forthwith."**]—A covenant "forthwith" to put premises into complete repair must receive a reasonable construction, and is not to be limited to any specific time; and therefore it will be for the jury to say, upon the evidence, whether the defendant has done what he reasonably ought in the performance of it. *Doe* d. *Pittman* v. *Sutton*, 9 Car. & P. 706.

For what Period.]—When a lessee covenants to pay the rent reserved and keep the demised premises in repair, he is bound, during the term, to perform both covenants as long as the subject-matter of the demise continues to exist, although it was originally of no value. *Meath (Earl)* v. *Cuthbert*, Ir. R. 10 C. L. 395.

Effect of, when subsequent Statute makes prior Use of Premises Unlawful.]—A. demised the basement of a warehouse (other parts of which he had leased to other persons for storing gunpowder) to B., with full and undisturbed right and liberty to store cartridges therein, and

covenanted to keep the premises in proper repair and condition, so as to be available during the term for the storing of cartridges, and to keep a proper storekeeper who should receive the cartridges; and he also covenanted for quiet enjoyment. Soon afterwards the Explosives Act, 1875, passed, prohibiting the storing of cartridges in the same building with gunpowder. When the act came into operation, A. at once removed B.'s cartridges out of the premises, in spite of B.'s request that he would not do so. On being subsequently required by B. to store a quantity of cartridges, A. replied that the premises were at B.'s disposal, but that if B. stored cartridges there, he must, to protect himself, give notice to the authorities. In an action by B. to restrain A. from obstructing the storing of his cartridges, and to compel A. to do everything necessary to enable him to deposit his cartridges in the demised premises, and for damages:—Held, that the covenant to keep the premises in proper repair and condition for storing cartridges only referred to their physical condition, and did not impose upon A. an obligation to procure licences to make the storage legal; and that, the subsequent act of parliament having rendered it illegal to store cartridges in the building, B. must bear the loss, as there was nothing in the lease to throw it upon A. *Newby* v. *Sharpe*, 47 L. J., Ch. 617; 8 Ch. D. 39; 38 L. T. 583; 26 W. R. 685—C. A.

Held, also, that A.'s removal of B.'s cartridges was only a trespass, and not an eviction. *Ib.*

Landlord finding Materials—Damages resulting from Non-repair.]—The tenant agreed to keep the buildings in good repair. The landlord by a subsequent clause, agreed, on notice from the tenant, to find materials for repairs, the tenant doing the drawing and labour. A barn requiring repair, the tenant gave the landlord notice to find materials, which he failed to do for more than the allowed period. The barn remained out of repair, in consequence of which a storm damaged the roof, and the rain entered and damaged the tenant's corn:—Held, that the tenant was not entitled to damages for the injury done to his corn, for that his obligation to repair was not conditional on the landlord finding materials, and that the damage arose from his own failure to carry out his part of the contract, and that he ought to have repaired, and claimed the cost of the materials from the landlord. *Tucker* v. *Linger*, 51 L. J., Ch. 713; 21 Ch. D. 18; 46 L. T. 198; 30 W. R. 425. *S. C.*, in H. L., 52 L. J., Ch. 941; 8 App. Cas. 508; 49 L. T. 373; 32 W. R. 40; 48 J. P. 4.

Implied Covenant by Landlord to enable Lessee to perform Covenant to Repair.]—There were two houses, Nos. 38 and 40, in B. street. The upper stories of these houses adjoined, but the ground floors were separated by an archway, which was wholly under No. 40, the north wall of No. 38 thus being in its upper part a party wall between No. 38 and the archway. The defendants were freeholders of both houses and the archway. They let No. 38 to A. on lease, taking a covenant to repair, which included party walls. Afterwards, and during the term of the lease to A., they let No. 40 to the plaintiff for eleven years, taking a similar covenant, the archway remaining in their own occupation. In 1874, during the currency of both these leases, that part of the wall which formed the party wall between No. 38 and the archway, and was in the joint occupation of A. and the defendants, bulged and gave way, and the plaintiff's house, which rested on it, became in consequence uninhabitable. The plaintiff then claimed compensation from the defendants on the ground that there was an implied covenant in the lease that the defendants would keep their premises in such condition as to enable him to perform his covenant to repair:—Held, that there was no such covenant, and that he was not entitled to recover. *Colebeck* or *Colbeck* v. *Girdlers' Co.*, 45 L. J., Q. B. 225; 1 Q. B. D. 234; 34 L. T. 350; 24 W. R. 577.

In Agreement—Lease never Executed.]—By agreement, reciting a former agreement, for the grant of a lease of copyhold premises to A. for twenty-one years, from the 25th of March, 1820, and that A. had requested, and the plaintiff had agreed, that the defendant should be accepted as tenant, and a lease should be granted to him instead of to A. on the same terms; and that the plaintiff was desirous to let the premises to the defendant so soon as a good licence for that purpose should be granted to him by the lord of the manor, but not before; the plaintiff, in consideration of the covenants and agreements on the part of the defendant, covenanted that he would, so soon as a good licence for that purpose should have been procured to him from the lord, at the defendant's expense, lease the premises to the defendant for all the residue then unexpired of the term of twenty-one years from the 25th of March, 1820; and the defendant covenanted thenceforth yearly, during the remainder of the term, to pay the plaintiff the rent, and also that he would from time to time, during the term to be granted, keep the premises in repair. The defendant entered upon the premises, and occupied them until the expiration of twenty-one years from the 25th of March, 1820:—Held, that he was liable on the covenant for repair, although no lease had ever been made to him pursuant to the agreement, nor any licence obtained from the lord for that purpose. *Pistor* v. *Cator*, 9 M. & W. 315; 12 L. J., Ex. 129.

Floors of Warehouse Overloaded by Sub-tenant—Fall of Premises.]—The plaintiffs demised certain floors in a warehouse to the defendant at a rent. He covenanted to repair, maintain and keep the inside of the premises in good and tenantable repair and condition, and to deliver them up at the end of the term, damage by fire, storm or tempest, or other inevitable accident, and reasonable wear and tear only excepted. The plaintiffs covenanted to keep the walls, roof and main timbers of the premises in good and substantial repair and condition. The lease also contained a provision for the suspension of the rent in the event of the premises being burnt down, or damaged by fire, storm or tempest. Sub-lessees of the defendant overloaded a floor with flour, in consequence of which the whole building fell. The plaintiffs rebuilt it, and sued for rent during the time the building was unoccupied, and for damages. The defendant denied liability, and claimed damages from the plaintiffs:—Held (1), that, notwithstanding the fall, the defendant was liable to pay the rent; (2), that there was no implied warranty by the plaintiffs that the building was fit for the purpose for which it was to be used; (3) that, in the absence of notice to them of any damage or want

of repair, the plaintiffs were not liable on their express covenant to keep the walls, roof, and main timbers of the building in repair; (4) that, on the authority of *Saner* v. *Bilton* (7 Ch. D. 815), the destruction of the building, if caused by using the property demised in what was apparently a reasonable and proper manner, having regard to its character, and to the purposes for which it was intended to be used, was not waste, and therefore the tenant would not be liable to pay damages for it; (5) that as the case was not within the exceptions in his express covenant to repair, he was liable under it to the cost of putting the inside of the floors demised, and the fixtures therein, in good and tenantable repair. *Manchester Bonded Warehouse Co.* v. *Carr*, 49 L. J., C. P. 809; 5 C. P. D. 507; 43 L. T. 476; 29 W. R. 354; 45 J. P. 7.

Liability of Landlord.]—A tenant hired of a landlord the ground-floor of a warehouse, the upper part of which was occupied by the landlord himself. The water from the roof was collected by gutters into a box, from which it was discharged by a pipe into the drains. A hole was made in the box by a rat, through which the water entered the warehouse and wetted the tenant's goods. The landlord had used reasonable care in examining and seeing to the security of the gutters and the box. In an action by the tenant against the landlord for the damage so caused:—Held, that he was not liable, either on the ground of an implied contract, or on the ground that he had brought the water to the place from which it entered the warehouse. *Carstairs* v. *Taylor*. 40 L. J., Ex. 129; L. R. 6 Ex. 217; 19 W. R. 723.

In a lease of a newly-constructed grain warehouse there was a covenant by the lessor that he would during the term "keep the main walls and main timbers of the warehouse in good repair and condition." The lessee entered under the lease and stored grain in it in a reasonable and proper way. After a short time a beam which supported one of the floors broke, and ultimately the external walls sank and bulged outwards, and the lessor spent a large sum in repairing the premises. In an action by the lessor to recover from the lessee what he had thus expended:—Held, that the lessee had not been guilty of waste. *Saner* v. *Bilton*, 47 L. J., Ch. 267; 7 Ch. D. 815; 38 L. T. 281; 26 W. R. 394.

Held, also, that the lessor was bound under his covenant to put the walls and main timbers in good repair, having regard to the class of buildings to which the warehouse belonged, and not merely to the condition of the particular building. *Ib.*

Held, also, that the covenant implied a licence by the tenant to the landlord to enter upon the premises for a reasonable time for the purpose of executing the necessary repairs. *Ib.*

Rights of Trustees of Leaseholds where Tenant for Life does not Repair.]—When leasehold houses are vested in trustees on behalf of a tenant for life and remaindermen, it is the duty of the trustees to keep the property free from the risk of forfeiture by a breach of the covenants of the lease, and they are entitled to have the rents applied in keeping the houses in a proper state of repair. The trustees are not bound to be content with the setting apart of a sum of money in the joint names of themselves and the tenant for life as an indemnity against the consequences of a breach of the covenants of the lease, but are entitled to require the covenants to be specifically performed. When a tenant for life of leasehold houses is allowed by the trustees to receive the rents, and the houses are not kept in a proper state of repair according to the covenants of the lease, the court will, at the instance of one of the trustees, appoint a receiver of the rents, for the purpose of enforcing the proper repair of the houses. *Fowler, In re, Fowler* v. *Odell*, 16 Ch. D. 723; 44 L. T. 99; 29 W. R. 891.

ii. *What Premises.*

Buildings Erected and Built, or to be Erected and Built.]—A lessor, in 1779, demised for a term of ninety-nine years, from the 29th of September, 1778, premises described as "all that piece or parcel of land situate on the north side of East Lane, in Walworth, abutting south on the said lane, north, &c., and which said piece or parcel of land hereby intended to be demised, contains in width, &c., together with the messuage or tenement, and all other erections and buildings erected and built, or which may at any time during the time hereby intended to be granted be erected and built, on the said piece or parcel of land or any part thereof." The description in the parcels then continued as follows: "And also all that one acre of land lying at the back of the garden belonging to the said messuage as the same is now fenced in and inclosed; which said messuage and garden is in the occupation of H. P., and the said acre of land in the occupation of the said lessee"; and the lessee covenanted that he, his heirs, administrators, and assigns, should and would "repair the said messuage or tenement and erections and buildings erected and built, or to be erected and built, upon the said ground demised." At the date of the lease, in 1779, the only building on any part of the demised land was the messuage or tenement mentioned in the first portion of the parcels. At the expiration of the term in 1877, not only the site of the original messuage and garden but also the one-acre field lying behind was covered with numerous small houses, all of which were out of repair:—Held, that the covenant to repair extended to the whole of the demised land and the buildings thereon erected, and that the defendants were liable for the whole claim. *Hudson* v. *Williams*, 39 L. T. 632.

A covenant in a building and repairing lease to leave the demised premises, with all new erections, well repaired, extends to the new erections only. *Lant* v. *Norris*, 1 Burr. 287.

Under a lease of a farm, the tenant was bound to keep in repair the buildings to be erected thereon during the term; the tenant, with the permission of the landlord, who was lord of the manor, built a house on the waste adjoining the farm, and he enjoyed it with the farm:—Held, that the tenant was also under an obligation to keep the house in repair. *White* v. *Wakley*, 26 Beav. 17; 28 L. J., Ch. 77; 4 Jur. (N.S.) 988; 6 W. R. 791.

A lessor demised "three tenements or dwelling-houses, and a field or plot of ground adjoining thereto," and the lessee covenanted "well and sufficiently to repair, sustain, and keep the tenements or dwelling-houses, field or plot of ground and premises, and every part thereof, as well in houses, buildings, walls, hedges, ditches, fences,

gates, as in all other needful and necessary reparations whatsoever, when and as often as occasion shall require during the term, and at the end or sooner determination thereof the premises so well and sufficiently repaired into the hands and possession of the lessor peaceably to leave and yield up" :—Held, that the covenant did not extend to houses afterwards built in the field. *Cornish* v. *Cleife*, 3 H. & C. 446 ; 34 L. J., Ex. 19 ; 11 Jur. (N.S.) 181 ; 11 L. T. 606 ; 13 W. R. 389.

Where the lessee covenanted to build and to repair both the houses built and to be built, and for delivering up at the end of the term. For forty-six years of the lease the lessor received the rent and omitted to enforce the covenant to build, &c. Upon a sale of the terms :—Held (1). that the covenant for delivering up, &c., extended to the additional houses covenanted to be built, and not merely to those already built at the date of the lease. (2) That the title was bad, although the purchaser might hold on to the end of the term, and escape the covenant by assignment to a pauper; and (3) that the purchaser was not bound to accept either compensation or indemnity. *Nouaille* v. *Flight*, 7 Beav. 521 ; 13 L. J., Ch. 414 ; 8 Jur. 838.

Fittings in Coal-mine.]—Where a lessee of a coal-mine covenanted at the end of the term to yield up the works and mines, and all ways and roads in such good repair, order and condition, so that the works might be continued and carried on by the lessor :—Held, that such covenant did not include wooden sleepers, or iron tram-plates fastened to such wooden sleepers, used for the purpose of a railway. *Beaufort (Duke)* v. *Bates*, 3 De G. F. & J. 381 ; 31 L. J., Ch. 481 ; 6 L. T. 82 ; 10 W. R. 200.

Liability to repair Mill-wheel.]—An agreement for the letting of a farm and mill provided that the tenant "should keep and leave the messuages and buildings in good and substantial repair," &c. In an action by the landlord to recover damages for non-repair of the mill-wheel :—Held, that the tenant was liable. *Openshaw* v. *Evans*, 50 L. T. 156.

Rights of Tenant as to Repair of External Wall of Dwelling.]—A lessor of a house, situate in a borough, covenanted with the lessee to repair and keep in repair all the external parts of the demised premises, except the glass and lead of the windows. The corporation, acting under a local statute passed after the demise, pulled down an adjoining house, and thereby left the wall of the demised house, which had previously divided the two, exposed and without support ; the wall thereupon gave way, and the house became uninhabitable. The lessee immediately called upon the lessor to repair, which he, six weeks after the sinking of the wall, finally refused to do. On this the lessee, who had removed to other premises, pulled down and began to rebuild the wall, and, before the work was finished, sued the lessor upon his covenant :—Held, that the wall, even before the neighbouring house had been removed, was an external part of the demised premises ; the external parts of premises being those which form the inclosure of them, and beyond which no part of them extends. *Green* v. *Eales*, 2 Q. B. 225 ; 1 G. & D. 408 ; 11 L. J., Q. B. 63 ; 6 Jur. 436.

Held, also, that the lessee was liable on his covenant, though the injury to the wall was done in the first instance by the corporation, and the local statute had a special clause for the recovery of compensation from them in case of such injuries ; for the lessor ought to have set about the repair in time to prevent the mischief which ensued. *Ib.*

In such an action the lessee, after such refusal, having rebuilt an external wall, is entitled to recover the costs thereof, the jury having found that this was the proper mode of restoring it. *Ib.*

He may also recover the price of damage done to plate-glass and fixtures in consequence of the sinking of the wall ; but the lessee cannot recover the rent paid by him for the occupation of other premises during the progress of the repairs, though, during that time, the demised premises were not safely inhabitable. *Ib.*

iii. *Conditional or Absolute Covenants.*

Conditional.]—The plaintiff and defendants agreed, the plaintiff to let and the defendants to take a messuage, barn, stable, and outbuildings, and the defendants agreed to keep in repair the messuage, buildings, and premises, the same being first put into repair by the plaintiff. In an action for non-repair :—Held, first, that the repair by the plaintiff was a condition precedent to the obligation on the defendants to keep in repair. *Neale* v. *Radcliffe*, 15 Q. B. 916 ; 20 L. J., Q. B. 130 ; 15 Jur. 166.

Held, secondly, that on this contract the condition precedent could not be decided, and that the plaintiff could not recover for non-repair of any part of the premises without having first repaired the whole. *Ib.*

A declaration stated that the plaintiff demised premises to the defendant, subject to a covenant that he should expend 100*l.* in substantial improvements, additions, and repairs, under the direction and with the approbation of some competent surveyor, to be named by the plaintiff. Breach, that the defendant would not expend 100*l.* in substantial improvements, additions, and repairs, although the plaintiff was always ready and willing to appoint a competent surveyor :—Held, that the appointment of a surveyor was a condition precedent to the defendant's liability to expend 100*l.*, and that the declaration was bad on special demurrer. *Coombe* v. *Greene*, 2 D. (N.S.) 1023 ; 10 M. & W. 480 ; 12 L. J., Ex. 291.

Agreement for a lease for five years, from the 1st April, 1840, the landlord undertaking to erect, by that time, a new warehouse on part of the ground to be demised, and to put the old warehouse in repair, the amount of rent to be determined with reference to the amount of the landlord's expenditure on the buildings. The new building was not erected, nor the old warehouse repaired, on the 1st April ; but no objection was made by the intended lessee, who then occupied part of the premises under a former agreement, and shortly afterwards the whole premises were destroyed by fire :—Held, upon a bill filed in equity by the landlord for specific performance of the agreement, and for the defendant to rebuild the premises, and to accept a lease, that it was a condition precedent, that the premises should be put in repair before the lease was granted, and that, as the landlord had not performed his engagement within the time limited, the contract could not be enforced in

equity. *Counter* v. *Macpherson*, 5 Moore, P. C. 83.

Absolute.]—In a lease for lives of a manor and demesnes, the lessee covenanted to repair and keep the premises in all needful and necessary reparations, having or taking in upon the demised premises sufficient housebote for the doing thereof, without committing waste:—Held, that the covenant was an absolute, and not a conditional, covenant to repair, with a licence to take timber for housebote. *Bristol (Dean)* v. *Jones*, 1 El. & El. 484; 28 L. J., Q. B. 201; 5 Jur. (N.S.) 956; 7 W. R. 307.

A lease was in the following forms: C. covenants with J. that C. will, during the continuance of the term, at his own costs and charges, in all things well and sufficiently repair and glaze the windows of the messuage, and also the hedges, ditches, mounds, and fences of and belonging to the premises, and all fixtures, additions thereto, during the term, in and by, and with all and all manner of needful and necessary reparations, cleansings, and amendments, when and as often as occasion shall require, the farmhouse and buildings being previously put and kept in repair by J.:—Held, that these latter words raised an absolute covenant on the part of J. to put farmhouse and buildings in repair. *Connoch* v. *Jones*, 3 Ex. 233; 18 L. J., Ex. 204.

iv. *Notice.*

To Tenant.]—A lease, containing a covenant by the lessee to repair the premises at all times (as often as need or occasion should require), "and at farthest within three months after notice," is one entire covenant, the former part of which is qualified by the latter. *Horsfall* v. *Testar*, 1 Moore, 89; 7 Taunt. 385.

In ejectment for a forfeiture of a lease, containing the usual clause of re-entry, and a covenant generally to repair, with a further covenant, within three months after notice, to repair the defects pointed out in a notice, the forfeiture is complete before the expiration of the three months. *Roe* d. *Goatly* v. *Paine*, 2 Camp. 520.

A general covenant to repair, and further to repair within three months after notice from the lessor, are separate and independent covenants, and a right of re-entry attaches for a breach of the former, though no notice is given under the latter. *Baylis* v. *Le Gros*, 4 C. B. (N.S.) 537; 4 Jur. (N.S.) 513.

Covenants to repair after notice considered as distinct covenants. *Gregory* v. *Wilson*, 9 Hare, 690; 16 Jur. 304.

Waiver—Acceptance of Rent.] — A notice, requiring a tenant to remedy a breach of covenant by repairing premises within three months expired on February 1st, 1884. No repairs were then done, and on February 2nd, the rent due at Christmas, 1883, was accepted:—Held, that the acceptance of the rent was no waiver of the breach of covenant. *Cronin* v. *Rogers*, 1 Cab. & E. 348.

Suspension of—Negotiation for Purchase of Lessee's Interest.]—When a notice to repair has been given, and the lessee makes an offer to sell his interest in the premises, and a negotiation takes place on that offer, the effect of that offer and the negotiation is to suspend the notice till the negotiation has been terminated, from which event alone the date of the notice can properly be calculated. Equity will relieve against an ejectment founded on the original notice. *Hughes* v. *Metropolitan Ry.*, 46 L. J., C. P. 583; 2 App. Cas. 439; 36 L. T. 932; 25 W. R. 680—H. L. (E.)

How far a Waiver to Forfeiture.] — An indenture of lease, with a clause for re-entry, contained a general covenant on the part of the lessee to keep the premises demised in repair, and a further covenant that he would, within three months after notice being given to him by the landlord, repair all defects specified in the notice. The premises demised being out of repair the landlord gave the lessee notice to repair, in accordance with the covenants of the lease. Before the expiration of three months, ejectment was brought:—Held, that the notice was not a waiver of the forfeiture incurred by the breach of the general covenant to repair, and that the action was maintainable. *Few* v. *Perkins*, 36 L. J., Ex. 54; L. R. 2 Ex. 92; 16 L. T. 62; 15 W. R. 713.

To Landlord.]—Under a covenant by a lessor "to keep the main walls, main timbers, and roofs of the demised premises in good repair during the continuance of the demise," the lessor cannot be sued for any non-repair, unless he has had notice from the lessee of the want of repair. *Makin* v. *Watkinson*, 40 L. J., Ex. 33; L. R. 6 Ex. 25; 23 L. T. 592; 19 W. R. 286.

Necessity for.]—In an action by a tenant against a landlord for breach of an agreement to keep drains in repair, the jury found that neither party knew of the defective condition of the drains before the damage occurred, and that the plaintiff had not, and the defendant had, the means of knowing:—Held, that the defendant was not liable. *Hugall* v. *McKean*, 53 L. T. 94; 33 W. R. 588—C. A. Affirming 1 Cab. & E. 391.

v. *Upon whom binding.*

Demise to Two as Tenants in Common.]—Premises were demised to G. and A., "their executors, administrators, and assigns," habendum to "the said G. and A., their executors, administrators, and assigns, as tenants in common and not as joint tenants," at a single yearly rent; and G. and A. covenanted "for themselves, their executors, administrators, and assigns that they the said G. and A., or some or one of them, their executors, administrators, or assigns," would pay the said yearly rent and keep the premises in repair. G. having died during the term, the lessor sued A. and the executors of G. for breaches of covenant occurring after G.'s death:—Held, that the covenants were in form joint and not several, and that G.'s executors were not liable. *Whyte* v. *Tyndall*, 57 L. J., P. C. 114; 13 App. Cas. 263; 58 L. T. 741; 52 J. P. 675—H. L. (Ir.)

Lessee's Executors after Entry.]—Semble, that an executor of a lessee cannot, after entering, limit his liability under the testator's covenant to repair. *Rendall* v. *Andreæ*, 61 L. J., Q. B. 630.

Assignee of Lease.]—*See* ante, cols. 1072–1074.

Under-lessee—Breach by his Sub-lessee.]—A declaration by the assignee of part of the reversion, for non-repair of premises, stated that G. held the premises under a lease for ninety-nine years, which expired on the 25th December, 1849; that during the time he so held the premises he granted an under-lease to V. and S. for twenty-five years and a quarter from the 25th December, 1823, by which V. and S. jointly and severally covenanted with G. that they would during the term repair, and at the end of the term deliver them up in repair to G.; that during the under-lease to V. and S., G. granted his reversion to S. and the plaintiffs, whereupon the term in the under-lease was, as to one undivided sixth part, merged in the reversion, and S. and the plaintiffs became, as joint tenants, possessed of the reversion of three undivided sixth parts of the premises, and the plaintiffs became, as joint tenants, possessed of the reversion of two other undivided sixth parts; that V. afterwards assigned to S. his interest in the under-lease granted to him and S., whereupon the term as to one undivided sixth part, merged in the reversion in the three sixth parts, whereof S. and the plaintiffs were possessed, and that S. died before the determination of the under-lease, and alleged as a breach the non-performance by V. of the covenant to repair after S.'s death, and to leave in repair. Plea, that after G. demised to S. and V., and before the assignment to S. by V., V. and S. demised the premises to T. for twenty-three years from the 25th June, 1825, with covenants by T. to keep and leave in repair; the death of T., and that L. the original lessor sued the plaintiffs for non-repair, and that such action was settled by an agreement, without the privity or consent of V., whereby the representatives of T. agreed to pay 300*l.* and to give up possession to L., and the plaintiffs agreed to pay S. 200*l.*, and to deliver up the lease to a third person in trust for L.; but to be produced for the purpose of supporting any claims against V. relating to the premises, and that when such claims should have been satisfied, the plaintiffs would concur in surrendering their estate or interest in the lease, and that in pursuance of the agreement, possession was delivered to L., and that thereby V. had been prevented from performing his covenant:—Held, that the plea was bad, inasmuch as the agreement and the delivery of possession to L. did not operate as a surrender of all the plaintiff's interest, and was not so intended to operate; and the defendant not being a party to the agreement might, at the expiration of the underlease to T., have entered for the residue of the term granted to him and S., and performed his covenant to repair. *Badeley* v. *Vigurs*, 4 El. & Bl. 71; 2 C. L. R. 1627; 23 L. J., Q. B. 377; 1 Jur. (N.S.) 159.

—— **Where Lessee Bound.**]—Lessee, where there is a covenant by him to repair, makes an underlease to J. S., who is in possession. Under-lessee not liable to this covenant in law, nor bound by it in equity, unless the first lessee is insolvent. *Goddard* v. *Keate*, 1 Vern. 87.

Trustees or Beneficiaries.]—Trustees of a will held a lease upon trust for successive life tenants with remainders over, and the residuary personal estate upon trust out of the income to pay all the costs, charges and expenses of executing the trusts of the will:—Held, that they and not the life tenants were the persons liable to observe the covenants and to pay the rent and outgoings which on the true construction of the will, should be paid by them out of the income. *Baring, In re, Jeune* v. *Baring*, 62 L. J., Ch. 50; [1893] 1 Ch. 61; 3 R. 37; 67 L. T. 702; 41 W. R. 87.

Stranger—Possession for Twenty Years—Rent paid to Lessor.]—The effect of s. 34 of the Real Property Limitation Act (3 & 4 Will. 4, c. 27) is merely to extinguish the title of the prior rightful owner, and not to transfer that title to the person in possession. The plaintiff granted a lease of certain premises, the lease containing the usual covenant by the lessee and his assigns to repair. The defendant took possession during the term without any assignment from the lessee, and remained in possession for more than twenty years, paying the rent to the plaintiff. In an action at the expiration of the term for breach of the covenant to repair:—Held, that the defendant was not liable on the covenants in the lease. *Tichborne* v. *Weir*, 4 R. 26; 67 L. T. 735—C. A.

vi. *Performance and Satisfaction of Covenant.*

What Sufficient.] — A general covenant to repair is satisfied by the lessee keeping the premises in substantial repair: a literal performance of the contract is not to be required. *Harris* v. *Jones*, 1 M. & Rob. 173.

A lessee covenanted to preserve and keep, and at the end of the term leave the demised premises in good and tenantable repair:—Held, that this covenant would be satisfied by leaving the premises in such a state as, regard being had to the age of the building at the time of the demise, might be considered tenantable. *Stanley* v. *Towgood*, 3 Scott, 313; 3 Bing. (N.C.) 4; 2 Hodges, 132; 6 L. J., C. P. 129.

The lessee during the term erected a lean-to with a roof so ill constructed that it did not exclude the weather, and so left it at the end of the term:—Held, that it was a breach of his covenant to repair. *Ib.*

A lessee covenanted, within the two first years of the term, to put premises in good and sufficient repair, and at all times during the term to repair, pave, scour, cleanse, empty, and keep the messuages, ground, and other the premises, when, where, and as often as need should require; and within the first fifty years of the term to take down four messuages, as occasion might require, and in the place thereof erect upon the premises four other good and substantial brick messuages:—Held, that, if within the fifty years the houses should be so repaired as to make them completely and substantially as good as new houses, the covenant would be satisfied without taking down the old houses. *Evelyn* v. *Raddish*, 7 Taunt. 411.

Under a covenant by a farm tenant "well and substantially to repair, and keep in good substantial repair, and so well and substantially repaired" to yield up at the end of the term, the tenant is bound to give up the premises in as good a state of repair as when he took possession, and they must be inferred to have been then in a tenantable state. *Brown* v. *Trumper*, 26 Beav. 11.

When Premises old.]—Where a very old house is demised, with the usual covenants to repair, it

is not meant that the house should be restored in an improved state, or that the consequences of the elements should be averted; but the tenant has the duty of keeping the house in the state in which it was at the time of the demise, by the timely expenditure of money and care. *Gutteridge* v. *Munyard*, 7 Car. & P. 129; 1 M. & Rob. 334.

A. on becoming tenant to B. of a farm and outbuildings, agreed to keep the same, and at the expiration of the tenancy to deliver up the same, in good repair, order and condition. Breach, that he did not deliver up the same in good repair, order and condition:—Held, that, on this contract to keep the premises in good repair, the tenant was bound to put them in that condition, and that the tenant was not justified in keeping them in bad repair because he found them in that condition; but the extent of that repair was to be measured by their age and class. *Payne* v. *Haine*, 16 M. & W. 541; 16 L. J., Ex. 130.

On a covenant, as often as necessary, well and sufficiently to repair, uphold, sustain, paint, glaze, cleanse, and scour, and keep and leave the premises in such repair, reasonable wear and tear excepted, the tenant, if he has repaired within a reasonable time before leaving, is only bound, in addition to the repair of actual dilapidations, to clean the old paint, &c., and not to repaint, &c. *Scales* v. *Lawrence*, 2 F. & F. 289.

In an action on a covenant to keep premises in repair during the tenancy, the jury may take into consideration the state of repairs at the commencement of the demise, in order to assess the damages for which the defendant is liable. *Burdett* v. *Withers*, 2 N. & P. 122; 7 A. & E. 136; W. W. & D. 444; 6 L. J., K. B. 219; 1 Jur. 514.

So it is competent to the defendant to shew the general state and condition of the premises at the time of the demise, but not to go into matters of detail. *Young* v. *Mantz*, 6 Scott, 277; 1 Arn. 198; 4 Bing. (N.C.) 451; 7 L. J., C. P. 204.

In determining whether there has been a breach of a covenant to repair, regard must be had to the age and character of the premises at the date of the demise; and if the premises through their own inherent defects fall in the course of the tenancy into a particular condition, the results of their being in that condition are not breaches of a covenant to repair, however wide that covenant may be. *Lister* v. *Lane*, 62 L. J., Q. B. 583; [1893] 2 Q. B. 212; 4 R. 474; 69 L. T. 176; 41 W. R. 626; 57 J. P. 725—C. A.

Where Tenant's Agent has "improperly" Repaired.]—A breach of covenant to repair is not excused, because the covenantor has bonâ fide employed persons to repair. If the covenantor's agent has, in fact, not repaired, the breach is not such as equity will relieve against. *Nokes* v. *Gibbon*, 3 Drew. 681; 26 L. J., Ch. 433; 3 Jur. (N.S.) 726; 5 W. R. 400.

A breach of a covenant to make a roadway in front of a particular house is not to be relieved against in equity, because if made before the roadway in front of adjacent houses was made, it would be continually cut up and useless. *Ib.*

vii. *What constitutes a Breach.*

Neglecting to cleanse Ornamental Water.]—By an agreement of demise of a house and grounds, the landlord undertook to keep the premises in repair, and to pay all rates, taxes and charges which might be payable in respect of the premises. In the grounds was a piece of ornamental water, in which during the tenancy an accumulation of mud caused at one spot a public nuisance, and at another spot a nuisance to the tenant, and elsewhere choked up the stream. The tenant, being summoned under the Nuisances Removal Act, 1855, in respect of the public nuisance, employed a contractor to clear out the whole stream to the satisfaction of the inspector of nuisances. Afterwards, at the hearing of the summons, an order was made on him to abate the public nuisance. The whole of the mud was cleared out under the contract, that part which constituted the public nuisance being removed partly before and partly after the date of the order:—Held, first, that the landlord was not, under his agreement to repair, bound to cleanse the ornamental water. *Bird* v. *Elwes*. 37 L. J., Ex. 91; L. R. 3 Ex. 255; 18 L. T. 727; 16 W. R. 1120.

Held, secondly, that no charge on the premises in respect of any part of the work done had been created by the proceedings under the Nuisances Removal Act, 1855. *Ib.*

Wall of Warehouse insufficient to support Goods stored.]—A., in November, 1865, agreed with B. as follows: "I agree to let to you, for the term of five years, the whole of the warehouse and cellars, now occupied by P. & Co., for the annual rent of 600*l.*, the building to be put by me into good tenantable repair." Repairs were thereupon done by A., who knew that the premises were to be used by B. in his business of a silk and linen merchant and warehouseman; and in January, 1866, B., who had previously inspected the premises, entered into possession, making no complaint of their condition or want of repair. The building had originally been a dwelling-house, and had been converted into a warehouse by the addition of two storeys, without strengthening the outer wall, which was only fourteen inches thick, and as a warehouse it had been occupied by P. & Co. By reason of the insufficient thickness of the outer wall, and the weight of the linen stored by B. on the premises, the outer wall began to give way some time between March and June, and in October, 1866, a portion of it fell, rendering it necessary to pull down and rebuild the whole wall, which was done by A., B. being for some time deprived of the use of the premises, and otherwise sustaining damage thereby. In an action by him to recover damages for an alleged breach of agreement to put the premises into good tenantable repair:—Held, that A.'s contract was clearly performed at the time B. took possession of the premises, and made no complaint of their state of repair; that there was no contract on his part to put them into good tenantable repair for any particular or specified purpose; and that if B. required any extra support for his goods he should have called A.'s attention thereto whilst the repairs were going on. *McClure* v. *Little*, 19 L. T. 287.

Opening Doors or Windows in Wall.]—If a doorway is broken through the wall of a demised house into an adjoining house, and kept open for a long space of time, it amounts to a breach of covenant to repair. *Doe* d. *Vickery* v. *Jackson*, 2 Stark. 293.

Enlargement of windows, opening external doors, and taking down partitions, are no breach of a covenant to repair and to keep in repair a dwelling-house, together with all such buildings, improvements or additions as should be erected, set up, or made by the lessee. *Doe* d. *Dalton* v.

Jones, 1 N. & M. 6; 4 B. & Ad. 126; 2 L. J., K. B. 11.

On a covenant to keep premises in repair, it is a breach to pull them down, either wholly or partially, even so far as to open doors in a wall; and it is a breach for which the lessor may sue for and recover substantial damages during the term. Nor is it any equitable defence that it was done with the consent and acquiescence of the lessor, unless it appears that it was with his previous consent. *Gauge* v. *Lockwood*, 2 F. & F. 115. See *Bargnis* v. *Edwards*, 2 F. & F. 111.

Pulling down Premises.]—A covenant by a lessee, that he will, during the term, repair, uphold, support, and sustain and maintain the brick walls to the demised premises belonging, is broken, if the lessee, during the term, pull down a brick wall which divides the courtyard at the front of the house from another yard at the side of the house. *Doe* d. *Wetherell* v. *Bird*, 6 Car. & P. 195.

Covenant to repair at the end of the term and surrender buildings in good condition does not preclude an injunction against pulling them down and carrying away the materials just before the end of the term. *London Corporation* v. *Hedger*, 18 Ves. 355.

An under-lessee of certain premises for an unexpired term of fifty years, under a covenant to repair and keep up the demised premises, was required by a local board to treat with them for the purchase of a strip of land on which the buildings stood. The under-lessee proposed to pull down the demised premises and re-erect them upon plans sanctioned by the local board:—Held, that there being no negative covenant in the lease, the lessee was entitled to pull down and re-erect the premises. *McIntosh and Pontypridd Improvements Co., In re*, 61 L. J., Q. B. 164. And see *Doherty* v. *Allman*, 3 App. Cas. 709; 39 L. T. 129; 26 W. R. 513—H. L. (Ir.), post, col. 1275.

A tenant was bound by his lease to keep and leave the houses in tenantable condition, subject to a provision that the timber in the sub-tenants' houses should be valued at the commencement and end of the lease; and that the out-going tenant should pay, or receive from the in-coming tenant the difference in value at those respective times. The lease further provided that if the tenant should build an additional steading during the lease, the value thereof at the expiration of the lease should be allowed to him. The tenant pulled down the old buildings and built a new steading:—Held, that he was not authorised to pull down the old buildings without rebuilding or substituting others in their place; that the knowledge of such unauthorised acts without interference by the landlord did not bind him by acquiescence; but that the tenant was entitled to the value of so much of the new steading as ought to be considered as an additional steading, and not a substitution for the old buildings, subject to the provision in the lease as to the timber in the sub-tenants' houses. Held, also that the tenant was entitled to an allowance for the new buildings, so far as consistent with the former finding, according to a valuation at the time of removal, and not according to actual expenditure. *Sinclair* v. *Gordon*, 3 Bligh, 21.

Removing Fixtures.]—In 1804 owners of the fee-simple of certain lands agreed, by indented articles, to demise them for lives renewable for ever, and the intended lessees agreed to pull down a mill on the premises, and to build a new one, and covenanted to keep the mill and works in constant working order, repair, and condition. In 1823 a lease was executed in pursuance of this agreement, and the lessee thereby covenanted to preserve and keep the premises, and all buildings and improvements, then or thereafter to be made thereon, in good order and repair; to keep the mills, works and machinery therein in working order, repair and condition; to yield up the premises, and all buildings and improvements in like good order, repair and condition, and to keep the mill and works thereto belonging, or in anywise appertaining, in constant working order and repair. The lease was renewed in 1829, the renewal containing similar covenants by the tenant. In 1834 an under-lease, at a profit rent, was made of the mill and premises for 999 years, which disclosed the existence of a head lease. In 1862 S. & Co., became assignees of the sub-lease, and having entered into possession, took out the old millstones, and erected a quantity of new machinery of an improved description in the mill. In 1865 a fee-farm grant was made by the plaintiff, as owner of the reversion, to the owner of the superior lease, with covenants by the grantee similar to the lessee's covenants in the original lease and renewal, and also to keep the mill and works in constant working order, repair and condition. In 1874 an agreement was executed between the head landlord and S. & Co., reciting the original lease, its renewal, the under-lease, and the derivative title to it, and giving S. & Co. liberty to erect an engine-house and shed, in pursuance of which the defendants erected a steam-engine and boiler, and buildings for the same. In 1886 S. & Co. sold and proceeded to remove the new machinery placed by them in the mill:—Held, that by the terms of the contract of tenancy, and having regard to the covenants in the several instruments constituting their title, and of which they had notice, the defendants were only precluded from removing such fixtures and other things as were essential to or were included in the subject-matter of demise, originally or by substitution; but that such contract and covenants did not bind trade or tenants' fixtures as such, and that there should be excluded from the injunction all trade fixtures which had been introduced as scientific improvements to fulfil functions previously performed by manual labour or movable utensils. *Cosby* v. *Shaw*, 23 L. R., Ir. 181—C. A.

The mere removal and sale by a tenant, during the term, of fixtures which he does not immediately replace, but which can be replaced before the end of the term, is not in itself a breach of his covenant to repair and uphold the demised premises, and to deliver up the same at the end of the term, together with all things affixed thereto. *Doe* d. *Burrell* v. *Davis*, 10 C. B. 821; 15 Jur. 155.

A lessee of a mill and steam-engine covenanted to repair, reasonable wear and tear excepted. During the lease he added both to the height and extent of the mill, and removed all the works of the engine, except the fly-wheel, fly-wheel shaft, and boiler, and attached to them a new engine of greater power. Injunction granted to restrain the assignees of the lessee, who had become bankrupt, from removing the parts of the new building, and the new parts of the engine, subject to an action to be brought, by the lessors, to try the rights. *Sunderland* v. *Newton*, 3 Sim. 450. See *Kimpton* v. *Eve*, 2 Ves. & B. 349; 13 R. R. 116.

viii. *When Right of Action accrues.*

Commission of Breach—Before Expiration of Term.]—Upon a covenant to repair and keep in repair during the continuance of a term, an action may be maintained for breaches committed before the time has expired. *Luxmore* v. *Robson*, 1 B. & Ald. 584; 19 R. R. 396.

—— **Before Execution of Lease.**]—In an action for a breach of a covenant for repair in a lease, a tenant is not liable for acts done before the time of the execution of the lease, although the habendum of the lease states the premises to be held from a day prior to its execution. *Shaw* v. *Kay*, 1 Ex. 412; 17 L. J., Ex. 17.

Notice Served by wrong Person.]—A covenant by an under-lessee to repair after notice is not broken by a non-compliance with a notice to repair served upon the premises by the superior landlord as such landlord. *Williams* v. *Williams*, 43 L. J., C. P. 382; L. R. 9 C. P. 659; 30 L. T. 638; 22 W. R. 706.

ix. *Parties entitled to Sue.*

Lessor.]—Where a lease of an undivided third part of mines contained a recital of an agreement by the lessee with the lessor and the owners of the other two-thirds, for pulling down an old smelting mill, and building another of larger dimensions upon a waste near the mines, and also a covenant to keep such new mill in repair, and so leave it at the expiration of the term, but did not contain a covenant to build it:—Held, that such a covenant was to be implied: and that the lessor of the one-third might sue upon it in respect of his interest. *Sampson* v. *Easterby*, 4 M. & Ry. 422; 9 B. & C. 505; 5 L. J. (O.S.) K. B. 291. *S. C.*, nom. *Easterby* v. *Sampson*, 6 Bing. 644; 4 M. & P. 601; 1 C. & J. 105.

—— **After assigning Reversion.**]—But where the demise is not under seal, the lessor may, notwithstanding he has assigned his reversion, sue the lessee on his contract to repair for a breach committed during the tenancy, but subsequently to such assignment. *Bickford* v. *Parson*, 5 C. B. 921; 17 L. J., C. P. 192; 12 Jur. 377.

Executor of Tenant for Life.]—The executor of a tenant for life may recover for the breach of a covenant to repair, committed by the lessee of the testator in his lifetime, without averring a damage to his personal estate. *Ricketts* v. *Weaver*, 12 M. & W. 718; 13 L. J., Ex. 195.

A tenant for life of an estate for 1,000 years demised from year to year, with six months' notice to quit, the lessee covenanting to repair. After the death of the tenant for life, the co-executor assigned the reversion of the estate for 1,000 years:—Held, that the executor for the tenant for life was properly joined as a plaintiff. *Wyatt* v. *Cole*, 36 L. T. 613.

Assignee of Reversion.]—The 32 Hen. 8, c. 34, applies to leases only: and where a lease is not under seal the assignee of the reversion cannot maintain an action against the lessee for breach of his contract with the assignor to repair. *Standen* v. *Chrismas*, 10 Q. B. 135; 16 L. J., Q. B. 265; 11 Jur. 694.

A declaration by the assignee of part of the reversion, for non-repair of leasehold premises, stated that G. held the premises under a lease for ninety-nine years, which expired on the 25th December, 1849; that during the time he so held the premises he granted an under-lease to V. and S. for twenty-five years and a quarter from the 25th December, 1823, by which under-lease V. and S. jointly and severally covenanted with G. that they would during the term repair, and at the end of the term deliver the premises up in repair to G.; that during the continuance of the under-lease to V. and S., G. granted his reversion in the premises to S. and the plaintiffs; whereupon the term in the under-lease was as to one undivided sixth part, merged in the reversion, and S. and the plaintiffs became, as joint tenants, possessed of the reversion of three undivided sixth parts of the premises, and the plaintiffs became, as joint tenants, possessed of the reversion of two other undivided sixth parts of the premises; that V. afterwards assigned to S. his interest in the under-lease granted to him and S.; whereupon the term as to one undivided sixth part merged in the reversion in the three sixth parts whereof S. and the plaintiffs were possessed, and the plaintiffs became, as joint tenants, possessed of the reversion of two of the last-mentioned three sixth parts; that S. died before the determination of the underlease; and alleged as a breach the non-performance by V. of the covenant to repair after S.'s death, and to leave in repair:—Held, that the declaration was good, inasmuch as the whole of the reversion which remained was vested in the plaintiffs alone, in respect of which they were entitled to sue on the covenant to repair, as assignees, under 32 Hen. 8, c. 34, notwithstanding the partial merger of the term. *Badeley* v. *Vigurs*, 4 El. & Bl. 71; 2 C. L. R. 1627; 23 L. J., Q. B. 377; 1 Jur. (N.S.) 159.

Held, also, that under the conveyance by G. to S., and the plaintiffs, one-third of the reversion was at once destroyed by coalescing with half the interest under the lease which was in S., and that consequently S. never took as reversioner; and there never was any suspension of the right of action by reason of S. being a party to sue and be sued. *Ib.*

Held, also, that even if S. took and remained interested in one-sixth of the reversion, and that one sixth was destroyed by the assignment to him by V., still the right of action for not leaving in repair, which arose only at the termination of the lease, never accrued to S., and therefore was never suspended. *Ib.*

Held, also, that the plaintiffs might recover on the privity of contract transferred by 32 Hen. 8, c. 34, although there were an apportionment of the covenant to repair; but that in this case there was no such apportionment, as the plaintiffs had the whole existing reversion, and were injured if the whole of the premises were not kept in repair. *Ib.*

Held, also, that the plaintiffs might recover on the privity of contract transferred by the 32 Hen. 8, c. 34, where the entire interest in the covenant had not passed to them. *Ib.*

A declaration stated that F. and G. being seised of an estate in fee demised by indenture to the defendant and his assigns leave to dig for clay therein, and make such adits, and erect sheds and buildings as he should think necessary for working the clay, and to hold the same for twenty-one years; that the defendant covenanted with F. and G., their heirs and assigns, to pay compensation to them, their heirs and assigns,

for all such lands within the limits thereof as he might injure by such digging, the amount in case of difference to be settled by arbitration, and that the defendant would keep all houses and sheds in good repair; that the defendant entered and got the clay, when F. and G., by indenture, granted and conveyed the lands to the plaintiff, his heirs and assigns for ever, who thereby became seised in fee, and that the interest of the defendant was determined by a notice to quit. First breach, that the defendant, by digging for clay after the plaintiff so became seised, did injure and destroy part of the land for which the plaintiff was entitled to a compensation; and although he appointed an arbitrator to ascertain the amount, yet the defendant refused to appoint one. Second breach, that the defendant did not keep the works in repair:—Held, that the claim to damages, in respect of the injury to the land being merely a chose in action, did not pass to the plaintiff by the conveyance of the land to him, and that the agreement as to ascertaining the amount of injury was merely incidental, collateral, and annexed to the substantial matter, and was to be exercised by the person who was the owner of the land at the time the injury was done, and to whom the compensation ought to be made. *Martyn* v. *Williams*, 1 H. & N. 817; 26 L. J., Ex. 117; 5 W. R. 351.

Held, also, that the conveyance of the land to the plaintiff during the existence of the term in the incorporeal hereditaments was an assignment of the reversion within 32 Hen. 8, c. 34; that the covenant to repair, as it directly touched and concerned the thing demised, was assignable with the reversion, and that the action might be brought in the name of the plaintiff, who was entitled to the benefit of the covenants. *Ib.*

A lease was granted of a piece of land, with two messuages thereon, in course of erection, with a covenant by the lessee to complete the messuages within two months, and also to "keep the messuages or tenements or premises in repair during the term," with a proviso for forfeiture for breach of any of the covenants. The premises never were finished, and were much dilapidated:—Held, that a forfeiture was incurred by the breach of the covenant to repair, in respect of which forfeiture the assignee of the reversion might sue. *Bennett* v. *Herring*, 3 C. B. (N.S.) 370; 6 W. R. 37.

The assignee of the reversion of a lease may maintain ejectment for breach of a covenant to repair, without giving the tenant notice of the assignment. *Scaltock* v. *Harston*, 45 L. J., C. P 125; 1 C. P. D. 106; 34 L. T. 130; 24 W. R. 431.

Parties Suing jointly.]—B. having a term of sixty-one years in land, granted an annuity to W., and, for securing payment assigned the term, wanting one day, to R. R. then, at the request of W. and of B., demised, and B. demised and confirmed, the premises to S. for thirty-one years, paying rent to W. while the land remained subject to the annuity, and afterwards to B. S. covenanted with W. and R., and their respective executors, and also with B., to pay the rent while the land was subject to the annuity to R., and afterwards to B., and also to repair the premises. The premises came by assignment to G., who failed to repair, W. being dead:—Held, that an action for breach of the covenant to repair was properly brought against G. by R. and B. jointly. *Wakefield* v. *Brown*, 9 Q. B. 209; 15 L. J., Q. B. 373; 10 Jur. 853.

The benefit of a covenant to repair in a joint demise by tenants in common runs with the entire reversion only, and therefore the representatives of all the tenants in common on a lease so jointly made by them must join in suing for a breach of such covenant. *Thompson* v. *Hakewell*, 19 C. B. (N.S.) 713; 35 L. J., C. P. 18; 11 Jur. (N.S.) 732; 13 L. T. 989; 14 W. R. 11.

x. *Relief against Breach.*

Tenant of a lunatic's estate relieved against an ejectment founded on a forfeiture by breach of covenant to repair. *Vaughan, Ex parte, Eldridge, In re*, Turn. & R. 434.

Remedy by injunction to restrain an action on breach of covenant to repair, on the peculiar circumstances of the case, not amounting to neglect or surprise, and there having been no waiver or abandonment on the part of the defendant. *Hannam* v. *South London Waterworks Co.*, 2 Mer. 65.

No relief against covenant to repair in a given time, though no request by landlord; and though tenant was suffered to continue in possession merely without rent, &c., and though specified time in lease was inserted by mistake, as alleged by plaintiff; the quantum of damage is no criterion. *Bracebridge* v. *Buckley*, 2 Price, 200.

As to relief against an ejectment by landlord for breach of covenant to repair, quære. *Hill* v. *Barclay*, 16 Ves. 402. *And see* 18 Ves. 56; 11 R. R. 147.

Relief against forfeiture where compensation can be made as against a clause of re-entry for breach of a covenant to lay out a specific sum in repairs in a given time, and not limited to cases of accident, &c., but granted even against negligence and voluntary acts. *Sanders* v. *Pope*, 12 Ves. 282.

Lessee of a long term of years covenants to lay out 200*l.* upon the premises within the first ten years; he fails to do it; and, after thirty years were expired, lessor brings action of covenant, and recovers 150*l.* damages. Equity will not relieve. *Barker* v. *Holder*, 1 Vern. 316.

One makes a lease, and the lessee covenants to pay the rent, and to repair; the lessee makes 100 under-leases; the rent is behind, and the premises out of repair; the original lease is avoided for nonpayment of rent; some of the under-lessees bring a bill to be relieved against the forfeiture; equity will not apportion the rent, but the plaintiffs must pay the whole rent in arrear, and repair all the houses, and may compel the other under-lessees to contribute. *Webber* v. *Smith*, 2 Vern. 103.

On payment of damages, equity will relieve against covenant to repair. *Hack* v. *Leonard*, 9 Mod. 91. *But see* 19 Ves. 141.

Neither in cases of accidental neglect to perform the covenants to repair, nor in case of wilful or obstinate breaches of such covenants, will the court relieve the tenant against the consequences of the breach. *Gregory* v. *Wilson*, 9 Hare, 683; 16 Jur. 304.

In a lease of house property for twenty-one years, the lessee covenanted to pay the rent, keep in repair, and insure, and the landlord covenanted that he would, at the expiration of the term (provided all arrears of rent should have been paid, and all the covenants should have been performed and kept), at the request in writing of the lessee, grant a new lease for the

further term of twenty-one years, at the same rent and subject to the provisoes and agreements in the lease contained (including the covenant for renewal), and so from time to time upon the expiration of every subsequent term of twenty-one years, provided such request in writing should be given as aforesaid. The lessee expended large sums of money in building houses on the premises, and at the expiration of the first twenty-one years a new lease was granted in the same terms for twenty-one years. In both leases there were clauses for re-entry on breach of the covenants. Before the expiration of the second term, the lessee gave notice in writing that he would require a new lease. At that time one of the houses was much out of repair, and the lessee allowed it to remain out of repair, on the ground that from communications with the lessor it was doubtful whether a new lease would be granted, in consequence of an alleged forfeiture:—Held, that the court would not interfere by injunction to prevent the lessor recovering possession in ejectment, the lessee not having within reasonable time proceeded to repair. *Job* v. *Banister*, 26 L. J., Ch. 125; 3 Jur. (N.S.) 93; 5 W. R. 177—L.C.

Where Negotiation for Purchase of Tenant's Interest.]—A notice to repair, within six months, houses held on lease by the Metropolitan Railway Company was given on the 22nd of October, 1874, to expire on the 22nd of April, 1875. It was answered by a letter of the 28th of November, suggesting that the lessors might like to purchase the premises. The lessors' solicitors, by letter of the 1st of December, asked the price demanded, and were told, by letter on the 30th of December, that it was 3,000*l*. The lessors' solicitors on the 31st of December, 1874, wrote to say that, considering the condition of the premises, "the price is out of all reason. We must therefore request you to reconsider the question of price, having regard to the previous observations, and to the fact that the company has already been served with notice to put the premises in repair, and we shall be glad to receive in due course a modified proposal from you." No further communication on this subject took place till the 19th of April, 1875, when the agent for the company wrote to say that as "the negotiations had not resulted in a sale," the company would take in hand the repairs. On the 20th of April the solicitors for the lessors wrote, declaring that "the negotiations" had been broken off in December last, and that there had been ample time since then to complete the repairs. On the 22nd of April the notice expired, and on the 28th the ejectment was served:—Held, that the company was entitled in equity to be relieved against the forfeiture, for that the letters at the end of November and at the beginning of December had the effect of suspending the notice, and that the suspension did not come to an end till the 31st of December, till which time the operation of the notice was waived, so that no part of that time could be counted against the tenant in a six months' notice to repair. *Hughes* v. *Metropolitan Ry.*, 46 L. J., C. P. 583; 2 App. Cas. 439; 36 L. T. 932; 25 W. R. 680—H. L. (E.)

Under Conveyancing Acts.]—*See* ante, J., 2 *i.* iii. (cols. 1029 et seq.).

Stay of Proceedings—Repairs done before Action commenced.]—In ejectment upon a clause of re-entry in a lease for breach of covenant to repair, the court has no power to stay proceedings on payment of costs, though it appears that the necessary repairs were done before the commencement of the action. *Doe* d. *Mayhew* v. *Ashby*, 2 P. & D. 302; 10 A. & E. 71; 8 L. J., Q. B. 207; 3 Jur. 458.

b. Yearly Tenancy.

Liability of Tenant.]—A tenant from year to year is only bound to fair and tenantable repairs, so far as to prevent waste or decay of the premises, and not to substantial and lasting repairs, such as new roofing. *Ferguson* v. ——, 2 Esp. 590; 5 R. R. 757.

And not being liable to general repairs, he is only bound to use the premises in a husbandlike manner, but no further. *Horsefall* v. *Mather*, Holt N. P. 7; 17 R. R. 589.

A tenant from year to year of a house is only bound to keep it wind and water tight. A tenant who covenants to repair is to sustain and uphold the premises; but that is not so with a tenant from year to year. *Anworth* v. *Johnson*, 5 Car. & P. 239.

A tenant from year to year is not bound to do substantial repairs. *Leach* v. *Thomas*, 7 Car. & P. 328.

A tenant from year to year is not liable for permissive waste, and is not liable to make good mere wear and tear of the premises. *Torriano* v. *Young*, 6 Car. & P. 8. See *Martin* v. *Gilham*, 2 N. & P. 568; 7 A. & E. 540; 7 L. J., Q. B. 11.

A. devised estates to B. for life; the devise contained a limited power of leasing. The devisee leased part of the demised premises for a term beyond the limit appointed. The lease contained the usual covenants to repair, and was afterwards assigned to the defendants, who, for several years, remained in possession, and paid the rent to the expiration of the term:—Held, that although the lease was void, the defendants held as tenants from year to year under the covenants of the lease, and were liable to repair up to the end of the term. *Beale* v. *Sanders*, 3 Bing. (N.C.) 850; 5 Scott, 58; 3 Hodges, 147; 6 L. J., C. P. 283; 1 Jur. 1083.

—— **To Deliver up in Repair.**]—By an agreement expressed to be made by a corporation by their agents on their behalf and the defendant, the corporation agreed to let to the defendant and the defendant to take certain premises for three years; and the defendant also agreed to put and maintain the premises in tenantable repair, and to deliver them up at the end of the term. The agreement was executed by agents of the corporation and by the defendant, but the corporation seal was not affixed. The defendant occupied for the term, and held over afterwards, paying the rent reserved:—Held, that although the agreement was not under seal, the occupation and payment of rent admitted a tenancy from year to year under the corporation, and that on such tenancy being determined by regular notice to quit, the defendant was liable on an implied promise to deliver up the premises in tenantable repair. *Ecclesiastical Commissioners* v. *Merrall*, 38 L. J., Ex. 93; L. R. 4 Ex. 162; 20 L. T. 573; 17 W. R. 676.

—— **For Repairs which should have been done by Lessor.**]—The jury having given damages (under 20*l*.) in an action by a landlord against his tenant for an injury to the former, arising

from the tenant quitting premises occupied by him as tenant from year to year without having done repairs he was bound to do. The court refused to disturb the verdict, although it appeared that the larger portion of the repairs required ought to have been done by the landlord himself. *Woods* v. *Pope*, 1 Scott, 536 ; 1 Bing. (N.C.) 467 ; 6 Car. & P. 783.

Duty of Landlord.]—As between the landlord and tenant of premises let from year to year, there is no obligation upon the former to do substantial repairs in the absence of an express stipulation to that effect. *Gott* v. *Gandy*, 2 El. & Bl. 845 ; 2 C. L. R. 392 ; 23 L. J., Q. B. 1 ; 18 Jur. 310 ; 2 W. R. 38.

c. Premises Burnt.

Liability of—Lessee.]—If a lease contains a covenant to keep in repair, as well as a covenant to insure for a specific sum, and the premises are burnt down, the lessee is liable on the former covenant, and the amount is not limited to the sum mentioned in the latter. *Digby* v. *Atkinson*, 4 Camp. 275 ; 16 R. R. 792.

A testator directed his trustees to allow A. to occupy a mill, so long as he should think proper to do so, "he nevertheless keeping the premises in good and tenantable repair and repairing," at a rent of 100*l*. A. accepted the gift, but afterwards the premises were totally destroyed by accidental fire :—Held, that he was bound to reinstate them. *Gregg* v. *Coates*, 23 Beav. 33 ; 2 Jur. (N.S.) 964 ; 4 W. R. 735.

A lessee of a house, who covenants generally to repair, is bound to rebuild it if it is burned by an accidental fire. *Bullock* v. *Dommitt*, 6 Term Rep. 650 ; 2 Chit. 608 ; 3 R. R. 300. And see *Phillipson* v. *Leigh*, 1 Esp. 398.

—— **Assignee.**]—The assignee of a lease, whereby the lessee covenanted for himself and his assigns absolutely to repair premises without qualification, is bound to repair, notwithstanding they are destroyed by fire. *Ib.*

—— **Yearly Tenant.**]—Where after the expiration of a lease containing a covenant by the tenant to keep the premises in repair, he verbally agrees to hold over, paying an additional rent, he is bound to rebuild them if they are burned down by accidental fire. *Digby* v. *Atkinson*, 4 Camp. 275 ; 16 R. R. 792.

—— **Lessor.**]—If a lessor covenants with his lessee that he will, in case the premises demised shall be burnt down, "rebuild and replace" the same in the same state as they were in before the fire, he is only bound to restore the premises to the state in which they were when he let them, and is not bound to rebuild any additional parts which may have been erected by his tenant. *Loader* v. *Kemp*, 2 Car. & P. 375.

The lessee covenanted to repair, "casualties by fire and tempest excepted." Quære, if the landlord is bound to repair in either of the excepted cases. *Weigall* v. *Waters*, 6 Term Rep. 488.

d. Tenant's Right to Leave.

On Account of Bad Repair of Premises.]—Where a tenant of a house undertakes by his agreement to keep it in as good repair as when he took it, fair wear and tear excepted, he is not entitled to quit upon its becoming uninhabitable for want of other repairs during the term ; and the landlord is under no implied obligation to do any repairs in such a case. *Arden* v. *Pullen*, 10 M. & W. 321 ; 11 L. J., Ex. 359. S. P., *Gott* v. *Gandy*, 2 El. & Bl. 845 ; 2 C. L. R. 392 ; 23 L. J., Q. B. 1 ; 18 Jur. 310 ; 2 W. R. 38.

In an agreement for a tenancy of buildings for a term, the landlord to do the repairs, there is no implied condition that the tenant may quit if the repairs are not done. *Surplice* v. *Farnsworth*, 7 Man. & G. 576 ; 8 Scott (N.R.) 307 ; 13 L. J., C. P. 215 ; 8 Jur. 760. S. P., *Sutton* v. *Temple*, 12 M. & W. 52 ; 13 L. J., Ex. 17.

A tenant of a house who is bound by agreement to keep it in tenantable repair, may quit without notice in the course of his term, if the premises become unwholesome for want of sufficient drainage, if they cannot be kept dry without extravagant and unreasonable labour and expense on his part. *Collins* v. *Barrow*, 2 M. & M. 112.

Where B. took possession of a house, and paid 10*l*. to A., who neglected to execute a lease and to make repairs within the period of ten days, as agreed on, notwithstanding which B. still continued in possession :—Held, that, on account of B.'s intermediate possession of the premises under the agreement, he could not, by quitting the house, for the default of A., rescind the contract and recover back the 10*l*. in an action for money had and received, but could only declare for a breach of the special contract. *Hunt* v. *Silk*, 5 East, 449 ; 2 Smith, 15 ; 7 R. R. 739.

A. agreed to purchase B.'s equitable interest in lands for a term of years, at a specified rent. A., after paying the rent several years, and acknowledging that a further sum was due, cannot resist B.'s claim for such further rent in an action on the agreement, by shewing that he has not been able to use the lands ; but it seems that B. might have recovered in an action for use and occupation. *Conolly* v. *Baxter*, 2 Stark. 525.

e. Pleadings in Actions.

Claim—Sufficiency of.]—A landlord may maintain an action for not repairing, against a tenant who occupies premises under a special agreement (which was to be the basis of a future lease), containing a provision that he should keep the premises in tenantable repair, without setting out such special agreement in the declaration. *Colley* v. *Streeton*, 3 D. & R. 522 ; 2 B. & C. 273 ; 2 L. J. (O.S.) K. B. 25 ; 26 R. R. 350.

A declaration stated that the defendant had become and was a tenant to the plaintiff of rooms, on the terms that the defendant should not allow any nails to be driven into the walls, and that if any damage should arise from so doing, he would pay the cost of repairing the same on vacating the apartments ; and that in consideration thereof, the defendant promised the plaintiff to use the rooms in a tenantlike manner, and not to allow any nails to be driven into the walls. The declaration averred that the defendant quitted possession, and that he did not use the rooms in a tenantlike manner, but, on the contrary thereof, pulled down bells, and broke chimneypieces and stoves, and drove nails into the walls, and although the costs of repairing the injuries of the walls amounted to 150*l*., he had not paid that sum to the plaintiff :—Held, on general demurrer, that this declaration shewed a sufficient consideration for the defendant's promise, by alleging that he had become

tenant on the terms of the special agreement, and that it was not necessary to allege that he became tenant to the plaintiff at his request. *Dietrichsen* v. *Giubilei*, 14 M. & W. 845; 3 D. & L. 292; 15 L. J., Ex. 73.

—— **Exception as to Fire.**]—If the covenant to repair contains an exception of "fire and all other casualties," it is fatal on non est factum to state it as a general covenant to repair, omitting the exception. *Tempany* v. *Burnand*, 4 Camp. 20.

In an action for not repairing, if the covenant to repair contains an exception of "casualties by fire," it is fatal on non est factum to state it in the declaration as a general covenant to repair, omitting the exception. *Brown* v. *Knill*, 5 Moore, 164; 2 Br. & B. 395.

—— **What included in.**]—In an action on a covenant to keep premises in tenantable order and repair, and at the end of the term deliver them up in such tenantable repair, the breach assigned was, that the tenant did not nor would sufficiently repair and keep the premises in tenantable order and repair, nor deliver them up in such tenantable repair at the end of the term; but, on the contrary thereof, suffered and permitted the premises to be and continue, and the same were, ruinous and in decay, for want of needful and necessary reparations, and the tenant at the end of the term left them so out of repair:—Held, that, under this breach, the lessor could not recover for voluntary waste, as by removing windows, &c. *Edge* v. *Pemberton*, 12 M. & W. 187; 1 D. & L. 467; 13 L. J., Ex. 48.

—— **What constitutes a Variance.**] — A declaration stated that the plaintiff agreed to let and the defendant to take the farm of L. at a yearly rent, and the plaintiff undertook to put the premises in repair within twelve months, after which time the defendant undertook to keep them repaired, and that the plaintiff repaired within twelve months, and demised to the defendant on the terms aforesaid, and he became tenant and occupier, but he did not keep in repair. The agreement produced at the trial was to let and take as above, that the plaintiff should keep the buildings insured in 600*l.* (the defendant repaying the premiums), and rebuild in case of fire; and that the plaintiff should repair within twelve months, and the defendant afterwards keep in repair as above stated:—Held, that the variance between the contract declared upon and that proved was a ground of nonsuit. *Beech* v. *White*, 12 A. & E. 668; 4 P. & D. 399; 10 L. J., Q. B. 4.

In an action for not repairing premises demised, the declaration stated that the plaintiff "demised certain premises, with the appurtenances (except as therein is excepted), to hold, &c. except, &c., for the term of twelve years, except the last day thereof." The lease being produced in support of the declaration, was found to contain no exception "of any part of the premises," but only an exception of the "last day of the term":—Held, not to be a fatal variance, the allegation of the exception being either satisfied in the lease, or it might be rejected as surplusage. *Williams* v. *Hayes*, 9 Price, 642; 2 Br. & B. 395.

A plaintiff sued upon a deed by which the defendant covenanted and agreed with him to procure a licence from the lord of the manor, in which a messuage in the occupation of the plaintiff was situate, to lease the premises to the plaintiff, and to make him a good and sufficient demise of the same; the declaration alleged that it was thereby covenanted that the lease should contain a covenant, and pending the occupation by the plaintiff under the provisions of the deed, the defendant would, once in every three years, paint the outside of the messuage, and keep the same in good and tenantable repair; and that, until the licence should be obtained and the lease granted, the plaintiff should continue in possession of the premises as tenant from year to year, subject to the terms and conditions in the deed specified: breach, the non-repair of the outside of the premises during the continuance of the tenancy from year to year. The deed, on its production at the trial, contained the provisions that, until the licence could be obtained, and the lease should be granted, the plaintiff should be considered to be tenant of the premises at the rent and subject to the terms and conditions hereinbefore specified:—Held, that there was no variance between the allegation and the proof, but the declaration correctly stated the legal effect of the deed. *Price* v. *Birch*, 1 D. (N.S.) 720.

Defence—Denial of Lessor's Title.]—To an action by a lessor for a breach of covenant, on an indenture of lease in not repairing, the lessee cannot plead in bar that the lessor had only an equitable estate in the premises; for that is tantamount to a plea of nil habuit in tenementis. *Blake* v. *Foster*, 8 Term Rep. 487; 5 R. R. 419.

—— **Non-delivery of Materials by Lessor.**]—A declaration on a covenant in a lease to deliver timber growing on the demised premises, sufficient for the repairs thereof, averred that there was timber growing on the premises sufficient for the repairs, but that the defendant did not deliver it, and the defendant pleaded that there was not timber growing on the premises sufficient and proper for the repairs:— Held, that the plea was good, although it did not allege that there was not timber growing on the premises sufficient for the repairs or any part thereof. *Snell* v. *Snell*, 7 D. & R. 249; 4 B. & C. 741; 4 L. J. (O.S.) K. B. 44.

—— **Offer to Surrender by Executor of Lessee.**]—Semble, an offer by an executor to a lessor, to surrender to him a lease granted to his testator, is an answer to an action of covenant against him as assignee, for breach of a covenant to repair, as to all breaches accruing after that offer. *Read* v. *Tenterden* (*Lord*), 4 Tyr. 111.

—— **Sub-demise to Lessor—Covenant to Repair by Lessor.**]—To an action by lessor against assignee of a lease for not repairing and yielding up the premises in repair, he pleaded, that while he was assignee he demised the premises to the plaintiff for a term short of thirty days of his own, the plaintiff covenanting to repair and yield up in repair, the defendant finding timber and ironwork, and alleging that the want of repair complained of was caused by the plaintiff's default, and was a breach of his covenant, that the defendant was ready to find the timber and ironwork, and was entitled to recover from the plaintiff the amount of damage he sought to recover:—Held, that the plea did not disclose either a defence on equitable grounds, or a defence at law, on the principle of avoiding circuity of action. *Minshull* v.

Oakes, 2 H. & N. 793; 27 L. J., Ex. 194; 4 Jur. (N.S.) 170.

—— **Reasonable Time for Performance not elapsed.**]—Assignees of G., a bankrupt, sued the executor of J. H. A count stated that R. H. demised premises to G., and covenanted to put all the premises forthwith in repair, and during the term maintain in repair the main walls and steam-engines, as far as fair and reasonable wear and usage rendered necessary; that the reversion became vested in J. H.; and that, though R. H. had not put into repair, J. H. had not done so, or maintained in repair according to the covenant. To the first breach, for not putting in repair, the defendant pleaded, first, that a reasonable time for performance elapsed in the time of R. H., and he broke the covenant; secondly, that not only was this so, but that G. brought an action against J. H. and R., as executors of R. H., for such breach, and recovered compensation:—Held, that there could be but one breach of the covenant as to putting in repair, and that as such breach occurred in the time of R. H., these pleas were good. *Coward* v. *Gregory*, 36 L. J., C. P. 1; L. R. 2 C. P. 153; 12 Jur. (N.S.) 1000; 15 L. T. 279; 15 W. R. 170.

—— **Plaintiff received sufficient Compensation.**]—To the second breach, for not maintaining in repair, the defendant pleaded, first, that G. brought an action against J. H., as an assignee of the reversion, for not maintaining in repair, and recovered compensation; and that the want of repair complained of was only a continuance of that for which the former action was brought: secondly, that there had been such recovery by action, as mentioned in the plea to the first breach and the preceding plea to the second breach, and that G. did not expend the sums recovered on the premises or put them in repair, and that if he had done so, no breach would have occurred:—Held, that the breach was continuing; that the former recovery went in mitigation of damages, and not in bar, even on equitable grounds; and that the pleas were therefore bad. *Ib.*

—— **Other.**]—The defendant also pleaded to the second breach, that the default arose from G. not keeping a covenant to maintain in repair all except what the landlord was to maintain; to which the plaintiff replied, that the landlord had never put in repair:—Held, that the putting in repair was a condition precedent to the tenant's covenant coming into force, and that therefore the replication was good. *Ib.*

The defendant also pleaded to the second breach, that the want of repair was not occasioned by fair and reasonable wear and usage:—Held, that these words only applied to the steam-engines, &c. and that, therefore, the plea was bad. *Ib.*

f. Evidence.

Production of Agreement—Necessity for.]—If the declaration in an action by B. against A. aver that C. did not leave the premises in good repair at the expiration of his tenancy, the agreement between A. and C. need not be produced to prove such averment. *Goodson* v. *Gouldsmith*, 2 Car. & P. 555.

Tenancy being Consideration for Covenant.]—A tenant occupied premises, under an agreement containing a proviso to keep the premises in tenantable repair, and the landlord declared generally, that "the defendant became tenant of the premises, and in consideration thereof undertook to repair," without setting out the agreement:—Held, that such agreement was admissible to prove the fact of tenancy as the consideration for the promise to repair. *Colley* v. *Streeton*, 3 D. & R. 522; 2 B. & C. 273; 2 L. J. (O.S.) K. B. 25; 26 R. R. 350.

Promise.]—A stamped agreement for a lease of premises for seventeen years and a half, to which the plaintiff was no party, but made between the defendant and other persons from whom the plaintiff derived title to the premises, is inadmissible to prove the defendant's promise to keep the messuage in repair. *Dyer* v. *Ashton*, 2 D. & R. 19; 1 B. & C. 3; 1 L. J. (O.S.) K. B. 8.

As to Extent of Repairs.]—In an action against a tenant for not leaving premises in repair, evidence as to a prior promise on the part of the lessor to put them in repair is not admissible, and it would be a misdirection to tell the jury to have regard to such promises; but they may measure the extent of the repairs to be done by the age and class of the premises. *Haldane* v. *Newcombe*, 9 L. T. 420; 12 W. R. 135.

In Action for Forfeiture.]—In ejectment for a forfeiture, under a covenant to keep in tenantable repair, it is not necessary to shew that the premises were in repair on the day of the demise; but if proved to be out of repair a short time previously, it is incumbent on the defendant to give evidence that they have been put into repair before the right to re-entry accrued. *Doe* d. *Hemmings* v. *Durnford*, 2 C. & J. 667; 1 L. J., Ex. 251.

As to Holding over on Terms of Lease.]—A tenant for life of an estate for 1,000 years demised from year to year, with six months' notice to quit, the lessee covenanting to repair. After the death of the tenant for life the co-executor assigned the reversion of the estate for 1,000 years. The lessee continued to pay rent to the assignees of the reversion, and gave six months' notice to quit:—Held, that this furnished evidence that the lessee held over upon the terms of the original agreement, and was bound by the covenant to repair. *Wyatt* v. *Cole*, 36 L. T. 613.

g. Damages.

What Recoverable—Costs of Action.]—A. leased premises to B., from the 25th March, 1823, for sixteen years wanting ten days; and B. covenanted with A. to keep the premises in repair, and to paint once in every five years of the term, and to leave the premises in repair. B. underleased the premises to C., from the 24th June, 1834, for four years and three-quarters wanting eleven days; and C. covenanted with B. to keep the premises in repair (the covenant so far being in the same terms as in the original lease), and to paint once during the term, and to leave the premises in repair. A. sued B. for breaches of this covenant, and B. let judgment go by default, and upon the writ of inquiry the damages were assessed at 64*l.* 10*s.*, being the amount of dilapidations proved by a surveyor, whose estimate had been laid before B. previously to the commencement of the action. B. afterwards sued C. for the amount

of the dilapidations and the costs of the action brought against him. The jury found the amount of the dilapidations to be 57*l.* 10*s.*:—Held, that B. was not entitled to recover also the amount of the costs in the former action. *Penley* v. *Watts*, 7 M. & W. 601; 10 L. J., Ex. 229. See also *Short* v. *Kalloway*, and *Smith* v. *Howell*, infra.

A messuage and premises were demised to the plaintiff, by a lease dated the 10th May, 1828, for the term of twenty-one years from the 25th March then last; which lease contained covenants to paint the outside of the premises once in every three years, and the inside once in every seven years, and to repair and keep in repair the premises, and also to do any repairs which on a view of the premises by the lessor should be found wanting, of which notice should be given. By a lease dated the 15th June, 1830, the plaintiff demised the premises to the defendant for the residue of the term, wanting ten days, containing covenants, with the exception of the stipulation as to painting the outside woodwork, in precisely the same terms as those contained in the original lease. The original lessors having brought an action against the plaintiff for breaches of the covenant to repair, he applied to the defendant to perform the repairs, and for instructions as to the course he should pursue with respect to the defence of the action. The defendant denied that any notice to repair had been given, and insisted that the premises did not require it; the plaintiff thereupon offered to suffer judgment by default, which the defendant refused to assent to. The plaintiff then gave the defendant notice, that, as he had denied that any notice to repair had been served, and insisted that the premises were not out of repair, he should traverse the breaches of covenant assigned, and try the question, holding the defendant responsible for the costs. This he accordingly did, and the result was that the original lessors recovered 68*l.* damages, and 85*l.* 12*s.* for costs, and he himself incurred costs amounting to 53*l.* 14*s.* 4*d*:—Held, that the plaintiff was not entitled to recover from the defendant the costs of defending the action, as they were not necessarily occasioned by the defendant's breach of the covenant to repair. *Walker* v. *Hatton*, 10 M. & W. 249; 2 D. (N.S.) 263; 11 L. J., Ex. 361. See *Tindall* v. *Bell*, 11 M. & W. 228; 12 L. J., Ex. 160.

Held, also, that although the covenants contained in the sub-lease were (with the exception of that relating to painting) the same in words as those contained in the original lease, they were, in effect substantially different, the periods at which the leases were granted being different. *Ib.*

Measure of.]—A declaration stated, that the plaintiffs and A., since deceased, being possessed of a house for the residue of a term of ninety-four years wanting twenty days, demised the same to the defendants for twenty-one years, at a certain rent, by a deed containing a covenant to repair, and alleged a breach of that covenant, by means whereof all the estate and interest of the plaintiffs and A. in the house became and were forfeited; and the same reverted to B. who thereupon availed himself of the forfeiture, and brought an ejectment, in which he recovered judgment, and obtained possession of the house; by means of which premises the plaintiffs, since the death of A., had lost the rents covenanted to be paid by the defendants. The plea traversed the alleged breach of the covenant to repair; on which issue was joined. At the trial the plaintiffs claimed damages for the loss of their term, and for the amount of dilapidations in the house demised to the defendants. It appeared, by the particulars delivered in the ejectment brought by B., that such ejectment was founded upon the breach of certain covenants contained in a superior lease granted by B. for ninety-nine years; and that the breaches of covenant relied on were the non-repair of various houses, including the house in question, which was shewn to be out of repair, and for the breach of a covenant which was not contained in the lease to the defendants:—Held, first, inasmuch as it did not appear that B. might not have recovered possession of the property for a breach of the covenant not contained in the lease to the defendants, that the plaintiffs were not entitled to recover the value of their term from the defendants. *Clow* v. *Brogden*, 2 Scott (N.R.) 302; 2 Man. & G. 39.

Held, secondly, that they were entitled to recover the amount of the dilapidations in the house in question, at the time that the ejectment was brought for the forfeiture. *Ib.*

A plaintiff declared in covenant, reciting that P. had leased a house to the defendant, and the defendant had by the lease covenanted to repair; that he had assigned to the plaintiff, with a covenant that defendant had repaired according to the terms of the lease: breach, non-repair, alleging, by way of aggravation, that plaintiff had assigned to C., with a covenant that the covenants in the lease had been performed; that C. had sued plaintiff for the nonperformance of the covenants in the lease, whereby the plaintiff had to pay C. 120*l.* to settle the action, besides the expenses of defending it. On motion by the defendant for a new trial, on the ground that the plaintiff was not liable to C., except for his own acts, and therefore could not charge the defendant with the 120*l.*, the court refused a rule, the verdict being general, and not shewing that the jury had allowed damages in respect of C.'s action, and it being the defendant's duty to point out at the trial the limitation contended for. The court also refused to increase the damages by 119*l.*, which was proved to have been expended in defending the action by C., since the damages recovered by C. exceeded the sum given in the present action, and must therefore in part have been attributable to the plaintiff's own acts; so that the costs of defence did not appear to be the necessary consequence of defendant's breach of covenant. *Short* v. *Kalloway*, 11 A. & E. 28.

In an action during the continuance of the term demised for damages occasioned by the non-repair of premises, pursuant to a covenant in the lease "to keep the premises in good and sufficient repair, and at the expiration or other sooner determination of the term, so to yield and give up the same," the judge is right in refusing to direct the jury to find only nominal damages for the plaintiff. *Bell* v. *Hayden*, 9 Ir. C. L. R. 301.

In an action by the lessee against the assignee of a lease, for breach of a covenant in the deed of assignment to keep the demised premises in repair:—Held, that the lessee, in the absence of actual loss by him sustained, could recover no more than nominal charges, although the lessor had commenced an action against him for breach of the covenant contained in the lease. *Beattie* v. *Quirey*, Ir. R. 10 C. L. 516.

B. and P., the owners of an unexpired term of

seventy-two years in a house and premises, let them to G. for twenty-one years, under the usual covenants to pay the rent and to keep the premises in repair, and afterwards they assigned the reversion to B. G. had previously assigned the residue of his term of twenty-one years to the plaintiff, with the usual covenants. The plaintiff afterwards assigned the term to the defendant, with similar covenants to pay the rent and to keep the premises in repair, and with a covenant that the defendant would observe and fulfil all the covenants of the former lease, and that he would save harmless and indemnify the plaintiff from all costs, damages and expenses which might be incurred by reason of any delay, breach or default in payment or performance thereof. On the rent becoming due and unpaid, and the premises falling out of repair, B. brought an action against G., who suffered judgment by default. G. afterwards brought an action to recover the amount so paid by him and his costs. The plaintiff defended the action unsuccessfully, and he became liable to pay to G. the amount of the judgment by default, and also of the costs of that action. The plaintiff then sued the defendant, not having paid that amount to G., and judgment not having been signed in the action against him:—Held, that the plaintiff was entitled to recover from the defendant the amount of the rent and repairs, and the costs of the action in which G. had suffered judgment by default, but that he was not entitled to the costs of the action brought against him by G. *Smith* v. *Howell*, 6 Ex. 730; 20 L. J., Ex. 377.

In an action, brought during the term, for a breach of covenant to repair, if the evidence shews that the premises were out of repair before action the lessor is entitled to nominal damages, although the lessee expended money, after action, in repairing the demised premises. *Morony* v. *Ferguson*, Ir. R. 8 C. L. 551.

A lessor is not deprived of any part of the ordinary damage recoverable on a breach of covenant by the lessee to deliver up the demised premises in good repair, by reason of the lessor's effecting structural alterations in the premises after the determination of the lease. *Inderwick* v. *Leech*, 1 Cab. & E. 412. Affirmed in C. A.

If a tenant who is bound to repair leaves, and at the end of the tenancy the premises are out of repair, the jury may give the landlord, in an action against the tenant, not only the amount of the actual expense of the repairs, but also a compensation for the loss of the use of the premises while they were undergoing repair. *Woods* v. *Pope*, 1 Scott, 536; 1 Bing. (N.C.) 467; 6 Car. & P. 783.

In an action against the assignee of a lease of a house for breach of covenant to leave the premises in repair at the end of the term, it appeared that owing to changes in the surrounding property the house had so far altered in value since the commencement of the lease that it would be as valuable for letting purposes if some of the repairs required by the covenant, according to its strict meaning, were either omitted or executed at a cheaper rate than was usual under such a covenant:—Held, that the facts above mentioned were no ground for limiting the liability of the defendant under the covenant, and that the measure of damages for a breach of it was the amount required to put the premises into such repair as was originally contemplated by the covenant. *Morgan* v. *Hardy*, 35 W. R. 588—C. A. Affirming 17 Q. B. D. 770.

—— **Injury to Reversion.**]—On breach by a lessee of a covenant to repair, the measure of damages is the injury to the marketable value of the reversion. *Mills* v. *East London Union*, 42 L. J., C. P. 46; L. R. 8 C. P. 79; 27 L. T. 557; 21 W. R. 142.

The lessees of premises underlet them by a lease, in which there was the usual general covenant by the lessees to repair. The underlessee having neglected to repair according to his covenant, the lessees entered and did the repairs themselves in order to save a forfeiture of their own lease, with which they had been threatened by their landlord, and then and during the continuance of the lease to their under-tenant, the term of which had not expired, sued him for breach of such covenant to repair:—Held, that they could only recover nominal damages, since by having done the necessary repairs, they had at the time the action was brought sustained no injury to the reversion. *Williams* v. *Williams*, 43 L. J., C. P. 382; L. R. 9 C. P. 659; 30 L. T. 638; 22 W. R. 706.

In an action for breach of covenant to keep in repair brought by the lessor or his assignee during the pendency of the term, the damages may, but need not necessarily, be the present value of a sum, equal to the cost of repair, that sum being payable at the end of the term; or the damages may, but need not necessarily, be the injury caused by the want of repair to the saleable value of the reversion; and, save in very extreme cases, it is the province of the jury to decide which of these modes is, in the particular case, the appropriate one. *Metge* v. *Kavanagh*, Ir. R. 11 C. L. 431.

In estimating the damages recoverable by the covenantee during the currency of a lease in respect of the breach of a covenant to keep the demised premises in repair, all the circumstances must be taken into consideration, and the damages must be assessed at such a sum as reasonably represents the diminution of the value of the reversion by the breach of covenant; and where the covenantee is himself subject to covenants to a superior landlord, and the covenantor has notice of the original lease, the covenantee's liability to his landlord must be taken into account. *Conquest* v. *Ebbetts*, 65 L. J., Ch. 808; [1896] A. C. 490; 75 L. T. 36; 45 W. R. 50—H. L. (E.)

—— **Where Reversion Extinguished.**]—The measure of damages in an action for breach of covenant to repair is the sum necessary to put the premises in repair, notwithstanding before action the reversion of the plaintiff has been extinguished by an entry of the superior landlord. *Davies* v. *Underwood*, 2 H. & N. 570; 27 L. J., Ex. 113; 3 Jur. (N.S.) 1223; 6 W. R. 105.

—— **Where Substantial.**]—A defendant held premises under a lease, with a covenant to keep and yield them up in repair. At the expiration of the lease, at Christmas, 1863, the premises were dilapidated to an amount fixed by the jury at 22*l*. The plaintiff (the reversioner) had before this time made a verbal agreement with a third person to grant him a lease for a long term, and he at once proceeded to pull down the premises:—Held, that the plaintiff was, notwithstanding, entitled to recover substantial damages. *Rawlings* v. *Morgan*, 18 C. B. (N.S.) 776; 34 L. J., C. P. 185; 11 Jur. (N.S.) 564; 12 L. T. 348; 13 W. R. 746.

In an action by a lessee against an assignee

for damages sustained by the former, in consequence of the neglect of the latter, while he continued assignee, to repair the premises, pursuant to a covenant in the lease it appeared that in June, 1843, the plaintiff assigned the lease to the defendant; in October, 1851, the defendant assigned the lease to T.; and in June, 1852, T. assigned to H., who in August, 1852, surrendered it to the ground landlord. It was proved that in July, 1852, the premises were dilapidated, but there was no evidence of their state at any prior time:—Held, that the plaintiff was entitled to recover substantial damages, and not nominal damages only. *Smith* v. *Peat*, 2 C. L. R. 424; 9 Ex. 161; 23 L. J., Ex. 84: S. P., *Mapleton* v. *Rawlings*, 3 C. L. R. 237.

—— **Premises Destroyed by Fire.**]—The plaintiff being assignee of a lease which contained a covenant to repair, underlet the premises to the defendant, upon the terms that he should "maintain them in as good a state as they would be when repaired by him." Shortly after the defendant took possession, the premises, which were old and dilapidated, were destroyed by fire. The jury found that the cost of rebuilding them would be 1,635*l.*, but that they would be more valuable by 600*l.*:—Held, that the defendant was only bound to put the premises in the same state they would have been in if he had repaired them before the fire, and consequently he was liable to pay, as damages, 1,035*l.* only. *Yates* v. *Dunster*, 11 Ex. 15; 24 L. J., Ex. 226.

—— **Action commenced before Expiration of Term.**]—Where a tenant for years agrees to keep the premises in repair during the tenancy, and before the expiration of the term an action is brought against him for breach of this agreement, the plaintiff is entitled to recover nominal damages only. *Marriott* v. *Cotton*, 2 Car. & K. 553.

Two years before the determination of a lease a landlord brought an action against his tenant for breach of covenant to repair. The tenant paid a sum into court, which the landlord accepted in satisfaction. After the determination of the lease the landlord brought another action for breach of the covenants to keep the premises in repair and to deliver up in repair. No repairs were done between the first action and the end of the lease; the particulars in the second action included all matters which had been claimed for in the first action as well as some additional items:—Held, that the true measure of damages was the amount required to put the premises into repair less the sum paid into court in the first action. *Henderson* v. *Thorne*, 62 L. J., Q. B. 586; [1893] 2 Q. B. 164; 5 R. 404; 69 L. T. 430; 41 W. R. 509; 57 J. P. 679.

—— **Premises Relet before Termination of Lease.**]—Where a lessee has covenanted to leave the premises in repair at the end of the term, the rule as to the measure of damages, on breach of the covenant, is that the damages are such a sum as it will cost to put the premises into the state of repair in which the lessee was bound to leave them; and that rule is not affected by the fact that, before the expiration of the term, the lessor has relet the premises on the expiration of the term to a third person, who has covenanted to alter and rebuild the premises. *Joyner* v. *Weeks*, 60 L. J., Q. B. 510; [1891] 2 Q. B. 31; 65 L. T. 16; 39 W. R. 583; 55 J. P. 725—C. A.

—— **Rights of Lessee against Under-lessee in Absence of Covenant.**]—Premises were demised to the plaintiff and others for a term of years, commencing from March, 1829, and with covenants by him to repair and to insure in the Protector Fire Insurance Office, or in such other respectable fire insurance office in London or Westminster, as he and the other lessees should think fit. The demise then contained a proviso for re-entry in case of breach of covenants. By a lease of the 30th April, 1835, the plaintiff underleased the premises to the defendant for a term short of the original term, and with covenants to repair and insure precisely the same as those in the original lease, except that the covenant to insure was in the Protector Fire Insurance Office, or in such other respectable fire insurance office, in London or Westminster, as the defendant should think fit. The defendant had notice of the lease to the plaintiff and of its contents. The covenants to repair and insure having been broken, the plaintiff was ejected by the superior landlord:—Held, that the plaintiff was not entitled to recover against the defendant, as damages for breach of covenant, the value of the reversionary interest in the term which he had so lost, there being no covenant by the defendant to indemnify. *Logan* v. *Hall*, 4 C. B. 598; 16 L. J., C. P. 252; 11 Jur. 804.

—— **Covenant not to Commit Waste.**]—A covenant by a tenant not to commit waste on the demised property is not, with regard to the measure of damages for the breach of it, the same thing as a covenant to deliver up the property at the end of the term in the same state as that in which the tenant received it. Therefore, in an action by the reversioner against the tenant for waste, the measure of damages is not necessarily the sum which it would cost to restore the property to its condition before the waste: the true measure of damages is the diminution in the value of the reversion, less a discount for immediate payment. *Whitham* v. *Kershaw*, 16 Q. B. D. 613; 54 L. T. 124; 34 W. R. 340—C. A.

Death of Lessor.]—Lessee's damages in waste moderated by death of lessor. *Anon.*, Cary, 2.

Evidence.]—In an action for dilapidations, the plaintiff must prove his particulars of demand, in the same manner as in an action for goods sold and delivered. *Smith* v. *Douglas*, 16 C. B. 31; 3 C. L. R. 752.

Penalty or Liquidated Damages.]—Lessees, who had been granted the privilege of placing slag from blast furnaces on land let to them, covenanted (inter alia) to pay the lessor 100*l.* per imperial acre for all land not restored at a particular date:—Held, that the sum, although described in one part of the agreement as "the penalty therein stipulated," was not a penalty; but estimated or stipulated damages. *Elphinstone* v. *Monkland Iron and Coal Co.*, 11 App. Cas. 332; 35 W. R. 17—H. L. (Sc.)

Where one lump sum is made payable by way of compensation on the occurrence of one or more or all of several events, some of which may occasion serious, and others but trifling damage, the presumption is that the parties intended the sum to be penal, subject to modification; but where the payments stipulated are made proportionate to the extent of which the contractors may fail to fulfil their obligations, and they are to bear interest from the date of the failure,

payments so adjusted, with reference to the actual damage, are liquidated damages. *Ib.*

h. Other Matters.

Obligation to use Premises in Tenantlike Manner.]—There is no implied contract to use demised premises in a tenantlike manner where the tenant has expressly contracted to repair. *Standen* v. *Christmas*, 10 Q. B. 135; 16 L. J., Q. B. 265; 11 Jur. 694.

A. agreed to let, and B. to take, a house at a yearly rent payable quarterly, and at the end of the agreement was the following stipulation: "A. agrees to take the fixtures at the expiration of B.'s tenancy, and to allow the price at which they may be valued, provided they are in as good condition then as they are now, and B. agrees to leave the premises in the same state as they now are." Though not stated in the agreement, the house was at the time of the agreement in the occupation of C. as tenant to A., who afterwards quitted:—Held, that, notwithstanding the existence of express terms of agreement, an implied contract arose on the part of B. to use the premises in a tenantlike manner, and that the agreement was properly described as an agreement to leave the premises, at the expiration of the tenancy, in the same state as they were in at the commencement of the tenancy, and not at the date of the agreement. *White* v. *Nicholson*, 4 Scott (N.R.) 707; 4 Man. & G. 95; 11 L. J., C. P. 264.

Right of Landlord to Enter to Repair.]—A landlord has no right to enter his tenant's premises to repair them, without there was some stipulation at the time of the letting to that effect. *Barker* v. *Barker*, 3 Car. & P. 557.

A covenant for a landlord to be allowed to come into a house to see the state of its repair at "convenient times," is not broken by his not being allowed to go into some of the rooms, if he has given no notice of his coming. *Doe* d. *Wetherell* v. *Bird*, 6 Car. & P. 195.

A lessor who, in the absence of express power in the lease, enters upon the demised premises to repair them on breach of the lessee's covenant to repair, even though under a superior lease the lessor is liable to forfeiture for non-repair, and, though he enters by leave of weekly sub-tenants, commits a trespass which will be restrained by injunction. *Stocker* v. *Planet Building Society*, 27 W. R. 877—C. A.

In a lease of a newly-constructed grain warehouse, there was a covenant by the lessor that he would during the term "keep the main walls and main timbers of the warehouse in good repair and condition":—Held, that the covenant implied a licence by the tenant to the landlord to enter upon the premises for a reasonable time for the purpose of executing the necessary repairs. *Saner* v. *Bilton*, 47 L. J., Ch. 267; 7 Ch. D. 815; 38 L. T. 281; 26 W. R. 394.

Estate Liable for Repairs.]—By an agreement under seal, E. covenanted with B., his executors and administrators, that he would at any time thereafter, at the request of B., his executors, administrators or assigns, execute a demise of certain freeholds for the term of twenty-one years, at the yearly rent of 180*l.*, which lease should contain a covenant to keep the premises in good and substantial repair, and all other usual covenants; and B. for himself, his executors or administrators, covenanted with E., whenever thereto requested by E., to accept such lease, and execute a counterpart. Under this agreement B. entered and paid rent until his death (which took place before the 1st of January, 1870), and after his death his widow and legal personal representative entered and paid rent. No lease was ever executed, and no such request as above mentioned was ever made by either party. Since his death rent had accrued due, and a sum was required for repairs:—Held, that the liability under the deed was from the first, and still was, a specialty; hence that a claim by E. for the sums due for arrears of rent and dilapidations under the covenants agreed to be entered into by B. were debts by specialty against his estate. *Kidd* v. *Boone*, 40 L. J., Ch. 531; L. R. 12 Eq. 89; 24 L. T. 356.

Landlord not Liable for Damage for Neglecting to Repair.]—A landlord let premises to a tenant under a lease by which the latter covenanted to keep them in repair. Attached to the house was a coal cellar under the footway, with an aperture covered by an iron plate which was at the time of the demise out of repair and dangerous. A passer-by in consequence fell into the aperture and was injured:—Held, that, the obligation to repair being by the lease cast upon the tenant, the landlord was not liable for this accident. *Pretty* v. *Bickmore*, L. R. 8 C. P. 401; 28 L. T. 704; 21 W. R. 733.

Held, also, that the provision in the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), s. 102, makes no difference in this respect. *Ib.*

Assets of Devisee Liable.]—In 1832 an equitable tenant for life made a lease containing a covenant to keep the demised premises in repair, and, upon the determination of the lease by the death of the lessor, the lessee and his devisee continued in possession, and paid rent to the remainderman, without any fresh express agreement. In 1855, the remainderman assigned the reversion to a purchaser, who, in the following year, demised the premises to the remainderman for a term still unexpired. The premises were burnt in 1859, and no change of tenancy had taken place up to the death of the devisee in 1871:—Held, first, that the assets of the devisee were liable, under the covenant, to the expense of rebuilding the premises. *Morrogh* v. *Alleyne*, Ir. R. 7 Eq. 487.

Held, secondly, that the title of the remainderman being merely equitable, could not be relied on as a bar to his claim. *Ib.*

Held, thirdly, that the Statute of Limitations did not apply. *Ib.*

Tenant in Common—Contribution.] — One tenant in common of a house who expends money on ordinary repairs, not being such as are necessary to prevent the house from going to ruin, has no right of action against his co-tenant for contribution. *Leigh* v. *Dickeson*, 54 L. J., Q. B. 18; 15 Q. B. D. 60; 52 L. T. 790; 33 W. R. 538—C. A.

4. For Quiet Enjoyment and Title.

a. The Covenant.

To what extending.]—A covenant for quiet enjoyment generally only extends to a disturbance under a lawful title. *Anon.*, Lofft, 460.

A. demised by lease to B., who assigned his interest to C., and C. to D.; B. covenanted for

quiet enjoyment with C. and his assigns :—Held, that D. might maintain an action against B., on being ejected by A. for a forfeiture made by B. before the assignment to C. *Campbell* v. *Lewis*, 3 B. & Ald. 392 ; 21 R. R. 520.

An action on the covenant for quiet enjoyment may be maintained for the disturbance of a way of necessity. *Morris* v. *Edgington*, 3 Taunt. 24 ; 12 R. R. 579.

A lessee covenanted that the plaintiff, paying rent, should have quiet enjoyment of a term upon an underlease to commence in 1836 : the lessee having afterwards forfeited his own term by nonpayment of rent to the superior landlord, the plaintiff could not come into possession of the term to commence in 1836 :—Held, that the plaintiff could not sue on the covenant for quiet enjoyment ; at all events not before 1836. *Ireland* v. *Bircham*, 2 Bing. (N.C.) 90 ; 2 Scott, 207 ; 4 L. J., C. P. 305.

Covenants for title and quiet enjoyment do not extend to protect a purchaser against defects of title, which the recitals in his own purchase deed are sufficient to disclose. *Hunt* v. *White*, 37 L. J., Ch. 326 ; 16 W. R. 478.

By deed the defendant demised to the plaintiff a coal-mine for a term of years, with liberty to dig and sink pits for obtaining the coal : and the defendant covenanted with the plaintiffs that they might peaceably and quietly have, hold, occupy, possess, and enjoy the mine during the term, without any molestation, interruption, or disturbance whatever of, from, or by the defendant. After the making of the deed, the defendant excavated a quarry of ironstone, lying under some of the closes under which the demised mine was situate, but above that mine ; and made holes from the strata of ironstone into the demised mine, and thereby caused quantities of water to percolate into the demised mine ; and the defendant also, by excavating the quarry, caused parts of the roof of the demised mine to fall in, and by reason of the premises the demised mine became flooded, and the working of the coal was rendered impracticable :—Held, that though the defendant had a right to excavate the quarry, yet as the excavation had caused an interruption of the plaintiff's occupation of the demised mine, the defendant was liable for a breach of his contract for quiet enjoyment. *Shaw* v. *Stenton*, 2 H. & N. 858 ; 27 L. J., Ex. 253 ; 6 W. R. 327.

Where Implied.]—There is an implied covenant for quiet enjoyment under the words "granted and demised." *Iggulden* v. *May*, 9 Ves. 330 ; 7 East, 237 ; 3 Smith, 269 ; 2 Bos. & P. (N.R.) 449 ; 8 R. R. 623 ; 9 R. R. 104, n.

Semble, that no covenant for title or quiet enjoyment is implied from the mere relationship of landlord and tenant, or from the words "agree to let" in a lease, but only from the word "demise." *Baynes* v. *Lloyd*, 64 L. J., Q. B. 787 ; [1895] 2 Q. B. 610 ; 14 R. 678 ; 73 L. T. 250 ; 44 W. R. 328 ; 59 J. P. 710—C. A.

Under a parol demise the law will imply an agreement for quiet enjoyment, but not for good title. *Bandy* v. *Cartwright*, 8 Ex. 913 ; 22 L. J., Ex. 285 ; 1 W. R. 415.

In a conveyance in fee of land to the defendant, he covenanted with the grantor not to permit any part of the premises to be used for selling beer. The defendant afterwards granted a lease of part of the land, with covenants by the lessee not to carry on certain trades, but not mentioning that of a seller of beer, and with a covenant by the lessor for quiet enjoyment. The term was assigned to the plaintiff, who having no notice of the defendant's restrictive covenant used the premises as a beershop, and being restrained by injunction in chancery, at the suit of the vendor of the fee, sued the defendant for breach of the express covenant, for quiet enjoyment, and also for breach of a covenant for title alleged to be implied from the terms of the lease :—Held, that the covenant for quiet enjoyment excluded any implication of such an implied covenant, and that there had been no breach of the former covenant, as it did not guarantee to the tenant that he might lawfully use the land for any purpose not included in the restrictions in the lease. *Dennett* v. *Atherton*, 41 L. J., Q. B. 165 ; L. R. 7 Q. B. 316 ; 20 W. R. 442—Ex. Ch.

In a contract for a demise of land, a promise of quiet enjoyment during the term is implied by law. *Hall* v. *City of London Brewery Co.*, 2 B. & S. 737 ; 31 L. J., Q. B. 257 ; 9 Jur. (N.S.) 18.

In 1841, B. agreed to let to A. for eight years and a quarter premises, "subject to the same conditions as were mentioned in the memorandum under which B. held of C." ; and that "if C. was willing to accept A. as tenant instead of B., A. was willing to take the remainder of the lease or memorandum from C., and become his tenant." C. was tenant to D., and C.'s term expiring at Christmas, 1844, D. brought ejectment and turned A. out on the 7th of February, 1845. In an action by A. against B. for this eviction, the declaration, after setting out the agreement, alleged that B. promised A. that he should and might "quietly use, occupy, and enjoy the premises for the term for which B. had so agreed to let them" :—Held, that no such promise could be implied from the contract set out, the contract being subject to conditions, the nature of which were not disclosed. *Messent* v. *Reynolds*, 3 C. B. 194 ; 15 L. J., C. P. 226 ; 10 Jur. 550.

—— **Eviction by Title Paramount—Tenancy from Year to Year.**]—In a tenancy from year to year there is no implied covenant for quiet enjoyment against eviction by title paramount on the determination of the landlord's interest ; and if, on such determination, the tenant is evicted by the superior landlord, he has, in the absence of an express agreement, no claim against his landlord for damages for such eviction by the superior landlord. *Schwartz* v. *Locket*, 61 L. T. 719 ; 38 W. R. 142. S. P., *Penfold* v. *Abbott*, 32 L. J., Q. B. 67 ; 9 Jur. (N.S.) 517 ; 7 L. T. 384 ; 11 W. R. 169.

See further as to Eviction by Title Paramount, post, cols. 1151, 1152.

Qualifying Implied Covenant.]—The whole covenant implied in the word "demised" is qualified and restrained by an express covenant for quiet enjoyment. *Line* v. *Stephenson*, 6 Scott, 447 ; 4 Bing. (N.C.) 678. *S.C.*, 5 Bing. (N.C.) 183 ; 7 Scott, 69 ; 1 Arn. 385 ; 7 L. J., C. P. 263—Ex. Ch.

No absolute covenant for title can be implied from words of grant, where there is an express qualified title on the face of the deed. *Stannard* v. *Forbes*, 6 A. & E. 572 ; 1 N. & P. 633 ; W. W. & D. 321 ; 6 L. J., K. B. 185.

Qualified.]—Releasors covenanted that for and notwithstanding any act, &c. by them, or any or either of them done to the contrary, they had

good title to convey lands in fee; and also that they or some or one of them, for and notwithstanding any such matter or thing as aforesaid, had good right and full power to grant; and likewise that the releasee should peaceably and quietly enter, hold and enjoy the premises granted, without the lawful let or disturbance of the releasors or their heirs or assigns, or for or by any other person or persons whomsoever; and that the releasee should be kept harmless and indemnified by the releasors and their heirs, against all other titles, charges, &c. save and except the chief rent issuing and payable out of the premises to the lord of the fee:—Held, that, the generality of the covenant for quiet enjoyment against the releasors and their heirs, and any other person or persons whomsoever, was not restrained by the qualified covenants for good title and right to convey for and notwithstanding any act done by the releasors to the contrary. *Howell* v. *Richards*, 11 East, 633: 11 R. R. 287.

So, where the assignor covenanted that for and notwithstanding any act or thing by him done, the lease was valid; and that it should be lawful for the assignee at all times, during the term, quietly to enjoy, without the lawful let or interruption of the assignor, his executors, administrators or assigns, or any of them, or any other person or persons whomsoever, claiming any estate or right in the premises, and that the premises were discharged by the assignor, his heirs, executors or administrators, from all former incumbrances, made or suffered by his, or by their or either of their acts or privity; and then followed a covenant for further assurance by the assignor, his executors and administrators and all persons whomsoever claiming under him:—Held, that the general words in the covenant for quiet enjoyment were restrained by the restrictive words in the covenant for title and further assurance, which preceded and followed it, and therefore that such covenant was confined to the acts of the covenantor, and those claiming under him. *Nind* v. *Marshall*, 3 Moore, 703; 1 Br. & B. 319; 21 R. R. 610.

The assignor in a deed of assignment of a lease, after reciting the original lease granted to another for the term of ten years, which by mesne assignments had vested in him, and that the plaintiff had contracted for the absolute purchase of the premises, bargained, sold, assigned, transferred and set over the same to the plaintiff, for and during all the rest of the term of ten years, in as ample manner as the assignor might have held the same; subject to the payment of rent and performance of covenants; and then covenanted that it was a good and subsisting lease, valid in law, in and for the premises thereby assigned, and not forfeited or otherwise determined, or become void or voidable:—Held, that the generality of this covenant for title, which was supported by the recital of the bargain for an absolute term of ten years, was not restrained by other covenants which went only to provide for or against the acts of the assignor himself, or of those who claimed under him. *Barton* v. *Fitzgerald*, 15 East, 530; 13 R. R. 519.

Where a deed after reciting that under a deed A. was seised and possessed of premises, and that he had agreed with D. for the sale of all A.'s estate and interest under the same deed to D., witnessed that A. did grant and assign unto D. the premises, to hold the same to him, his heirs and assigns, for ever; and also contained a covenant that A. had in himself good right, full power and lawful authority to make that conveyance of his estate and interest under the deed to D., his heirs and assigns, for ever:—Held, that this was not an absolute covenant that A. had power to convey a freehold estate, but only that he had power to convey such an estate as he took under the deed. *Delmer* v. *M'Cabe*, 14 Ir. C. L. R. 377.

L., who was possessed of a term for years, provided C. should so long live, assigned the term and covenanted that, notwithstanding any act, deed, matter or thing done by him at any time theretofore, the lease was valid, and that the same was in full force and effect, and in no wise forfeited, surrendered, assigned, determined, or otherwise become void or voidable, or prejudicially affected in any manner howsoever, otherwise than by effluxion of time; and also, that, for and notwithstanding any such act, he (L.) had full power to assign. Before the assignment C. died, and L. knew the fact:—Held, that the covenant of the lease being valid and not determined, was qualified by the preceding covenant, and restrained to any acts done by L., and that therefore he was not liable upon this covenant for an eviction by the party entitled on C.'s death. *Stannard* v. *Forbes*, 1 N. & P. 633; 6 A. & E. 572; W. W. & D. 321; 6 L. J., K. B. 185.

By deed, after reciting a grant to A. in fee, and that the defendant's wife was the heiress of deceased, who died intestate, and reciting an appointment in fee by the defendant and his wife, in favour of the plaintiff, the defendant covenanted that, notwithstanding any act by him or his wife or A. committed, he and his wife were lawfully seised, and that, notwithstanding any act as aforesaid, he and his wife had a good right to convey; and that it should be lawful for the plaintiff to quietly occupy, without interruption by the defendant and his wife, or any person lawfully claiming under them or A.; and that the defendant and his wife, and all persons claiming under them or A. would execute to the plaintiff all further assurances. In an action for breach of this covenant for quiet enjoyment, the declaration averred, that P. claimed, as heir-at-law of A., deceased, lawful right and title to the premises; and then set out a recovery in ejectment by P., by which the plaintiff was evicted. The defendant set out the deed, and pleaded that A. died intestate, leaving the defendant's wife her only child and heiress-at-law; and that the plaintiff instigated P. to claim a right and title to the premises; and that P. in consequence made the claim, and prosecuted the ejectment. At the trial, the jury found that the defendant's wife was not the heiress-at-law of A.:—Held, first, that the jury was not estopped, by the recital in the deed of the heirship of the defendant's wife, from finding that she was not, in fact, such heiress. *Young* v. *Raincock*, 7 C. B. 310; 18 L. J., C. P. 193; 13 Jur. 539.

Held, secondly, that the generality of the terms of the covenant for quiet enjoyment was not restricted by the introductory words of the covenant for title and power to convey, to any act done by the defendant and his wife, or A. *Ib.*

Conditional.]—A covenant by lessor that the lessee paying the rent and performing covenants shall quietly enjoy is not a conditional covenant; and a plea stating the nonpayment of the rent, or the non-performance of a covenant by the lessee (to insure), is no bar to an action by the

lessee on the covenant for quiet enjoyment. *Dawson* v. *Dyer*, 2 N. & M. 559; 5 B. & Ad. 584.

Affected by Provisions of Act of Parliament.]—When after the granting of a lease an act of parliament has been passed which renders it illegal to use the premises for the purpose for which they were let, the refusal to permit them to be used for that purpose is no breach of a covenant for quiet enjoyment or of a covenant to keep the premises in proper condition. *Newby* v. *Sharpe*, 47 L. J., Ch. 617; 8 Ch. D. 39; 38 L. T. 583; 26 W. R. 685—C. A.

The defendant let the basement of a store to the plaintiff "with full and undisturbed right and liberty to store cartridges therein," and covenanted to keep the premises in proper repair and condition, so as to be available for storing cartridges, and covenanted for quiet enjoyment. Other parts of the store were at that time let to others persons for storing gunpowder. Soon afterwards the Explosives Act, 1875, passed, making it illegal to store cartridges and gunpowder in the same building. The defendant, upon the act coming into operation, removed the plaintiff's cartridges out of the building. A correspondence ensued, and the defendant stated to the plaintiff that the basement was at his disposal, but that if he stored cartridges there the defendant must, to protect himself from liability, give notice to the authorities. The plaintiff thereupon commenced an action to restrain the defendant from obstructing the storing of his cartridges, and to compel the defendant to do everything necessary to enable the plaintiff to store them there, and for damages:—Held, first, that there had been no eviction, the removal of the plaintiff's cartridges being only a trespass. *Ib.*

Held, secondly, there had been no breach of covenant by the defendant, for that the covenant to keep the premises in proper condition for storing cartridges only referred to their physical condition; and that the grant of liberty to store cartridges there did not import a warranty of the legality of so storing them, nor did anything in the lease bind the defendant to procure licences to make the storage legal. *Ib.*

Action on—Interesse Termini.]—An interesse termini will not support an action on a covenant for quiet enjoyment, nor an action for trespass or for damages. *Lock* v. *Furze* (L. R. 1 C. P. 441) and *Gillard* v. *Cheshire Lines Committee* (32 W. R. 943) distinguished. *Wallis* v. *Hands*, 62 L. J., Ch. 586; [1893] 2 Ch. 75; 3 R. 351; 68 L. T. 428; 41 W. R. 471.

In void Lease.]—A., being tenant for life of lands with a leasing power, granted a lease to B., which lease was afterwards held void, upon the ground that it was not made in accordance with the power. The lease contained a clause, that "A., for himself, his heirs and assigns, the premises, with the appurtenances, unto B., his executors, administrators, and assigns, under the rent, covenants, conditions, exceptions and agreements before expressed, against all persons whomsoever lawfully doing the same, will during the term warrant and defend." Upon the death of A. the remainderman brought ejectment against B., and recovered judgment and possession of the premises. In an action by B. against the executors of A. for a breach of the covenant:—Held, that the words "warrant and defend" operated not as a covenant in law only, but as an express covenant for quiet enjoyment, extending to the term purported to be granted by the lease, and therefore, that the executors of A. were liable for a breach thereof. *Williams* v. *Burrell*, 1 C. B. 402; 14 L. J., C. P. 98; 9 Jur. 282.

A lease having been granted by deed in terms from which the law implies a covenant for title, and the lessor proving to have no title to part of the demised premises:—Held, that the lessee might refuse to take possession of such part of the demised premises and elect to keep the remainder, and might in an action for rent due under the lease claim damages for breach of the implied covenant by way of counterclaim. *Mostyn* v. *West Mostyn Coal Co.*, 45 L. J., C. P. 401; 1 C. P. D. 145; 34 L. T. 325; 24 W. R. 401.

Trustees of a charity grant an improper lease of the charity lands, in which they covenant with the lessee, for his actual enjoyment of the demised premises during the term. The court in setting aside the lease, will order the indenture of the demise to be cancelled in toto, and will not leave the personal covenants of the trustees in force for the benefit of the lessee. *Att.-Gen.* v. *Morgan*, 2 Russ. 306; 26 R. R. 81.

T., by indenture dated in 1663, demised to W. lands, &c., in Ireland, together with the mines, timber, &c., to make sale, &c., thereof, without impeachment of waste, the lessee, his executors, &c., planting, from time to time, 500 trees of oak and ash, in the room, &c., during the lease to hold, &c., for a term of ninety-eight years, at a rent of 15*l.* sterling for the first three years, and 30*l.* sterling for the remainder of the term; and T. covenanted that W., &c., upon request, would, "from time to time, renew the said lease, and perfect such other further assurances as W., &c., should require," &c. The lease also contained a covenant of warranty of title, &c., and that in case of eviction, or that the premises should be wasted in war or rebellion, &c., that the rent should cease for the time. By an indenture dated in 1739, reciting the original lease, and the covenant for renewal, a further lease for ninety-eight years, recited to be in pursuance of the covenant, &c., was granted, containing a similar covenant. Upon a bill filed in 1827, claiming a further renewal:—Held, that the covenant was to be construed as a covenant for further assurance, and not for perpetual renewal. *Browne* v. *Tighe*, 8 Bli. (N.S.) 272; 2 Cl. & F. 396. Affirming Hayes, 158.

Of Easement not acquired by Lessor.]—In a conveyance in fee from A. to B. of a house and premises in the occupation of A., "together with all lights, liberties, privileges, easements and appurtenances to the premises belonging or in anywise appertaining or usually held and enjoyed therewith, or deemed or taken as part, parcel or member thereof," A. covenanted that notwithstanding any act, deed, matter or thing whatsoever made, done or permitted by him, or any person claiming through him, he, A., has now good title to convey the messuage and premises with the appurtenances. Some years before this conveyance, A. being then owner in fee and occupier of the house, &c., which was in the same condition, entered into a contract in writing with the owners of the adjoining premises that the cornice and spouts and three windows of A.'s house overlooking the adjoining premises were encroachments, and agreed to pay an annual sum of money so long as he was permitted to use the cornice, spouts and windows. A. had never

acquired any easement in respect of the cornice, spouts or windows by twenty years' user :—Held, that there was no breach of covenant for title by A., for that he only conveyed the premises so far as he was possessed or could convey them, and that his qualified covenant for title limited his covenant to that which he actually had, or but for any act of his would have had, and that he had not and never would have acquired any easement in the windows, cornice or spout, inasmuch as the adjoining owners would have interfered to prevent him but for his acknowledgment. *Thackeray* v. *Wood*, 5 B. & S. 325 ; 33 L. J., Q. B. 275 ; 10 Jur. (N.S.) 877 ; 10 L. T. 645. Affirmed, 6 B. & S. 766 ; 34 L. J., Q. B. 226 ; 13 W. R. 996—Ex. Ch.

Of Sporting Rights.]—The defendant demised to the plaintiff, for twenty-one years, a mansion-house and land, with the sole licence of shooting and sporting over all other lands, plantations, and coverts of the defendant, subject to the liberty for each tenant on his farm to kill rabbits with ferrets only. The defendant covenanted for quiet enjoyment, and that, if at any time during the term any of the tenants of the defendant of any such lands, plantations, or coverts, should obstruct the plaintiff in the enjoyment of the licence, or should destroy the game, rabbits, &c., then the defendant would, upon the requisition of the plaintiff, give notice to quit to such tenants, and enforce the notice by such legal measures as should be necessary. Breach, that, after the demise to the plaintiff, the defendant demised to R., for twelve years, one hundred acres of the plantations on which the exclusive right of killing rabbits had been granted to the plaintiff, without any clause in the demise to prevent R. from obstructing the plaintiff in the enjoyment of the licence, or from destroying rabbits, and without reserving to the defendant the power of giving R. notice to quit, or of enforcing such notice by such legal measures as should be necessary, the plantations not being at the time of the demise to the plaintiff parcel of any farm ; and that R. did afterwards kill and destroy rabbits. The defendant, in his plea, set out the lease which contained the demise of lands and pools, "for the better description whereof a plan is indorsed on the second skin of these presents." The plan was not set out. The defendant then pleaded, that the rabbits killed by R. were killed by him on his own farm with ferrets only :—Held, that the exception as to killing rabbits extended not only to farms existing at the time of the demise to the plaintiff, but also to farms subsequently created. *Newton* v. *Wilmot*, 8 M. & W. 711 ; 10 L. J., Ex. 476.

Held, also, that the declaration was bad, as not containing any breach, the demise to R. not constituting any breach of the defendant's covenant. *Ib.*

Water Supply—House Let out in Flats—Damage by Water.]—The defendant demised the ground-floor of his house to the plaintiff under a lease containing a covenant that the lessee might "peaceably hold and enjoy the said demised premises during the said term without any interruption by the lessor, or any person lawfully claiming through or in trust for him." The remainder of the house was let out in floors to different tenants. Before and during the demise to the plaintiff the water supply was effected by means of a main service pipe connected with a cistern placed at the top of the house, branch pipes being inserted into the main pipe for the supply of water to each floor. The tenants paid a proportion of the water-rate for the supply to their respective premises. The branch pipe on the first floor suddenly burst, and the water therefrom poured down into the plaintiff's premises and injured his goods. In an action for damages the jury found that the branch pipe when fixed (which was before the demise) was a reasonably fit and proper one for the purpose for which it was fixed and intended, and that there was no negligence or want of skill in the fixing and maintaining the pipe where and as it was :—Held, that the plaintiff had no cause of action founded upon the covenant for quiet enjoyment, because the covenant was prospective, and there had been no act of omission or commission during the demise to the plaintiff causing an interruption of his enjoyment. *Anderson* v. *Oppenheimer*, 49 L. J., Q. B. 708 ; 5 Q. B. D. 602—C. A.

Held, also, that the apparatus for the water supply being for the common benefit of the plaintiff and the other tenants, the plaintiff had no cause of action founded upon the principle laid down in *Rylands* v. *Fletcher* (L. R. 3 H. L. 330). *Ib.*

b. Breach of.

Demand of Rent by Mortgagee.]—In 1842 the defendant and two trustees, under a power given to the trustees in the defendant's father's will, created a term in certain estates, which, by a deed of 1843, the trustees assigned by way of mortgage for the purpose of raising money to pay the defendant's debts. By the deed of assignment, the defendant had power to lease, with the concurrence of the mortgagees. In 1846 the defendant made a lease, without the concurrence of the mortgagees, to the plaintiff, and covenanted for the plaintiff's quiet enjoyment without let, suit, trouble, denial, eviction, molestation, or disturbance by the defendant, or any person claiming under him. In 1851 the plaintiff, who had not heard of the mortgage deed before, received notice from the surviving mortgagee to pay over the rent to him, and on discovering that his lease was defective, he consented to, and did give up possession to the surviving mortgagee, who entered. The surviving mortgagee gave the plaintiff 75*l.* as compensation for money he had laid out, which he accepted, without prejudice to his right of action against the defendant :—Held, that the plaintiff was entitled to recover damages on the covenant for quiet enjoyment, and that there was an eviction, or at least a molestation, or disturbance coming within its terms ; also, that the disturbance was by a person claiming under the defendant, and that the receipt of the 75*l.* did not affect the plaintiff's right to recover. *Carpenter* v. *Parker*, 3 C. B. (N.S.) 206 ; 27 L. J., C. P. 78 ; 6 W. R. 98.

Ejectment by Mortgagee—Liability of Mortgagor—Estoppel.]—Where a mortgagor demised incumbered land, and covenanted for quiet enjoyment, and the lessee was ejected by the mortgagees :—Held, that although the legal estate was outstanding in the mortgagees, yet as there was a reversion in the landlord by estoppel, he was liable upon his covenant. *Harteup* v. *Bell*, 1 Cab. & E. 19—Affirmed in C. A.

Notice by Superior Landlord to pay Rent to him—Damages.]—The defendants granted the lease of certain premises to the plaintiff, with a covenant by the lessors for quiet enjoyment thereof by the lessee, and a covenant by the lessee to pay rent to the lessors. At a time when the plaintiff was in arrear with his rent, the defendants sent a notice to his tenants requiring them to pay their rent to the defendants' agent instead of to the plaintiff. One of the plaintiff's tenants accordingly paid his rent to the defendants' agent. The plaintiff having brought an action against the defendants for breach of the covenant for quiet enjoyment:—Held, that this notice was a breach by the lessors of the covenant for quiet enjoyment; that non-payment of the rent by the lessee did not disentitle him to the protection of that covenant; and that he was entitled to more than nominal damages for the breach of it. *Edge* v. *Boileau*, 55 L. J., Q. B. 90; 16 Q. B. D. 117; 53 L. T. 907; 34 W. R. 103.

Ejectment by Superior Landlord.]—The lessee of two houses under a lease, which contained a covenant to keep the houses in repair, sublet one of them, and covenanted for the quiet enjoyment by the sub-lessee without any interruption from or by him the first lessee, "or any person or persons whomsoever lawfully claiming by, from, through, or under him." The house let to the sub-lessee was kept in good repair, but in consequence of the other house being allowed to go out of repair, the superior landlord issued a writ, and recovered possession under a power of re-entry in the superior lease:—Held, in an action to recover damages for breach of the covenant for quiet enjoyment, that there had been no breach, for the superior landlord was not a person claiming "by, through, or under" the first lessee. *Stanley* v. *Hayes* (3 Q. B. 105) approved and followed. *Kelly* v. *Rogers*, 61 L. J., Q. B. 604; [1892] 1 Q. B. 910; 66 L. T. 582; 40 W. R. 516; 56 J. P. 789—C. A.

Interference by Subsequent Lessee.]—A. was sub-lessee of stalls and boxes in a theatre, with free admission at all performances except balls and masquerades, and with a covenant for quiet enjoyment. The lessor was lessee under the Crown of the whole of the theatre for a long term of years, and was under a covenant with the freeholder not to convert the theatre to any but theatrical purposes. The lessor, however, agreed to let the whole of the building to persons other than A. for the purposes of holding religious meetings, and these persons took possession of the theatre, and boarded over the site of A.'s stalls, and took down the partition between the boxes which had been constructed on the sites of those originally leased to A. Upon motion to restrain A.'s lessor and the persons in possession of the theatre from interfering with A.'s right:—Held, that there was an interference with A.'s right by his lessor, and the persons in possession of the theatre; but the theatre not being ready to be used as a theatre, and the persons in possession undertaking not to renew their engagement with A.'s lessor (which was a short one), no injunction was granted, but A. was awarded nominal damages and the costs of the suit. *Leader* v. *Moody*, L. R. 20 Eq. 145; 32 L. T. 422.

—— **Nuisance.**]—A. granted a lease to B. of two rooms with a covenant for quiet enjoyment. Then A. let a room above the two to C. for dancing and other entertainments. B. brought this action against A. for an injunction to restrain such use of the upper room, alleging that the dancing over his head, and the behaviour of visitors on the stairs, was a breach of the covenant:—Held, that the annoyance was no breach of the covenant. *Shaw* v. *Stenton* (2 H. & N. 858) and *Sanderson* v. *Berwick-upon-Tweed Corporation* (13 Q. B. D. 547) explained. *Jenkins* v. *Jackson*, 58 L. J., Ch. 124; 40 Ch. D. 71; 60 L. T. 105; 37 W. R. 253.

Covenant by Tenant to carry on Timber Business—Access of Air to Drying Sheds—Interference by Landlord.]—Where premises were demised for the purpose of the business of a timber merchant, and the lease contained a covenant by the lessee to carry on such business, and also a covenant by the lessor for quiet enjoyment, the lessor is under an obligation to abstain from doing anything on his adjoining property which would substantially interfere with the carrying on of the business in the ordinary course, and cannot consequently erect buildings on his land, which will interfere with the access of air to the lessee's drying sheds. *Aldin* v. *Latimer Clark, Muirhead & Co.*, 63 L. J., Ch. 601; [1894] 2 Ch. 427; 8 R. 352; 71 L. T. 119; 42 W. R. 453.

User of Premises for Trade Purposes—Trade of Delicate Nature.]—The covenant for quiet enjoyment has been recently extended, and is broken in the case of interference by the lessor, or those lawfully claiming under him, not only with the title to or possession of land, but also with the lawful enjoyment of the premises for the purposes for which they were let. *Robinson* v. *Kilvert*, 58 L. J., Ch. 392; 41 Ch. D. 88; 61 L. T. 60; 37 W. R. 545—C. A.

Therefore, where a lessor has let premises to be used for a particular business—e.g. storing paper—he would be guilty of a breach of such a covenant if he or persons lawfully claiming under him were afterwards to do anything which would render these premises unfit for storing paper generally; but would not, in the absence of express stipulation, be guilty if the act done, being harmless in itself, were nevertheless detrimental to the storing of some particular class of paper. *Ib.*

Lease of Residential Flat—Conversion of Part of Building into Club.]—Where a landlord enters into an agreement to let a residential flat to a tenant, under conditions and regulations which shew on the face of them that the building in which the flat is situated is intended to be used for residential flats only, and the building has in fact been so used, the landlord will be restrained at the suit of the tenant from converting a large part of the building into a club during the tenancy. *Hudson* v. *Cripps*, 65 L. J., Ch. 328; [1896] 1 Ch. 265; 73 L. T. 741; 44 W. R. 200; 60 J. P. 393.

Flooding of Mine.]—The defendant leased to the Parkside Mining Company a mine for the purpose of being worked as an iron mine; subsequently he leased to the plaintiffs an adjoining mine for the same purpose, the lease to the plaintiffs containing a covenant for quiet enjoyment of the mine, "without any interruption or

eviction by the lessor, his heirs or assigns, or any other person or persons claiming or to claim by, from, or under him." The Parkside Company, while properly working their mine under the terms of their lease from the defendant, struck a "feeder," with the result that a large body of underground water, the existence of which was unsuspected, and the nature of which was uncertain, flooded their mine, and rising in the levels found its way through a natural fissure in the limestone rock into the plaintiffs' mine, which was on a higher level, and caused considerable damage. The plaintiffs having brought an action to recover damages for breach of the covenant for quiet enjoyment:—Held, that the interruption to the working of the plaintiffs' mine by the irruption of water not having been caused by any direct act of interruption, or by any act the consequences of which either were foreseen or ought to have been foreseen by the defendant at the time when the covenant was entered into, was not an interruption within the meaning of the covenant, and that the defendant was not liable. *Harrison* v. *Muncaster*, 61 L. J., Q. B. 102; [1891] 2 Q. B. 680; 65 L. T. 481; 40 W. R. 102; 56 J. P. 69—C. A.

Title and Possession not affected—Drainage—Causing Floods.]—In order to constitute a breach of covenant for quiet enjoyment in a lease of land, it is sufficient that the lessee's ordinary and lawful enjoyment of the demised land be substantially interfered with by the acts of the lessor or those lawfully claiming under him, although neither the title to the land nor the possession of the land be otherwise affected. By a general system of drainage made by the defendants in a particular district various farms in that district were drained by several underground drains, by which the water was carried through all such farms. The defendants let one of these farms to the plaintiff, with the usual covenant for quiet enjoyment against the acts of the lessors or any person lawfully claiming through or under them. The defendants had previously let another of such farms adjoining, but lying above the plaintiff's farm, to one C., with a right to use the drains through the plaintiff's land, so far as they were adequate to carry the water from C.'s farm. C., during the plaintiff's tenancy, first, by an excessive user of the drainage system, which was properly constructed for the purpose of drainage, caused the water passing down the drains in his farm to escape and overflow into the plaintiff's farm and damage his crops. Secondly, by a proper user by C. of the drains passing through the plaintiff's farm, damage was also done to a field in the plaintiff's farm by the escape of water, but this arose from one of the drains there having been imperfectly and improperly constructed:—Held, that the defendants were liable to the plaintiff for a breach of their covenant for quiet enjoyment in respect of this last damage, as there had been within the meaning of such covenant a substantial interruption by a person who lawfully claimed through the defendants; but that the defendants were not liable for the damage done by the excessive user by C. of the drainage system, which was properly constructed, either under their covenant for quiet enjoyment or under the law of trespass or nuisance. *Sanderson* v. *Berwick-upon-Tweed Corporation*, 53 L. J., Q. B. 559; 13 Q. B. D. 547; 51 L. T. 495; 33 W. R. 67; 49 J. P. 6—C. A.

Action to stay Waste.]—Suit in chancery to stay waste is not a breach of covenant for quiet possession, though bill be dismissed with costs. *Morgan* v. *Hunt*, 2 Vent. 213.

Tenant's Right to Indemnity for Distress.]—The plaintiff took of the defendant a house at a yearly rent, under an agreement, by the terms of which the latter undertook that, up to the date of the agreement, he had paid, or would pay, "all arrears of rent, rates, taxes, or assessments"; and the former agreed, that "from and after that day, the same should be kept paid by him for the time he might occupy the premises." At the expiration of the first quarter, the superior landlord distrained for rent:—Held, that there was no implied duty in the defendant to indemnify the plaintiff against this claim, although the agreement between them stipulated for a yearly rent; the defendant having, by the subsequent clause, expressly undertaken to keep the reserved rent paid. *Upton* v. *Fergusson*, 3 M. & Scott, 88.

A defendant held premises under a lease from H. at a certain rent, and entered into an agreement with one N. for the sale of all the household furniture, &c., on the premises for a certain sum, to be paid by instalments, covenanting, on payment of the whole of the purchase-money, to demise the premises to N. for twenty-five years; the lease to contain the like covenants on the part of N. as were contained in the lease under which the defendant held. The agreement also contained a covenant that N. should, in the meantime, and until such lease should be granted, pay the rent and perform all the covenants which would be to be performed by him in case the lease was actually granted, with a power of distress for nonpayment of the rent. N. was let into immediate possession under this agreement, and paid the rent. The defendant neglecting to satisfy the rent due to the superior landlord, the latter distrained and sold the goods of N.:—Held, that there was an implied duty on the defendant to indemnify N. from the consequences of the non-performance of his covenants with the superior landlord, and that case was the proper form of action for the breach of such implied duty. *Hancock* v. *Caffyn*, 1 M. & Scott, 521; 8 Bing. 358; 1 L. J., C. P. 104.

Land Tax.]—A distress upon demised premises for land-tax due from the lessor before the demise is not a breach of his covenant that the lessee shall enjoy "without any disturbance of or by him, the defendant, or any other person or persons lawfully claiming or to claim by, from, or under him or them," because the claim for land-tax is a claim, not through him, but against him. *Stanley* v. *Hayes*, 2 G. & D. 411; 3 Q. B. 105; 11 L. J., Q. B. 176.

For Title and Against Incumbrances.]—The defendant in 1844 let, by agreement, coal under his land for twenty-five years, with full powers to work the coal. The lessees entered and worked it, and in 1845, after their working had ceased, the defendant sold part of his land to J. J. had seen the workings, but was not proved to be aware of the agreement. The defendant covenanted with J., his appointees, heirs, and assigns, for title, quiet enjoyment, and against incumbrances. In 1846 J. appointed part of the land to the plaintiff, who built on it, and who was not aware of the coal workings. In 1865

the lands and houses subsided, owing to workings carried on before J. bought. In 1848 some fire-clay was taken by the lessees; the value was small, and the taking illegal; but this did not contribute to the damages. In 1867 the plaintiff, as J.'s appointee, sued the defendant on the covenants, alleging the entry and working of the lessees as breaches:—Held, that the benefit of the covenants passed to the plaintiff as appointee, that a variance between the time of working as laid in the declaration, and as proved, was fatal. *Spoor* v. *Green*, 43 L. J., Ex. 57; L. R. 9 Ex. 99; 30 L. T. 393; 22 W. R. 547.

Held, that there was no breach of the covenant for title, that the plaintiff had bought the land without the coal, that the covenant for quiet enjoyment was not broken by what was done in 1848, that the making of the agreement if a breach at all, was not a continuing breach, that the action was barred by the Statute of Limitations. *Ib.*

A tenant for life under a marriage settlement, with power to grant leases for years, determinable on three lives, granted a lease of part of the estate to A. during the life of the latter and his two sons, and the survivors and survivor, covenanting for quiet enjoyment for and during the term, without interruption of lessor, his heirs, and assigns, or any other person claiming any estate, &c., under him, or any of his ancestors. The lessor died, and his eldest son, who was tenant in tail under the settlement, evicted the eldest son of the lessee, the third life being still in being:—Held, first that the eviction by the tenant in tail was a breach of the covenant for quiet enjoyment: and secondly, that the term demised by the lease meant a term to endure during three lives, and not merely during the life of the lessor. *Evans* v. *Vaughan*, 6 D. & R. 349; 4 B. & C. 261; 3 L. J. (O.S.) K. B. 217; 28 R. R. 250.

A lessor of a mine or vein of coal lying under certain closes covenanted that the lessee should and might, peaceably and quietly, have, hold, occupy, possess and enjoy the mine, without any let, suit, trouble, molestation, interruption or disturbance whatsoever. The lessor, in working ironstone lying between the surface of the soil and the demised coal, caused part of the roof of the coal-mine to crash and fall in, and to be flooded. The working of the ironstone was done in a workmanlike manner:—Held, that these acts constituted a breach of the covenant, for which the lessee might maintain an action thereon, and being continued at the time of action brought, also entitled him to an injunction restraining the lessor from working the ironstone within such a distance of the surface as interfered with the lessee getting the coal with full advantage and profit. *Shaw* v. *Stenton*, 2 H. & N. 858; 27 L. J., Ex. 253; 6 W. R. 327.

A. covenanted with his lessee for quiet enjoyment, as against any person "claiming by, from or under" him. An eviction by a prior appointee of A. and B. is a breach of the covenant. *Calvert* v. *Sebright*, 15 Beav. 156.

Held, also, that the case was not altered by the grant to the lessee being "as far as in his power lay, or he lawfully might or could." *Ib.*

Farm and Shooting Let to Separate Tenants—Destruction of Rabbits by Tenant.]—In 1857 A. demised to B. a farm called Upton Farm, containing 264 acres, about forty of which consisted of timber and underwood, with furze covers in various other parts of the farm. This lease reserved to the lessor "all timber and other trees, mines, minerals and quarries on the said farm, and also the exclusive right of shooting, fishing and sporting on the said farm," with liberty to the lessor, his servants, and others by his authority, at all seasonable times to enter for any of the purposes contained in the reservations therein contained. In 1860 A. demised Upton Castle, and about sixty acres of land adjoining it, to C., and also "the exclusive right of shooting, sporting over, and taking the game, rabbits and wild-fowl upon the premises, and also upon the entire manor of Upton," including the 264 acres under the lease to B., reserving to the lessor all trees, underwood, thorns and bushes growing on the land, as well as all mines, minerals and quarries, &c., with a covenant for quiet enjoyment, without interruption by the lessor or any person or persons lawfully claiming by, from or under him. B. finding the rabbits too numerous, by means of ferrets and guns destroyed a large number of them; he also cut all the underwood on his farm, and grubbed up and destroyed the furze covers, and thereby materially interrupted and injured C.'s right of sporting:—Held, that inasmuch as these acts on the part of B. were not warranted by the terms of the demise to him, they did not constitute a breach of A.'s covenant for quiet enjoyment in the lease of 1860. *Jeffryes* v. *Evans*, 19 C. B. (N.S.) 246; 34 L. J., C. P. 261; 11 Jur. (N.S.) 584; 13 L. T. 72; 13 W. R. 864. And see *Newton* v. *Wilmot*, ante, col. 1143.

Omitting to insert Covenant in Underlease.]—The governors of the Foundling Hospital granted a lease for years of a dwelling to L., who covenanted that the premises, or any part thereof, should not be converted into a shop or other place for carrying on any trade or public show of business during the term, without the consent in writing of the lessors. L. assigned the premises to M., who, by an underlease, demised the premises to F. with a covenant for quiet enjoyment, "to hold the same without any lawful let, suit, trouble, molestation, eviction, interruption, claim, or demand whatsoever, by or for her, her heirs, executors, administrators or assigns, or any person or persons whomsoever claiming or to claim by, from, under, or in trust for her, them, or any of them, or by or through her or their acts, means, right, title, forfeiture, privity or procurement." In this lease the covenant against converting the premises into a shop was omitted. F. assigned the lease to S., who underlet it to W., and he converted part of the premises into a shop, without the consent of the original lessors, who brought an ejectment, and evicted him for a forfeiture. M. having died, S. declared against her executor for a breach of the covenant of quiet enjoyment, averring that by her act, and through her means and procurement in making the underlease to F., without any covenant similar to that in the original lease to L., he was hindered from quietly enjoying:—Held, that the action would not lie. *Spencer* v. *Marriot*, 2 D. & R. 665; 1 B. & C. 457; 1 L. J. (O.S.) K. B. 134; 25 R. R. 453.

In Lease of Water.]—Demise of a mill and the stream of water flowing in the leat belonging to the lessor, except so much of the water as should be sufficient for the supply of persons with whom the lessor should have already contracted, or should thereafter contract to supply,

provided that such a quantity should be left as should be sufficient to supply the mill for twelve hours a day. Covenant that the lessee should enjoy without interruption of the lessor, or of persons claiming by his act, means, consent, default, privity, or procurement:—Held, no demise of water for twelve hours a day, and that diversions occasioned by contracts previously to the demise were no breach of the covenant for quiet enjoyment. *Blatchford* v. *Plymouth Corporation*, 3 Bing. (N.C.) 691; 4 Scott, 429; 3 Hodges, 86; 6 L. J., C. P. 217.

Eviction by Title Paramount.]—S. being entitled to premises under a lease for ninety-nine years, made to him in 1790 by a tenant for life and his eldest son, the remainderman in tail granted an underlease of the premises, in 1795, for sixty years, to A. and H., their executors, administrators and assigns, with a covenant for quiet enjoyment by the lessees, their executors, administrators and assigns, for and during the term thereby granted, "without any lawful let, suit, trouble, eviction, ejection, molestation or interruption of or by S., his heirs, executors, administrators and assigns, or of or by any other person or persons whomsoever, lawfully claiming or to claim by, from, or under him, or any of them, or by his, their or any of their acts, means, consent, neglect, default, privity or procurement." The tenant for life and his son, the lessors in the original lease (with the nature of whose title S. was made acquainted, and who at the time of making the lease gave him a bond conditioned for the due observance of their covenant for quiet enjoyment), having died, the ultimate remainderman, who was no party to the lease of 1790, entered by his title paramount, and evicted the plaintiff, who was in possession as assignee under the lease of 1795:—Held, that the plaintiff was not entitled to maintain an action against S. in respect of such eviction, upon his covenant for quiet enjoyment, although it was contended that S. might and ought, when he took the lease of 1790, to have required the lessors to join in a common recovery to cut off the entails, the court observing, that the not procuring of such common recovery to be suffered was not a neglect or a default within the meaning of the covenant, it not appearing that S. had the power to compel the parties to suffer a recovery. *Woodhouse* v. *Jenkins*, 2 M. & Scott, 599; 9 Bing. 431; 2 L. J., C. P. 38.

If a lease contains a covenant for quiet enjoyment against the lessor, and those who claim under him, the lessee cannot, upon an eviction by a paramount title, recover under the implied covenant for general title implied in the word "demise." *Merrill* v. *Frame*, 4 Taunt. 329; 13 R. R. 612.

A tenant for life, with remainder over by indenture demised to the lessee, his executors, &c., for the term of fifteen years, without any express covenant for quiet enjoyment. The lessee was evicted by the remainderman, after the death of the tenant for life, but before the expiration of the fifteen years:—Held, that the lessee could not maintain an action of covenant against the executor of the tenant for life in respect of such eviction. *Adams* v. *Gibney*, 4 M. & P. 491; 6 Bing. 656; 8 L. J. (O.S.) C. P. 242; 31 R. R. 514.

A tenant from year to year, who had been evicted by the reversioner after the determination of the landlord's interest, cannot maintain an action upon an implied covenant for quiet enjoyment against his landlord. *Penfold* v. *Abbott*, 32 L. J., Q. B. 67; 9 Jur. (N.S.) 517; 7 L. T. 384; 11 W. R. 169.

If a lessor's estate expires during the term, and the lessee is thereupon evicted by title paramount, no action can be maintained against the lessor for the breach of any implied covenant for title or for quiet enjoyment, any such implied covenant terminating with the expiration of the lessor's estate. *Baynes* v. *Lloyd*, supra.

Measure of Damages.]—A. entered into possession of premises under a lease expiring in 1864, and in 1860 obtained from the lessor another lease of the premises, to commence from the termination of the former lease. Before the expiration of the first lease, the second lease was repudiated by one claiming under a good title. In an action for a breach of the covenant for quiet enjoyment under the reversionary lease, A. is entitled to recover from the lessor the value of the term of which he has been deprived, and not merely the damages ordinarily given on the breach of a contract for the sale of land. *Lock* v. *Furze*, 19 C. B. (N.S.) 96; 34 L. J., C. P. 201; 11 Jur. (N.S.) 726; 12 L. T. 731; 13 W. R. 971. Affirmed, 1 H. & R. 397; 35 L. J., C. P. 141; L. R. 1 C. P. 441; 15 L. T. 161; 14 W. R. 403—Ex. Ch.

The plaintiff, a lessee of land, brought an action against the lessor and against other lessees who claimed a right of way over the plaintiff's land under a grant from the same lessor, denying the right and claiming an injunction against the lessees; or, if the court should hold that they had a right of way, then damages from the lessor under his covenant for quiet enjoyment. At the trial the other lessees established their right of way, and judgment was given against the lessor for damages for the loss sustained by the plaintiff by reason of the exercise of the right of way:—Held, that the measure of damages payable by the lessor was not the permanent injury to the land, but only the damage sustained at the commencement of the action. But that the lessor, being the cause of the whole litigation, must pay the costs of the plaintiff and the other lessees. *Child* v. *Stenning*, 48 L. J., Ch. 392; 11 Ch. D. 82; 40 L. T. 302; 27 W. R. 462—C. A.

The defendant demised to the plaintiff, a floral and market gardener, garden ground for a term of years, with a covenant for quiet enjoyment, "without any interruption whatever from or by the defendant or his executors or administrators or any other person or persons lawfully claiming by, from or under him or them"; and the plaintiff, having entered into possession and built a conservatory on the ground, an action was brought against him by C., who claimed title to the ground under a prior lease from the defendant. Of this action the plaintiff duly informed the defendant by letter, and requested to know what he was to do, to which letter the defendant returned no answer. Thereupon the plaintiff, relying on the defendant's demise to him, defended the action, in which a verdict was found for C., with 40*s.* damages against the present plaintiff:—Held, that the plaintiff, in an action against the defendant to recover damages for the latter's breach of the covenant for quiet enjoyment by reason of C.'s action, might recover damages as the necessary and immediate consequences of such breach, under the following

heads:—1. The damages and costs recovered against the plaintiff in C.'s action. 2. The plaintiff's own costs, as between attorney and client, of defending that action. 3. Compensation for the loss of the ground, estimated not merely at its bare yearly value, but also by what the plaintiff might have made of it during the term by his occupancy of it in his trade as a florist. 4. Compensation for loss in erecting and removing the conservatory. *Rolph* v. *Crouch*, 37 L. J., Ex. 8; L. Q. 3 Ex. 44; 17 L. T. 249; 16 W. R. 252.

c. Pleadings and Evidence.

Claim.]—In an action on a covenant for quiet enjoyment, the plaintiff may state generally that A., lawfully claiming title under the defendant, entered by virtue of such title on the premises, without setting forth the particulars of A.'s title. *Hodgson* v. *East India Co.*, 8 Term Rep. 278; *Lloyd* v. *Tomkies*, 1 Term Rep. 671. S. P., *Foster* v. *Pierson*, 4 Term Rep. 617.

A declaration for breach of a covenant or contract for quiet enjoyment must allege an eviction by a person claiming title paramount. *Hall* v. *City of London Brewery Co.*, 2 B. & S. 737; 31 L. J., Q. B. 257; 9 Jur. (N.S.) 18.

In an action on a covenant for quiet enjoyment an assignee, who has converted lands assigned to him into pleasure grounds, and has erected buildings on them, cannot recover the value of the improvements unless the special damage is stated in his declaration specifically. Quære, if so stated he could recover. *Lewis* v. *Campbell*, 8 Taunt. 715; 21 R. R. 516.

A declaration having set out an indenture from A. to B., in which it was recited that S. demised the premises to A. by indenture, and it was afterwards stated that S. entered and ejected C. from the premises for a forfeiture:—Held, that the court might, after verdict, presume that S. had a title to the premises, although there was no express allegation of that fact; and although part of the special damage laid in the declaration did not fall strictly within the covenant alleged to be broken; as it must be presumed, after verdict, that the jury was directed at the trial not to take that part into their consideration. *S. C.*, nom. *Campbell* v. *Lewis*, 3 B. & Ald. 392; 21 R. R. 520—Ex. Ch.

A declaration alleged that the defendant demised to W. premises for a term of years: that the defendant covenanted that he had full power and authority to demise; and that W., paying rent, and observing covenants in the lease, should peaceably enjoy; that W. entered and assigned to the plaintiff, who entered; that W. observed the covenants, but that the defendant broke his covenant in this, to wit, that he had not power to demise to W. for the term, but, on the contrary, was only interested for the life of S. C.; that S. C. died, and that E. C., lawfully claiming in that behalf, evicted the plaintiff:—Held, that the declaration was bad for not alleging the eviction to have been the act of the defendant, or of any one claiming by a title prior to the plaintiff. *Brookes* v. *Humphries*, 5 Bing. (N.C.) 55; 6 Scott, 756; 1 Arn. 385; 7 D. P. C. 118; 8 L. J., C. P. 34; 2 Jur. 945.

A declaration stated, that "before and at the time of making the agreement after mentioned, the defendant held the house and premises after mentioned for the residue of a term of years, and thereupon afterwards agreed to let to the plaintiff, who agreed to take of the defendant, the house and premises at a certain rent; and in consideration of the premises, the defendant promised the plaintiff that he should quietly hold and enjoy the house and premises during the term, without any eviction from the parties entitled to the reversion; nevertheless, he, the plaintiff, was evicted by the party entitled to the reversion":—Held, that the declaration was bad, inasmuch as, the plaintiff having declared on the simple relation of landlord and tenant, no such duty as that laid as the defendant's promise arose from that relation. *Granger* v. *Collins*, 6 M. & W. 458; 9 L. J., Ex. 172.

A covenant to permit and suffer the covenantee peaceably and quietly to enjoy an annuity secured on premises demised by the defendant for a term of years to trustees, for the purpose of such security, and for raising thereout, by mortgage or sale, a sum of money to be paid to the annuitant; and that the covenantor would not hinder, molest, or disturb him in the peaceable enjoyment of the annuity, and would do all such further and other lawful and reasonable acts and things, conveyances, and assurances in the law, for the further and better granting and securing the annuity, as should be required: and the breaches assigned were, that (an arrear of annuity having accrued) the defendant did not suffer the covenantee peaceably to enjoy; but on the contrary, hindered, molested, and disturbed him in this, to wit, that although requested to do a reasonable act for the further securing the annuity, that is to say, that the defendant should direct the trustees to raise, levy, and pay to the plaintiff the arrears; yet he would not; and that although requested to direct the trustees to take up money on mortgage of the premises, for the purpose of paying the arrears, and to join therein and deliver up the deeds, yet he would not:—Held, to be ill-assigned, the refusal to direct not being an act of molestation; for the covenant not being personal in that respect, and it not being shewn that the act required to be done by the defendant was such a necessary act as that the annuity could not be enjoyed without its being done on his part, and that he was consequently under an obligation to give such direction, it was not broken by such refusal. *Warn* v. *Bickford*, 9 Price, 43.

Action for a breach of covenant for quiet enjoyment. The plaintiff's assignee of the lease was evicted and himself put to costs; in an action against him by the assignee for the eviction, he must shew by whom the assignee was evicted; hence, stating generally that a third person was seised in fee of the premises and that the assignee was evicted, is sufficient. Semble, under the word "demise" the lessee may maintain an action of covenant against the lessor, for not having sufficient power to demise for the whole term, whereby plaintiff was put to expense in procuring a better title for the whole term. *Fraser* v. *Skey*, 2 Chit. 646.

Defence.]—In an action for quiet enjoyment, the declaration stated, that, before the demise to the plaintiff, the defendant made a devise to A., which was then subsisting; that, in order to get into possession, the plaintiff brought an ejectment, but was nonsuited on account of that prior demise; and that he had never been in possession; plea, that for the first half-year of the plaintiff's lease the plaintiff might have enjoyed, but that, for nonpayment of the rent

for twenty-one days after that half-year, the defendant had a right to re-enter, according to a proviso in the lease, and that he did re-enter:—Held, no answer to the plaintiff's demand. *Ludwell* v. *Newman*, 6 Term Rep. 458; 3 R. R. 231.

A declaration, against executors for a breach of covenant for quiet enjoyment of an estate for life, against all having lawful title from the testator, alleged that they, having lawful title, entered. The plea traversed, that the covenant of the testator was broken during the continuance of the term:—Held, that although the plea was demurrable for making such general traverse, yet, as the declaration was also bad, for not alleging that the executors entered, having lawful title from the testator, it must be taken that the plaintiff had alleged a sufficient breach in his declaration, and that the averment of lawful title meant mesne title derived from the testator, and that this being so, the plea put the title in issue. *Fox* v. *Waters*, 4 P. & D. 1; 12 A. & E. 43; 9 L. J., Q. B. 329; 4 Jur. 555.

Evidence.]—To shew the lawful title of the executors, the plaintiff proved that they had taken possession of the estate, and also proved admissions by one of them, that they held it under a deed of gift from the testator prior to the covenant declared upon:—Held, that, as the allegation, that the executors having lawful title entered, was not divisible, the plaintiff was bound to prove a joint title in the defendants; and that the admission by one, as to their holding under the deed of gift, was not evidence against the other. *Ib.*

Held, also, that although the admission was made by one of two co-executors, it was not made by him quâ executor, and, therefore, did not admit a breach of covenant by the testator. *Ib.*

Declaration on a covenant in a lease by the defendant, that the plaintiff shall have and enjoy the demised premises from a day named, during a certain term. Breach, that the plaintiff on the day entered upon and became possessed of the premises for the term, but was not able to enjoy the premises in this, viz. that the plaintiff being so possessed, the defendant entered into the premises, and upon the plaintiff's possession, and expelled and kept him out. Plea, that defendant did not enter and expel him; such breach is not proved by evidence that the plaintiff came to take possession; but was refused entrance by the defendant, who continued occupying the premises, and never admitted him. *Hawkes* v. *Orton*, 5 A. & E. 367; 6 N. & M. 842.

Generally.]—By a deed after reciting a grant to A. in fee, and that the defendant's wife was the heiress of A., who died intestate, and reciting an appointment in fee by the defendant and his wife, in favour of the plaintiff, the defendant covenanted that, notwithstanding any act by him or his wife, or A., committed, he and his wife were lawfully seised, and "that, notwithstanding any act as aforesaid," he and his wife had a good right to convey; and that it should be lawful for the plaintiff to quietly occupy, without interruption by the defendant and his wife, or any person lawfully claiming under them or A.; and that the defendant and his wife, and all persons claiming under them, or A., would execute to the plaintiff all further assurances. In an action for breach of this covenant, the declaration averred, that P. claimed, as heir-at-law of A., deceased, lawful right and title to the premises; and then set out a recovery in ejectment by P., by which the plaintiff was evicted. The defendant pleaded that A. died intestate, leaving the defendant's wife her only child and heiress-at-law; and that the plaintiff instigated P. to claim a right and title to the premises; and that P. in consequence made the claim, and prosecuted the ejectment. At the trial, the jury found that the defendant's wife was not the heiress-at-law of A.:—Held, first, that the jury was not estopped, by the recital in the deed of the heirship of the defendant's wife, from finding that she was not, in fact, such heiress. *Young* v. *Raincock*, 7 C. B. 310; 18 L. J., C. P. 193; 13 Jur. 539.

Held, secondly, that the plea, without such allegation of the heirship of the defendant's wife, was no answer to the action. *Ib.*

Held, thirdly, that the allegation in the declaration, that P. "claimed, as heir-at-law of A., lawful title," sufficiently shewed, after being pleaded over to, that he had a lawful title. *Ib.*

Held, fourthly, that the generality of the terms of the covenant for quiet enjoyment was not restricted by the introductory words of the covenant for title and power to convey, to any act done by the defendant and his wife, or A. *Ib.*

5. Not to Assign or Underlet.

a. The Covenant.

Generally.]—The power of assignment is incident to the estate of a lessee, without the word "assigns" unless expressly restrained. *Church* v. *Brown*, 15 Ves. 264; 10 R. R. 74. And see *Greenaway* v. *Adams*, 12 Ves. 395.

A proviso against assignment without licence in a lease to the lessee, his executors, administrators, and assigns, is not repugnant; for the construction is that it extends to such assigns only as he may lawfully have, viz. by licence or by law, as assignees in bankruptcy. *Weatherall* v. *Geering*, 12 Ves. 504; 8 R. R. 369.

A proviso in a lease for re-entry upon assignment by the lessee, his executors, administrators, or assigns, without licence, ceases by assignment with licence, though to a particular individual. *Brummell* v. *Macpherson*, 14 Ves. 173.

Covenant not to assign without licence, once dispensed with, the condition is gone both in law and equity: but the principle is questionable, and not to be extended; for instance, to a mere act where the licence is to be in writing. *Macher* v. *Foundling Hospital*, 1 Ves. & B. 191.

Where there is a right of entry given for assigning or underletting, if a person is found in the premises, appearing as the tenant, it is primâ facie evidence of an underletting sufficient to call upon the defendant to shew in what character such person was in possession, as tenant or as servant to the lessee. *Doe* d. *Hindly* v. *Rickarby*, 5 Esp. 4.

But it is not sufficient to prove the defendant, a stranger, in possession of the demised premises, and his declaration that they were demised to him by another stranger. *Doe* v. *Payne*, 1 Stark. 86; 18 R. R. 747.

And such evidence would not be sufficient, even if the tenant had covenanted not to part with the possession. *Ib.*

Covenant in a lease not to let, set, or demise the premises, or any part, for all or any part of the term, without consent, restrains assignment. *Greenaway* v. *Adams*, 12 Ves. 393.

Whether a usual Covenant.]—*See* ante, cols. 1087–1089.

Refusal of Consent.]—A lessee covenanted with the lessor not to assign the demised premises without the consent in writing of the lessor, "such consent not being arbitrarily withheld;" and it was provided by the lease that if the lessee should assign the premises without the consent in writing of the lessor, "but such consent is not to be arbitrarily withheld," the lessor might re-enter:—Held, that there was no covenant by the lessor, either express or implied, not to refuse his consent arbitrarily, but that an arbitrary refusal would leave the lessee at liberty to assign without the lessor's consent. *Treloar* v. *Bigge*, 43 L. J., Ex. 95; L. R. 9 Ex. 151; 22 W. R. 843.

An arbitrary refusal is equivalent to an "unfair and unreasonable" refusal; and a refusal "upon advice," though the grounds of refusal be not specified, is not "arbitrary." *Ib.*

A lessee, in a lease of a house and premises to him for twenty-one years, covenanted with the lessor, his executors, &c., that he would not carry or suffer to be carried on any other business upon the premises than that of a grocer and tea-dealer without the previous consent in writing of the lessor, his executor, &c., and that he, his executors, and permitted assigns, should not assign or underlease the premises without the like previous consent in writing, "but such consent not to be unreasonably withheld," and on the granting of such consent the lessee should pay a certain fee for the preparation of it, and give notice of any assignment to the lessor. The premises were afterwards conveyed by the lessor subject to the lease. The lessee applied for the necessary consent to enable him to mortgage the premises by way of underlease, and it was refused. On demurrer to an action for an injunction and for specific performance of the covenant, or for damages:—Held, that the words "but such consent not to be unreasonably withheld" did not amount to a contract on the part of the lessor, but were a qualification of the covenant by the lessee. *Treloar* v. *Bigge* (L. R. 9 Ex. 151) followed. *Sear* v. *House Property and Investment Society*, 50 L. J., Ch. 77; 16 Ch. D. 387; 43 L. T. 531; 29 W. R. 192; 45 J. P. 204.

In a lease when there is a covenant not to sublet without consent, but such consent must not be withheld except on reasonable objection, and a heavy rent is reserved by the lease, very strong ground for refusing the consent must be shewn, as the refusal throws a heavy burden of rent on the lessees. *Sheppard* v. *Hong Kong and Shanghai Banking Corporation*, 20 W. R. 459.

A lease contained a covenant by the lessee not to assign without licence; and the lessor covenanted not to refuse his licence unreasonably or vexatiously. The lessee contracted to assign his lease to the plaintiff "subject to the landlord's approval." The lessor on being applied to for his licence refused to give it, not from any personal objection to the proposed assignee, but because he wished himself to buy up the lease in order to rebuild the premises. The lessee having failed to obtain the lessor's licence surrendered the lease to the lessor for the same price for which he had agreed with the plaintiff. In a bill by him against the lessor and lessee for specific performance of the contract to assign the lease to him:—Held, that the reference to the landlord's approval in the contract did not throw upon the lessee the duty of taking legal proceedings to oblige the lessor to give his licence; and that having used all reasonable efforts to induce the lessor to consent, he was at liberty to consider the contract at an end and make his own terms with the lessor. *Lehmann* v. *McArthur*, 37 L. J., Ch. 625; L. R. 3 Ch. 496; 18 L. T. 806; 16 W. R. 877.

—— **Respectable and Responsible Person.**]—Under a stipulation in a lease of coal and ironstone that the lessees shall not underlet or assign without the consent of the lessor, except to responsible persons, the lessor has no right to prohibit the letting to responsible persons. *Whitehead* v. *Bennett*, 9 W. R. 626.

By a lease of January, 1886, certain pieces of land, with an iron furnace and mill, and water rights over the river D. were demised for a term of fourteen years. The lease contained a covenant by the lessees not to assign or underlet without the consent of the lessors, but such consent was not to be "unreasonably refused, or refused to a person of responsibility and respectability." There was no covenant by the lessees to work the furnace. In June, 1889, the lessees made an agreement with the corporation of Barrow-in-Furness to assign to them the residue of the term in the lease. By this agreement the lessees bound themselves to withdraw their opposition to a Water Bill promoted by the corporation in order to obtain certain water rights in the river D., and also to procure all necessary licences for assignment: and the corporation bound themselves not to use the water rights contained in the lease in connection with the manufacture of iron. The lessors refused their licence to this proposed assignment on the ground that the corporation were not taking the lease for the purposes for which it was granted, and might have objects prejudicial to the lessors:—Held, that the corporation was not "a person of responsibility and respectability" within the meaning of the covenant in the lease; and also that in the circumstances, the consent of the lessors to the assignment had not been unreasonably withheld. *Harrison* v. *Barrow-in-Furness Corporation*, 63 L. T. 834; 39 W. R. 250.

A lessee covenanted with her lessor not to assign the demised premises, or any part thereof, for the whole or any part of the term, without having first obtained a written licence signed by the lessor, such licence not to be unreasonably withheld in the case of any respectable and responsible person who might be the proposed assignee. The lease also contained a proviso for re-entry for breach of covenant. The plaintiff, the assignee of the lessor, being desirous of obtaining possession of the premises, commenced negotiations with the lessee for the surrender of the lease. The lessee made an offer to the plaintiff's agent to sell her interest to the plaintiff for 400*l.*, but five days later, without further communication with the plaintiff, contracted to assign her interest for the same sum to the defendant, a respectable and responsible person. The lessee had no reason for preferring the defendant to the plaintiff. The plaintiff refused to give his licence for the assignment, and brought an action against the defendant, to whom the lessee had assigned the lease, for recovery of possession of the premises on the ground of forfeiture by breach of covenant:—

Held, that the plaintiff had unreasonably withheld his licence within the meaning of the covenant. *Bates* v. *Donaldson*, 65 L. J., Q. B. 578; [1896] 2 Q. B. 241; 74 L. T. 751; 44 W. R. 659; 60 J. P. 596—C. A.

—— Sufficiency of References—Question for Jury.]—See *Ward* v. *Smith*, 11 Price, 19 (ante, col. 734).

Consent of Lessor or Lessee.]—A lease of mines contained a covenant that the lessee should not, without the consent of the lessor, let or assign the mines. The lessor granted to the lessee a licence to sublet a part, but the licence provided that this should not authorise any further letting or assigning of the part of the mines, the subject of the licence, without such consent as was required by the lease. The lessee then agreed to sublet to an under-lessee the part of the mines the subject of the licence, the underlease to contain provisions in all respects like those in the original lease:—Held, that, according to the agreement, the underlease ought to contain a covenant by the under-lessee against letting or assigning without the consent of the lessee, and not a covenant against letting or assigning without the consent of the lessor. *Williamson* v. *Williamson*, 43 L. J., Ch. 738; L. R. 9 Ch. 729; 31 L. T. 291. Reversing 22 W. R. 682.

Agreement that Underlease shall contain the same Covenants as Original Lease.]—The plaintiff, who was lessee of part of the property of a hospital, agreed with the defendant to grant him an underlease, "to contain all usual covenants (including a covenant not to assign or underlet without the consent of the plaintiff, such consent not to be withheld if the proposed assignee or tenant be respectable and responsible), together with such other covenants, clauses, and provisoes as are contained in the lease under which the premises are held." The original lease contained (1) a covenant that if any dispute relating to the demised premises should arise between the lessee and any other tenant of the hospital, it should be referred to the arbitration of the hospital; (2) that the lessee, his executors, administrators, or assigns, would not assign or sublet without the licence of the hospital: (3) that all demises and assignments of the demised premises should be prepared by the solicitors of the hospital:—Held, that the covenants in the original lease were not to be taken as models and inserted in the underlease with the names of the under-lessor and under-lessee substituted for the names of the original lessors and lessee respectively, but that the plaintiff was entitled to have them inserted without modification, so as to bind the under-lessee to refer disputes with tenants of the hospital to the arbitration of the hospital, not to assign or underlet without the consent of the hospital, and to have his demises and assignments prepared by the solicitors of the hospital. *Williamson* v. *Williamson* (43 L. J., Ch. 738) distinguished. *Haywood* v. *Silber*, 30 Ch. D. 404; 54 L. T. 108; 34 W. R. 114—C. A.

Assignment without Consent.]—When a lease provides that the lessee shall not assign or underlet without the consent in writing of the lessor, which, however, is not to be withheld from any assignment or underlease to a respectable and responsible person, it is unnecessary to the validity of an assignment or underlease to a person of that character that the consent of the lessor should be first obtained. *Hyde* v. *Warden*, 47 L. J., Ex. 121; 3 Ex. D. 72; 37 L. T. 567; 26 W. R. 201. S. P., *Tobin* v. *Cleary*, Ir. R. 7 Ch. 17—C. A.

A lease of a farm contained a clause of forfeiture if (inter alia) the lessee should underlet or part with the possession of the demised premises, or any part thereof, without the consent in writing of the lessor first had and obtained, provided always that such consent should not be withheld if the proposed assignee or lessee were a respectable and responsible person:—Held, that the consent of the lessor was not necessary if the lessee underlet or parted with possession of the premises to a respectable and responsible person. *Burford* v. *Unwin*, 1 Cab. & E. 494.

Indorsement of Consent.]—A lease, made in 1866, contained a clause that the lessee should not assign the premises without the consent in writing of the lessor, to be endorsed on the lease. The lessee assigned with the contemporaneous consent in writing of the lessor, which was indorsed on the lease, but not on the assignment:—Held, that the assignment was valid. *Ulster Permanent Building Society, In re*, 13 L. R., Ir. 67.

Lessor's Consent whether Implied.]—When a lease is not assignable without the landlord's assent, the fact that the landlord did not object to the assignees taking possession cannot, irrespective of all other circumstances, be held sufficient to imply his recognition of the assignees. *Elphinstone* v. *Monkland Iron and Coal Co.*, 11 App. Cas. 332—H. L. (Sc.)

Parol Licence—Sufficiency.]—Proviso in lease that lessee should not demise premises without licence in writing. Parol licence to underlet is insufficient; but if such licence is given as a snare, and under circumstances of fraud, court will relieve. *Richardson* v. *Evans*, 3 Madd. 218.

Fine in respect of Licence—"Fine, or sum of money in the nature of a fine."]—Sect. 3 of the Conveyancing and Law of Property Act, 1892, provides that a condition in a lease against assigning or under-letting without licence shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that "no fine, or sum of money in the nature of a fine," shall be payable for such licence:—Held, that money paid as a fine is money which the payer hands over with the intention of passing the property in it to some one else; and a sum of money required by a lessor as a condition of granting a licence to be deposited by the lessee as security for the performance of the remaining part of the contract under which the lease was granted, and which, if such contract were duly carried out by the lessee, would be repayable to him, was not a fine, or sum of money in the nature of a fine, within the meaning of the section. *Cosh's Contract, In re*, 66 L. J., Ch. 28; [1897] 1 Ch. 9; 75 L. T. 365; 45 W. R. 117—C. A.

Proceedings to obtain Consent — Necessary Parties.]—Premises held under a demise, containing a proviso that lessees shall not assign without the licence of the landlord in writing, are sold under a decree to a purchaser, who pays

his purchase-money into court, and is let into possession; the landlord having refused to concur in the assignment, the representatives of the lessee filed a bill against him, alleging that his conduct with respect to the sale had been such as to deprive him in equity of any right to act on the legal construction of the covenant and proviso against assignment, and praying that he might be decreed to give his licence in writing for the transfer of the interest: the purchasers are necessary parties to such a bill. *Maule* v. *Beaufort* (*Duke*), 1 Russ. 349.

b. Upon whom Binding.

Assignees.]—Semble, that a covenant by a lessee, that he, his executors and administrators, shall not assign without licence, is not binding upon the assignee of the lessee. *Paul* v. *Nurse*, 2 M. & Ry. 525; 8 B. & C. 486; 7 L. J. (O.S.) K. B. 12.

A covenant that the lessee, his executors or administrators, will not assign, does not bind his assignees. *Doe* d. *Cheere* v. *Smith*, 5 Taunt. 795; 1 Marsh. 359; 2 Rose, 280; 15 R. R. 660.

Personal Representatives.]—If a lease contains a proviso that the lessee and his administrators shall not set, let, or assign over the whole or part of the premises without leave in writing, on pain of forfeiting the lease, the administratrix of the lessee cannot underlet without incurring a forfeiture. *Roe* d. *Gregson* v. *Harrison*, 2 Term Rep. 425; 1 R. R. 513.

A parol licence to let part of the premises does not discharge the lessee from the restriction of such a proviso. *Ib.*

Executors may dispose of a lease for years as assets, notwithstanding a proviso or covenant that the lessee shall not alien. *Seers* v. *Hind*, 1 Ves. 295.

Assignees in Bankruptcy.]—An option given to a tenant to call for an extended lease, will pass to his assignees in bankruptcy, and may by them be assigned to a purchaser. *Buckland* v. *Papillon*, L. R. 1 Eq. 477; 12 Jur. (N.S.) 155. Affirmed, 36 L. J., Ch. 81; L. R. 2 Ch. 67; 12 Jur. (N.S.) 992; 15 L. T. 378; 15 W. R. 92.

But such would not have been the case, if the tenant had been restrained from alienation. *Ib.*

To Railway Company.]—A railway company arranged by private contract the price of the interest of a tenant in land they required, there being a covenant in his lease not to assign without the consent of his landlord:—Held, that the covenant was abrogated so as to enable the tenant to assign to the railway company without the consent of his lessor. *Slipper* v. *Tottenham and Hampstead Junction Ry.*, 36 L. J., Ch. 841; L. R. 4 Eq. 112; 16 L. T. 446; 15 W. R. 861.

c. Breach of.

Sale—No Assignment Executed.]—The lease of a farm contained a covenant by the lessees, "that they would not assign or otherwise part with possession of the premises without the written consent of the lessor," with a proviso that "in case the lessees should fail in the observance or performance of any or either of the covenants and agreements on his or their part," it should be lawful for the lessor to re-enter. The lessees sold their interest in the lease to W., and the lessor in a letter consented that W. should take the farm "on the same conditions and in accordance with the lease." W. entered and took possession of the farm, but no assignment of the term was executed to him:—Held, that there was no such breach of the covenant not to assign without the written consent of the lessor, as to enable him to maintain ejectment, first, because W. appeared to have entered into possession at the instance of the lessor rather than of the lessees; and, secondly, because the consent to the assignment did not prohibit the lessees from parting with possession of the premises till a lease had been executed. *West* v. *Dobb*, 10 B. & S. 987; 39 L. J., Q. B. 190; L. R. 5 Q. B. 460; 23 L. T. 76; 18 W. R. 1167—Ex. Ch.

Underlease.]—A covenant not to assign or otherwise part with the premises, or any part thereof, for the whole or any part of the term, is broken by an underlease. *Doe* d. *Holland* v. *Worsley*, 1 Camp. 20.

Although underleases are not within the general words of provisoes concerning assignments. *Kinnersley* v. *Orpe*, 1 Dougl. 55. S. P., *Church* v. *Brown*, 15 Ves. 264; 10 R. R. 74.

A covenant not to assign, transfer, set over, or otherwise do or put away the lease or premises, does not extend to an underlease for part of the term. *Crusoe* d. *Blencowe* v. *Bugby*, 2 W. Bl. 766; 3 Wils. 234.

Letting from Year to Year.]—Letting the premises from year to year by the tenant is a breach of a covenant not to "underlease." *Timms* v. *Baker*, 49 L. T. 106.

Covenant in Restraint of Trade—Assignment to Schoolmaster.]—Where a lessee of a house and a garden for term of years covenanted with the lessor "not to use or exercise, or permit or suffered to be used or exercised, upon the demised premises or any part thereof, any trade or business whatsoever, without the licence of the lessor," and afterwards, without the licence of the lessor, assigned the lease to a schoolmaster, who carried on his business in the house and premises:—Held, that the assignment was a breach of this covenant, and the lessor entitled to re-enter under a proviso for re-entry for non-performance of covenants. *Doe* d. *Bish* v. *Keeling*, 1 M. & S. 95; 14 R. R. 405. And see *Jones* v. *Thorne*, 3 D. & R. 152; 1 B. & C. 715; 1 L. J. (O.S.) K. B. 200; 25 R. R. 546.

Assignment to Partner of Part of Premises.]—Where a lease contained a proviso for re-entry, in case the tenant should demise, lease, grant, or let the demised premises, or any part or parcel thereof, or convey to any person whomsoever for all or any part of the term, without the licence of the lessor in writing, and the tenant without such licence, agreed with a person to enter into partnership with him, and that he should have the use of a back chamber and some other parts of the premises exclusively, and of the rest jointly with the tenant, and accordingly let him into possession:—Held, that the lessor was entitled to re-enter. *Roe* d. *Dingley* v. *Sales*, 1 M. & S. 297.

Ejectment—Clause of Re-entry Unnecessary.]—In an agreement enuring as a lease, "it was stipulated and conditioned that the lessee shall not underlet":—Held, that these words created

a condition, upon a breach of which the lessor might maintain ejectment, without an express clause of re-entry. *Doe* d. *Henniker* v. *Watt*, 1 M. & Ry. 694; 8 B. & C. 308; 6 L. J. (O.S.) K. B. 185.

Devise.]—Lease for years, with clause of re-entry, if lessee, during his life, should alien term without consent. Semble, that devise without consent is a forfeiture. *Parry* v. *Harbert*, Dyer, 45, pl. 3.

Aliter if devisee were executor. *Windsor* (*Lord*) v. *Burry*, cited id. n.

Covenant not to Assign for more than a Year.]—A lease of the opera-house contained covenants on the part of the lessee; secondly, not to grant away, assign, dispose of, &c., the stalls or boxes "for any longer period than one year or season." On the 21st December, 1851, the lessee leased certain boxes for one year, to commence from March, 1852. On the 1st of August, 1852, he made another lease of the same boxes to a different person, with this habendum, "from the 1st of February now next ensuing, or from such subsequent day during the year, upon which the theatre shall be opened, and thenceforth for the full term of one year, to be computed from that day":—Held, that this was not a breach of the covenant. *Croft* v. *Lumley*, 6 H. L. Cas. 672; 27 L. J., Q. B. 321; 4 Jur. (N.S.) 903; 6 W. R. 523.

Thirdly, "not to charge nor incumber the theatre, or the income thereof, or the terms hereby granted, by mortgaging the same, or granting any rent-charges, or any other incumbrance whatever." The lessee was greatly in debt. In respect of his debts, he granted warrants of attorney (one of which was to secure payment of bills not then due, and another provided that it was a concurrent security, with an indenture therein recited, that judgment was to be entered up when the grantee thought fit, and be registered), and judgments were signed against him on those warrants of attorney, and upon judge's orders, and registered:—Held, that no breach of this covenant had been committed. *Ib.*

Covenant not to Let for more than Seven Years.]—Clause in a lease for three lives, to prevent the lessee, or his executors, &c., from letting for above seven years, without licence of lessor; the third life being in possession under his father's will, and being his executor, leased for fourteen years:—Held, no forfeiture, for he had no notice of the condition; and as the lease could not extend beyond the life of the lessor, it could not pass an interest for fourteen years certain. *Northcote* v. *Duke*, Ambl. 511; 2 Eden, 314.

Limitation of lease defeated by alienation by lessee. *Anon.*, Cary, 9.

Letting Lodgings.]—Letting lodgings is not a breach of a covenant not to underlet. *Doe* d. *Pitt* v. *Laming*, 4 Camp. 77; 15 R. R. 728.

Deposit of Lease.]—A covenant in a lease of a chop-house not to let, set, assign, transfer, set over, "or otherwise part with the premises demised, or that present indenture of lease," is not broken by proof of a deposit of the lease with the brewers of the lessee, as a security for money advanced and beer supplied to the house, as it could not be deemed to be a parting with the premises within the meaning of the covenant. *Doe* d. *Pitt* v. *Hogg*, 4 D. & R. 226; 1 Car. & P. 160; 2 L. J. (O.S.) K. B. 121. *S. C.*, nom. *Doe* d. *Pitt* v. *Laming*, R. & M. 36; 27 R. R. 512.

Semble, that a proviso to make void a lease, on assignment by the lessee, does not apply to a mere deposit of it, by way of equitable mortgage. *Cocks, Ex parte, Hand, In re*, 2 Deac. 14.

A lease deposited by way of equitable mortgage contained a covenant on the part of the lessee, not to assign without licence:—Held, that this was no objection to the usual order. *Drake, Ex parte*, 1 Mont. D. & D. 539.

A covenant by a lessee not to "mortgage, sell, assign or otherwise part with this present indenture of lease, or the premises hereby demised, or any part or parcel thereof," is not broken by a deposit of the lease, accompanied by a letter of agreement that the depositee shall have a lien thereon "by way of equitable mortgage," more especially if, by reason of the lease also containing a covenant against sub-letting, it may be inferred that the primary intention of the parties to it was to protect the landlord from having a new tenant imposed upon him. *M'Kay* v. *M'Nally*, 4 L. R., Ir. 438.

Equitable Charge.]—Semble, equitable agreements charging the property comprised in a lease, but not accompanied with a change of possession, or other alteration of the property, do not work a forfeiture of the lease in equity, notwithstanding there is a clause in the lease against assignments. *Bowser* v. *Colby*, 1 Hare, 109; 11 L. J., Ch. 132; 5 Jur. 1106.

Advertisement.]—Under a right of re-entry upon underletting, an advertisement does not work a forfeiture; but was made the ground for imposing terms. *Gourlay* v. *Somerset* (*Duke*), 1 Ves. & B. 68; 13 R. R. 234.

Letting under the Court.]—Where the respondent in a petition matter under the 5 & 6 Will. 4, c. 55, held under a lease containing a non-alienation clause; the court directed the receiver to manage the lands himself. Semble, a letting under the court would not be a forfeiture of the lease. *Rogers* v. *Bateman*, Fl. & K. 432.

Execution.]—A lessee who covenanted "not to let, set, or assign, transfer, make over, barter, exchange, or otherwise part with the indenture," &c., with a proviso that the landlord might in such case re-enter, gave a warrant of attorney to confess judgment, on which the lease was taken in execution and sold:—Held, to be no forfeiture of the lease. *Doe* d. *Mitchinson* v. *Carter*, 8 Term Rep. 57; 4 R. R. 586.

But it being found by verdict that the tenant gave such warrant of attorney to a creditor for the express purpose of enabling such creditor to take the lease in execution under the judgment; this is in fraud of the covenant, and the landlord, under a clause of re-entry in the lease for breach of the condition, may recover the premises in ejectment from a purchaser under the sheriff's sale. *S. C.*, 8 Term Rep. 300.

Deed of Assignment.]—Proviso in a lease for re-entry, and that the lease should be void, if the lessee assigned without licence. The lessee by deed assigned all his property real and personal to trustees for the benefit of his creditors, and was afterwards declared a bankrupt:—Held, that the deed of assignment being an act of bankruptcy, did not operate as a valid conveyance of the lessee's interest under the lease,

and that therefore it did not work a forfeiture. *Doe* d. *Lloyd* v. *Powell*, 8 D. & R. 35; 5 B. & C. 308; 4 L. J. (O.S.) K. B. 159; 29 R. R. 253. Affirmed, 2 Y. & J. 372.

Bankruptcy.]—Though bankruptcy supersedes an agreement not to assign without licence, it has that effect only in favour of general creditors; and where there is no actual lease, but it rests in agreement to grant a lease, an individual cannot have a specific performance in opposition to such provision, and it is very disputable whether the general assignees could obtain it, even if there were no such provision. *Weatherall* v. *Geering*, 12 Ves. 504; 8 R. R. 369.

—— **Assignment by Assignee.**]—Demise for years to S., and S. covenanted that he, his executors, administrators, or assigns, would not assign the indenture, or his or their interests therein, or assign the premises to any person whatsoever, without the consent in writing of the lessor; proviso, that in case S., his executors, administrators, or assigns, should part with his or their interest, contrary to his covenant, that the lessor might re-enter. S. deposited the lease as a security for money borrowed, and became bankrupt, and the lease was sold by direction of the chancellor to pay that debt:—Held, that the assignees under the commission might assign the lease to the vendee, without the consent of the lessor. *Doe* d. *Goodbehere* v. *Bevan*, 3 M. & S. 353; 2 Rose, 456; 16 R. R. 293.

When lessee for years, who had covenanted for himself, his executors, and administrators, but not assigns, that he would not, without the lessor's consent, assign over the lease, becomes bankrupt, and the assignee under the commission enters on the farm, sells off the crop and stock, pays the Michaelmas rent, and the day before the next rent day assigns the lease to R.; it appearing in proof that R. never ploughed or sowed the land, never resided on the farm, but occupied it rather as agent:—Held, to be a fraudulent transaction between the assignee under the commission and R., and the former decreed to answer the rent due to the time, and the assignment to be set aside. *Philpot* v. *Hoare*, 2 Atk. 219.

Lessee for years under a restriction of alienation, and power of re-entry in such case, died; his executors entered and enjoyed, and then became bankrupt, the assignees sold this lease to plaintiff for 50*l.*; the lessor, insisting on the forfeiture, ejected him. Per curiam, the commissioners' assignment being by authority of a statute, will supersede the private agreement, and the assignment by the assignees to the plaintiff is no breach of the condition, but good. *Goring* v. *Warner*, 7 Vin. Abr. pl. 9; *Goring* v. *Nash*. *Ib.*

Effect of.]—By a deed dated March 1st, 1832, the defendant leased a farm for fourteen years, the lease contained a proviso for re-entry by the lessor if the lessees should assign without his licence and a covenant by the lessees not to assign; also a covenant by the lessor at the expiration of the demise to pay for certain things at a valuation. After the expiration of the term the lessees continued to occupy the farm as tenants from year to year on the terms of the lease. In 1864, they by deed assigned their interest in the farm, with their farming stock and valuations, to the plaintiff, in order to raise a sum of money to be paid to their creditors under a composition deed executed at the same time. The plaintiff entered into occupation of the farm but never paid rent. On the 18th March the defendant, having no knowledge of the assignment, gave the lessees notice to quit, and the plaintiff, as assignee, gave him a similar notice:—Held, that the plaintiff could not maintain an action against the defendant on the covenant for a valuation. Per Mellor and Lush, JJ., on the ground that there was no new contract between the plaintiff and defendant, and that the right of action did not pass from the lessees to the plaintiff by the assignment of the tenancy created by parol between the lessor and lessees. Per Shee, J., on the ground that the lessees having no right to assign without the licence of the lessor, could not transfer any interest to the plaintiff. *Elliott* v. *Johnson*, 8 B. & S. 38; 36 L. J., Q. B. 44; L. R. 2 Q. B. 120; 15 W. R. 253.

Lands were demised in 1861 by lease, with a covenant against alienation or subletting without the consent of the landlord. A deed, purporting to assign the tenancy to A., was executed by the personal representatives of the lessee, but the consent of the landlord to such assignment was not obtained. A. afterwards sublet the premises to the defendant, as tenant from year to year, who came into and continued in possession of the lands. The rent, under this subletting, being in arrear, an ejectment was brought by A. and others claiming under him, for non-payment of rent, in which the defendant, the sub-tenant, took defence, denying that there was any subsisting tenancy in respect of the lands between himself and the plaintiff or any other person:—Held, first, that as the assignment to A. was void and no estate passed to A. thereunder, his sub-tenant (the defendant) was estopped from disputing A.'s title, and that it was no defence, to show that the term of the lease so ineffectually assigned had expired after the subletting and before the commencement of the action. Secondly, that as at the time of the subletting, A. was in possession without title, and not as tenant under the lease containing the prohibitory covenant, the subletting was not avoided by the 18th section of the 23 & 24 Vict. c. 154. *Wogan* v. *Doyle*, 12 L. R., Ir. 69.

Assignment to Partner on Dissolution.]—A lease was granted to two partners, B. and H., as joint tenants. The lessees covenanted that they, their executors, administrators, or assigns, or any or either of them, would not, during the term, assign, underlet, or part with the possession of the demised property to any person or persons without the written consent of the lessor; and there was a proviso for re-entry on the breach of any of the covenants. The partners dissolved partnership, and agreed that the partnership property should be made over to B., and that the leasehold property should be assigned to him with the consent of the lessor, if such consent could be obtained, and recited, as the fact was, that H. had given up sole possession of the leaseholds to B. Consent was not obtained, and no assignment of the leasehold was executed, but B., from the time of the dissolution, remained in sole possession:—Held, that there had been no breach of the covenant, and that the proviso for re-entry had not come into operation. *Bristol Corporation* v. *Westcott*, 12 Ch. D. 461; 41 L. T. 117; 27 W. R. 841—C. A.

A. and B., partners in trade, were assignees of a lease which contained a covenant by the lessee, for himself and his assigns, that he would not,

neither should his executors, administrators, nor assigns, assign the demised premises without the consent in writing of the lessor. On the dissolution of the partnership, A. assigned all his interest in the premises to B. :—Held, a breach of the covenant. *Varley* v. *Coppard*, L. R. 7 C. P. 505; 26 L. T. 882; 20 W. R. 972. *See preceding case.*

Waiver of Breach.]—The acceptance of rent with knowledge of a written underletting for a time certain is a waiver pro tanto of the breach of covenant not to underlet. *Walrond* v. *Hawkins*, 44 L. J., C. P. 116; L. R. 10 C. P. 342; 32 L. T. 119; 23 W. R. 390.

A lessor lets houses and lands upon a lease for twenty-one years, containing a covenant that the lessee would not assign, underlet, or permit any person to occupy any part of the premises without the consent of the lessor. The lessee underlet part of the premises by written agreement to T. for a year, and the lessor having accepted, and also distrained for rent accrued due after the making of the agreement, and with notice thereof, brought ejectment as for a forfeiture upon breach of the covenant not to underlet or permit to occupy :—Held, that the breach was not a continuing breach. *Ib.*

—— **On Application for Discovery.**]—Demurrer lies to a bill for discovery of an assignment of a lease, without licence, if it does not expressly waive the forfeiture. *Uxbridge* v. *Staveland*, 1 Ves. 56.

Bankruptcy of Sub-tenant — Title of his Trustee to Payment for Hay and Straw on Premises.]—A tenant held under a lease containing a covenant against subletting, and a clause giving the landlord a right to re-enter in case of breach of covenant, bankruptcy, or liquidation on the part of the tenant. The tenant sublet without leave. Afterwards the under-tenant filed a liquidation petition, and the landlord then first heard of the subletting. The landlord then agreed with two of the under-tenant's creditors to accept a new tenant on the old terms if one could be found in thirty-one days, and, if no tenant was found, to give a reasonable time for the removal of the corn and other effects belonging to the estate of the under-tenant. No new tenant was found, and the landlord took possession. The lease contained covenants by the tenant to do certain things during the last year of the term, and on delivering up the premises to leave thereon the hay and straw grown thereon during the last year on being paid for the same. In an action by the under-tenant's trustee in bankruptcy against the landlord to recover the value of the hay and straw :—Held, that the under-tenant was bound by the terms of the lease; that the lease having been determined by forfeiture in consequence of the under-tenant filing a liquidation petition, the clause giving a right to payment for the hay and straw did not apply; that the defendant's rights were not affected by the subsequent agreement and he was entitled to judgment. *Silcock* v. *Farmer*, 46 L. T. 404—C. A.

Evidence as to.]—If a person is found on the premises, appearing as the tenant, it is primâ facie evidence of an underletting sufficient to maintain an action for a breach of covenant not to assign or underlet. *Doe* d. *Hindly* v. *Rickarby*, 5 Esp. 4.

Measure of Damages.]—The measure of damages for a breach of a covenant for assigning or underletting premises without a licence, is such a sum as will, as far as money can, put the lessor in the same position as if he had still the lessee's liability, instead of the liability of another of inferior pecuniary ability, for breaches both past and future. *Williams* v. *Earle*, 9 B. & S. 740; 37 L. J., Q. B. 231; L. R. 3 Q. B. 739; 19 L. T. 238; 16 W. R. 1041.

Land and buildings were demised for a term of years, the lease containing a clause providing that the lessee should not be at liberty to sublet without the consent in writing of the lessor, his executors, administrators, or assigns, but that such consent should not be unreasonably withheld. The lessee, without obtaining such consent, sublet the premises to a person who intended (to the lessee's knowledge) to use them, and who did in fact use them for the purposes of a dangerous business. The buildings were damaged by a fire which arose from the use of the premises for the business for which they were taken. The lessor brought an action claiming damages for the breach of the covenant not to sublet :—Held, that the damage caused by the fire was not too remote, as it was the natural and probable result of the breach of covenant. *Lepla* v. *Rogers*, [1893] 1 Q. B. 31; 5 R. 57; 68 L. T. 584; 57 J. P. 55.

Relief against.]—If a lessee for years covenants not to alien without licence of the lessor, under penalty of forfeiting the lease, and he afterwards aliens without licence, equity will not relieve him. *Wafer* v. *Mocato*, 9 Mod. 112.

No relief against forfeiture by breach of covenant not to assign without licence. *Hill* v. *Barclay*, 18 Ves. 63; 11 R. R. 147.

A. made a lease of lands, with a condition against assigning or subletting without the consent of A., under his hand and seal, on breach of which the lease was to be void. The lessee made an agreement for a lease of a part of the lands, with the consent of A., by letter, not under seal. B. afterwards purchased A.'s reversion, subject to the agreement. C. the lessee's administratrix, applied to B. for permission to make a lease, in pursuance of the agreement to E., to whom the interest under it had been assigned. B. advised and encouraged C. to make the lease, stood by while a large sum was expended by E. on the lands, and witnessed the execution of the lease knowing it to be a lease of the lands from C. to E. B. knew of the clause of subletting, but did not know that the consent of A. was not valid in law, not being under seal, and swore that he had no intention, at the time, of taking advantage of a forfeiture. B. afterwards brought an ejectment for the forfeiture :—Held, that the court had power to relieve the tenant, notwithstanding the condition in the lease against assigning or subletting. *Burke* v. *Prior*, 15 Ir. Ch. R. 106.

Under Conveyancing Acts.]—*See* supra, J. 2, *i.* iii.

Remedy of Under-tenant.]—Lessee underlets parcel of land, in fraud, commits breach of covenant and forfeits lease, and after obtains fresh lease: under-lessee hath remedy in equity. *Anon.*, Cary, 13.

6. As to Rates and Taxes.

a. Construction Generally.

Where a party took a part of premises the whole of which were rated at a certain annual value, and the lessor covenanted to pay all taxes then chargeable thereon, and the lessee covenanted to pay all fresh taxes which might thereafter be charged on the premises, or any part thereof:—Held, that the true construction of these covenants was, that the lessor should pay such taxes as were charged on the premises at the time of making the lease, at the then annual value, and that the lessee should pay all fresh taxes, and all such additions to those formerly chargeable as were occasioned by the improved value of the premises. *Watson* v. *Atkins*, 3 B. & Ald. 647.

Under a covenant by a tenant for the payment of 80*l.* yearly rent, all taxes thereon being to him allowed, but that he would pay all further or additional rates on the premises, or on any additional buildings or improvements made by him; and a covenant by the landlords to pay all rates, on the premises, or on the tenant, in respect of the yearly rent of 80*l.*, except such further or additional taxes as might be assessed on the premises; the tenant is bound to defray all increase of the old as well as the new rates, beyond the proportion at which the premises were rated at the time of the deed, which was 20*l.* in respect of the 80*l.* rate. *Graham* v. *Wade*, 16 East, 29.

A lease contained a covenant by the lessee to pay all rates and taxes, and a proviso for re-entry on breach:—Held, first, that the nonpayment within a reasonable time of a poor rate, which had been duly assessed, allowed and published, was a breach justifying a re-entry by the landlord, and that it was not necessary to shew that the rate had been demanded of the tenant, or that express notice of it had been given to him. *Davis* v. *Burrell*, 10 C. B. 821; 15 Jur. 658.

Held, secondly, that if the covenant meant to pay on demand, a personal demand was not necessary, but that a demand on the premises of the tenant's son was sufficient. *Ib.*

A declaration, after setting forth an agreement, by which the defendant took of the plaintiff's rooms, part of a house, and agreed to pay, without saying to whom, the proportion of the rates and taxes "which might be assessed on the premises so taken" by him, averred, that afterwards, rates amounting, to wit, to 150*l.* were assessed on the house, being the rates whereof the proportion was agreed to be paid as aforesaid; that such rates were afterwards assessed, became due, and were paid by the plaintiff; that the proper proportion payable by the defendant was a proportion, to wit, one-third, amounting to, to wit, to 50*l.*, of all which the defendant had notice, and was requested by the plaintiff to pay that sum. Pleas, first, as to 12*l.* 10*s.*, tender and payment into court; secondly, as to the residue, traverse of the request to pay: and fourthly, as to the residue, that the proper proportion payable by the defendant was a proportion amounting to 12*l.* 10*s.*, without this, that the proper proportion, to wit, one-third, amounting, to wit, to 50*l.*:—Held, first, that the defendant was bound to pay his proportion of the rates to the plaintiff. *Hooper* v. *Woolmer*, 1 L. M. & P. 634; 10 C. B. 370; 20 L. J., C. P. 63.

Held, secondly, that his liability to do so was a primary and not a collateral liability; and, therefore, that no request to pay was necessary. *Ib.*

Held, thirdly, that under the agreement to pay a proportion of the rates assessed on the premises so taken by him, he was bound to pay a proportion of the rates assessed on the house of which such premises were a part. *Ib.*

Held, fourthly, that the fourth plea was bad, as traversing only the precise amount of the proportion stated in the declaration, which was immaterial. *Ib.*

A lessee covenanted that he would pay all taxes, charges, rates, tithes or rent-charge in lieu of tithe dues, and duties whatsoever, as then were or should at any time thereafter during the demise be taxed, charged, assessed or imposed upon the demised premises:—Held, that the covenant was not confined to rates payable by the landlord, but meant all rates then imposed on the lessee in respect of his occupation, and all future rates which might be imposed on the land itself. *Hurst* v. *Hurst*, 4 Ex. 571; 19 L. J., Ex. 410.

—— **Improved Value of Premises.**]—A tenant of a piece of ground, at a fixed annual rent, covenanted not to build without the licence of the lessor, and the lessor covenanted to pay all taxes charged or to be charged during the term. At the time of executing the lease the lessor gave the lessee a licence to build, which he did, and thereby much increased the annual value of the premises:—Held, that the lessor was liable to pay taxes in proportion to the rent received, and not according to the improved value. *Watson* v. *Home*, 7 B. & C. 285; 1 M. & Ry. 191; 6 L. J. (O.S.) K. B. 73; 31 R. R. 200.

The tenant compounded his taxes under the provisions of a local act, whereby his premises were assessed at a less annual sum than the improved annual value:—Held, that the tenant paid taxes in respect of the whole improved annual value, and that the landlord was to pay that proportion of the taxes paid which the rent bore to such improved annual value. *Ib.*

b. Land Tax.

If a party agrees to take a lease at a net rent, he cannot object that the lease contains a covenant for him to pay the land tax and sewers rate. *Bennett* v. *Womack*, 3 Car. & P. 96; 7 B. & C. 627; 1 M. & Ry. 644; 6 L. J. (O.S.) K. B. 175; 31 R. R. 270.

A tenant verbally agreeing "to pay all taxes," is bound to pay the land tax, although not specifically mentioned. *Amfield* v. *White*, R. & M. 246; 27 R. R. 745.

Upon the construction of an agreement to demise a farm for fourteen years, "at the yearly rent of 40*l.* payable quarterly, free of all outgoings"; and by which the parties agreed "to grant and accept a lease on the above and other usual terms":—Held, that the landlord was entitled to a net rent payable free of land tax, and tithe commutation rent-charge. *Parish* v. *Sleeman*, 1 De G. F. & J. 326; 29 L. J., Ch. 96; 6 Jur. (N.S.) 385; 8 W. R. 166.

A. demised land to B. upon a building lease, at the yearly rent of 60*l.*, clear of all rates and assessments, the sewers rate and land tax excepted, with the usual covenant for payment of rent. B. having by building on the land increased its ratable value to 300*l.* per annum:—Held, that he was only entitled to deduct the sewers rate and land tax upon the original rent, and not in respect of the improved value. *Smith* v. *Humble*, 15 C. B. 321; 3 C. L. R. 225.

The Property Tax Act, 46 Geo. 3, c. 65, ss. 112, 115, in declaring covenants to pay the same void, has a retrospective operation; therefore, covenant entered into before the act passed is void. *Buxton* v. *Monkhouse*, G. Coop. 41.

c. Tithe Rent-Charge.

The lessor of lands was at the date of the lease, also the owner of the tithe rent-charge upon such lands. The lease contained a covenant by the lessee to pay "all taxes and assessments whatsoever for or in respect of the demised premises, save and except the level tax, property tax, and land tax," which were to be paid by the lessor:—Held, in an action upon the covenant by the assignees of the reversion and of the tithe rent-charge, against the lessee for nonpayment of tithe rents, that the words "taxes and assessments" in the covenant did not include the tithe rent-charge, and that the action was therefore not maintainable. *Jeffery* v. *Neale*, 40 L. J., C. P. 191; L. R. 6 C. P. 240; 24 L. T. 362; 19 W. R. 700.

By a lease, the tenant agreed to pay the rent, "without any deduction in respect of any taxes, rates, assessments, or charges whatsoever, the landlord's property tax only excepted":—Held, that he was bound to pay the tithe rent-charge imposed upon the demised hereditaments. *Lockwood* v. *Wilson*, 43 L. J., C. P. 179; 30 L. T. 761; 22 W. R. 919.

By articles of agreement for a lease, the reddendum was expressed thus: "At the yearly rent of 109*l.* 14*s.* 4*d.*, over and above all taxes, charges, and impositions whatsoever, except quit and crown rents":—Held, that the tenant was not liable to the tithe rent-charge. *Davies* v. *Fitton*, 2 Dr. & War. 225; 4 Ir. Eq. R. 612.

Although a direct covenant by the tenant to pay the tithe would be void, by 2 & 3 Will. 4, c. 119, s. 13, yet there is nothing to prevent a landlord from reserving, and a tenant from agreeing to pay, a larger rent in consideration of the tithe. *Ib.*

And see *Dawes* v. *Thomas*, post, col. 1180.

d. Paying Expenses.

The defendant became tenant of a house under a lease by which he covenanted to pay "all rates, taxes, charges and assessments whatsoever which now are or may be charged or assessed upon the said premises, or any part thereof, or upon any person or persons in respect thereof," land tax and property tax excepted. The local board of health gave notice to the plaintiff, as owner (he having acquired the lessor's interest in the premises) to sewer, level, pave, &c., the street in which the house was situate; and, upon his failure to comply with the notice, the board did the work, and made an apportionment upon him in respect thereof, under the Public Health Act, 1848 (11 & 12 Vict. c. 68), and the acts amending that act, and he was compelled to pay the amount and interest:—Held, that this was a "charge upon the premises," or "upon a person in respect thereof," from which by his covenant the defendant undertook to relieve the plaintiff, and therefore the plaintiff was entitled to maintain an action against the defendant in respect of the money and interest so paid by him. *Hartley* v. *Hudson*, 48 L. J., C. P. 751; 4 C. P. D. 367.

The lessee of a house in a new street within the metropolitan district for seven, fourteen, or twenty-one years, covenanted with his lessor to pay all rates and assessments taxed, rated, charged, assessed, or imposed upon the demised premises, or upon or payable by the occupier or tenant in respect thereof:—Held, that the proportion of the expense of paving the new street assessed upon the demised house under 25 & 26 Vict. c. 102, s. 96, was not a rate payable by the tenant under this covenant. *Allum* v. *Dickinson*, 52 L. J., Q. B. 190; 9 Q. B. D. 632; 47 L. T. 493; 30 W. R. 930; 47 J. P. 102—C. A.

A local act gave a corporation power to call on the owner (i.e. the person receiving the rack rent) of any houses to pave the street opposite to his houses, and in default to do it themselves, and recover the expenses from such owner by action, and also, as an additional remedy, by obliging all his tenants to pay to the extent of their unpaid rent, whether the expenses were incurred before their own particular houses or not. A. let a house to B., who covenanted to pay and discharge "all taxes, rates, assessments and impositions payable in respect of the demised premises." The corporation, on default by the landlord, paved the street before the tenant's house; the landlord paid the money expended by them in his default, and sought to recover it from the tenant on his covenant:—Held, that he was not liable. *Tidswell* v. *Whitworth*, 36 L. J., C. P. 103; L. R. 2 C. P. 326; 15 L. T. 574; 15 W. R. 427.

By an agreement of lease the tenant agreed to pay "all rates, taxes, and assessments payable in respect of the premises during the term":—Held, that a sum assessed upon the owners as their proportion of the expense of paving the street upon which the premises abutted, was not a rate, tax, or assessment within the meaning of the covenant, but a charge imposed upon the owner for the permanent improvement of his property. *Wilkinson* v. *Collyer*, 53 L. J., Q. B. 278; 13 Q. B. D. 1; 51 L. T. 299; 32 W. R. 614; 48 J. P. 791.

To pay Outgoings.]—The plaintiff, the owner of certain premises, demised them to the defendants for a term of years at a yearly rent "clear of all present and future rates, taxes, and deductions," and a covenant was contained in the lease that the defendants, "their successors or assigns, should and would during the term well and truly pay, or cause to be paid, the yearly rent thereinbefore reserved, and also should and would bear and pay all the rates, taxes and outgoings then payable or thereafter to become payable, whether by landlord or tenant, in respect of the said premises." The corporation, within whose limits the premises were situated, incurred under the special act certain expenses in paving the street adjoining the premises, which expenses they were empowered to charge upon the owners of buildings and lands in the street. The plaintiff on demand paid the expenses incurred by the corporation, and brought the present action to recover them from the defendants under the covenants in the lease:—Held, that the omission of the word "outgoings" in the reddendum clause did not qualify the covenant so as to take it out of the decision in *Crosse* v. *Raw*, (post, col. 1175); and that the plaintiff was therefore entitled to recover. *Gardner* v. *Furness Ry.*, 47 J. P. 232.

The lessee of a house in a new street within the metropolitan district covenanted with his lessor to pay during the term "all existing and future taxes, rates, assessments, land tax, tithe or

tithe rent-charge, and outgoings of every description for the time being payable either by the landlord or tenant in respect of the said premises" :—Held, that the owner's proportion of the cost of paving the street under 25 & 26 Vict. c. 102, s. 96, was an "outgoing" payable by the lessee under this covenant. *Aldridge* v. *Ferne*, 17 Q. B. D. 212 ; 55 L. J., Q. B. 587 ; 34 W. R. 578.

By an agreement for a lease of a house for three years at a rent of 75*l.* per annum the tenant agreed "to pay all sewers rate, tithe rent-charge, land tax (if any), and all existing and future taxes, rates, assessments and outgoings of every description, payable by landlord or tenant in respect of the premises during the tenancy (except the landlord's property tax)." The local board made a claim upon the landlord and tenant for 68*l.* 15*s.* 11*d.*, the share of the expenses of paving the road abutting on the house, which had been apportioned to it :—Held, that the words of the agreement were large enough to cover this payment ; and that their meaning could not be regarded as altered because the agreement was only for a term of three years :—that the tenant, therefore, must pay the amount claimed by the board. *Batchelor* v. *Bigger*, 60 L. T. 416.

A lessee covenanted that he would, during the continuance of the term, pay and discharge "all taxes, rates, duties and assessments whatsoever which during the continuance of the demise should be taxed, assessed or imposed on the tenant or landlord of the premises demised in respect thereof." The vestry of the parish, having, under the provisions of the metropolis management acts, paved the street upon which the demised premises abutted, assessed the sum payable by the owner as his proportion of the estimated expenses at 49*l.* 2*s.* 6*d.*, gave the occupier a notice under s. 96 of the act of 1862, requiring him to pay it, and upon his failure to do so, took proceedings against the owner before a magistrate, and compelled him to pay :—Held, that this was a duty or an assessment, assessed or imposed upon the owner in respect of the premises, within the covenant. *Thompson* v. *Lapworth*, 37 L. J., C. P. 74 ; L. R. 3 C. P. 149 ; 17 L. T. 507 ; 16 W. R. 312.

e. Water Rate.

In a lease of a shop and basement and of three rooms on the third floor of the same house, the lessor covenanted to pay "all rates and taxes chargeable in respect of the demised premises." Water was separately supplied by a water company to the shop and basement, and paid for by the tenant. In an action to recover from the lessor the amount so paid :—Held, that such charge was a "rate" within the meaning of the covenant. *Direct Spanish Telegraph Co.* v. *Shepherd*, 53 L. J., Q. B. 420 ; 13 Q. B. D. 202 ; 51 L. T. 124 ; 32 W. R. 717 ; 48 J. P. 550.

By a covenant contained in a lease of a warehouse in the city of London the lessor covenanted with the lessees to pay all rates, taxes, and impositions whatsoever, whether parliamentary, parochial, or imposed by the corporation of the city of London or otherwise, howsoever, which then were or thereafter might be rated, charged, or assessed on the said premises, or any part thereof, or on the said yearly rent, or on the landlord, owner, or tenants of the said premises in respect thereof. Water having been supplied to the demised premises for domestic purposes by the New River Company under the provisions of the Waterworks Clauses Act, 1847, the lessees paid the water-rates due in respect of such supply, and sought to recover the same from the lessor :—Held, that such water-rates were not rates or impositions imposed on or in respect of the premises within the meaning of the covenant, and therefore the lessees were not entitled to recover the same from the lessor. *Direct Spanish Telegraph Co.* v. *Shepherd* (13 Q. B. D. 202) discussed. *Badcock* v. *Hunt*, 58 L. J., Q. B. 134 ; 22 Q. B. D. 145 ; 60 L. T. 314 ; 37 W. R. 205 ; 53 J. P. 340—C. A.

In a lease of premises within the district supplied with water by the New River Company the lessor covenanted to pay "all rates, taxes, assessments, water-rate, and other outgoings, except the gas and electric light, now or hereafter to be imposed or assessed upon the said premises, or on the lessor or lessees in respect thereof" :—Held, that the water-rate payable under the covenant was the rate payable for the supply of water to the premises for domestic purposes under s. 35 of the company's private act of 1852, which was calculated at a percentage upon the annual value of the house ; and not the rate payable by agreement between the tenant and the company for water supplied for trade purposes under s. 40 of the act. *Floyd* v. *Lyons*, 66 L. J., Ch. 350 ; [1897] 1 Ch. 633 ; 76 L. T. 251 ; 45 W. R. 435—C. A.

f. Drainage Expenses.

The defendant was tenant to the plaintiffs of certain hereditaments under a lease, by which he was bound to "bear, pay, and discharge . . . all other taxes, rates, duties, and assessments whatsoever, whether parliamentary, parochial, or otherwise." The drainage having become defective, the sanitary authority of the borough within which the hereditaments were situated caused a notice to be served upon the plaintiffs requiring them, as owners, to abate the nuisance, and the notice not having been complied with, obtained an order from a justice to the like effect. The plaintiffs having executed the works necessary to enable them to obey the order, sought to recover the cost of them from the defendant under the foregoing covenant :—Held, that the action was maintainable. *Budd* v. *Marshall*, 50 L. J., Q. B. 24 ; 5 C. P. D. 481 ; 42 L. T. 793 ; 29 W. R. 148 ; 44 J. P. 584—C. A.

Under a demise of premises for twenty-one years, the lessee covenanted to pay the rent reserved "without any deduction or abatement except land tax and landlord's property tax," and further "to pay and discharge all manner of taxes, rates, charges, assessments and impositions whatever (except as aforesaid) then or at any time or times during the term to be charged, assessed, or imposed on the premises demised, or in respect thereof, or of the rent as aforesaid, by authority of parliament or otherwise howsoever." During the term the lessor received from the sanitary authority a notice, pursuant to the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 94, to abate a nuisance injurious to health, arising from the bad condition of the drains upon the premises, and in order to prevent proceedings against him, executed the required works :—Held, that, the payment having been made by the lessor, not for a "rate, charge, assessment, or imposition assessed or imposed on the demised premises or in respect thereof," but

in performance of a duty imposed upon him by the act of parliament, he was not entitled to call upon the lessee under his covenant to repay the amount. *Rawlins* v. *Biggs*, 47 L. J., C. P. 487; 3 C. P. D. 368; 27 W. R. 138.

In a lease of a house and premises, the lessee covenanted with the lessor to "bear, pay and discharge the sewers rate, tithes, rent-charge in lieu of tithes, and all other taxes, rates, assessments and outgoings whatsoever which at any time or times during the demise should be taxed, rated, charged assessed, or imposed upon the demised premises, or any part thereof, or upon the landlord or tenant in respect thereof, or on the rent thereby reserved (except the landlord's property tax)":—Held, that the lessee could not recover from the lessor the expenses of making a drain, which, under 29 & 30 Vict. c. 90, s. 10, the lessor, as owner, might have been required by the sewer authority to make, but which the lessee had made under an arrangement with the lessor, by which the expense was to be borne by the party liable. *Crosse* v. *Raw*, 43 L. J., Ex. 144; L. R. 9 Ex. 209; 23 W. R. 6.

The drainage board for a district incurred expenses in making surveys and plans for certain proposed works. The estimates for the proposed works amounted to more than 1,000*l*. The proprietors of one half of the land dissented from the execution of these works, which were never carried out. The board made a general rate on the occupiers of land in the district, in order to pay for the expenses of the surveys and plans:—Held, that the occupiers, and not the owners, were chargeable, under the 24 & 25 Vict. c. 133, ss. 31, 38, with these expenses; and that the rate was properly made on the present value of the land. *Griffiths* v. *Longdon and Eldersfield Drainage Board*, 41 L. J., Q. B. 25; L. R. 6 Q. B. 738; 25 L. T. 126; 19 W. R. 1162.

A., who was tenant of premises under a lease, in which he covenanted to pay "all such parliamentary, parochial, and county district and occasional levies, rates, assessments, taxes, charges, impositions, contributions, burthens, duties and services whatsoever as during the term should be taxed, assessed, or imposed upon or in respect of the premises," underlet the premises to B., who covenanted in the underlease to perform the covenants on the lessee's part in the lease to A. A district board of works, acting under the Metropolis Management Act, 18 & 19 Vict. c. 120, compelled B., as occupier of the premises, to pay the expense of executing drainage works from the premises, which the board was authorised by the act to obtain the payment of from the occupier, the act allowing such occupier to deduct the same out of the rent due from him to the owner, provided it did not affect any contract between landlord and tenant:—Held, that this was an expense included in the terms of the covenant in the original lease, and against which the occupier, B., undertook to bear A. harmless, and that therefore B. was not entitled to deduct the same from his rent. *Sweet* v. *Seager*, 2 C. B. (N.S.) 119; 3 Jur. (N.S.) 588; 5 W. R. 560.

A lessee covenanted to pay the tithe or rent-charges in lieu of tithes and tax (if any), sewers rates, main drainage rates, and all other taxes, rates and assessments, and impositions and outgoings whatsoever then or thereafter to be charged or imposed on or in respect of the said premises or any part thereof:—Held, that the lessee was not liable to pay the amount charged by the urban authority for sewering, levelling, and paving the road on which the demised premises abutted, under s. 150 of the Public Health Act, 1875. *Hill* v. *Edward*, 1 Cab. & E. 481.

If a party agrees to take a lease at a net rent, he cannot object that the lease contains a covenant for him to pay the sewers rate. *Bennett* v. *Womack*, 3 Car. & P. 96; 7 B. & C. 627; 1 M. & Ry. 644; 6 L. J. (O.S.) K. B. 175; 31 R. R. 270.

g. Other Impositions.

Expenses of Works under Metropolis Management Act.]—The owner of a theatre, in pursuance of a notice given by the metropolitan board of works, under the provisions of s. 11 of the Metropolis Management and Building Acts Amendment Act of 1878, incurred certain expenses in executing works required by the notice to be done by him. In an action against his lessee to recover the expenses under a covenant contained in the lease, by which the lessee covenanted to pay, bear and discharge every other rate, tax, charge, assessment, burden, duty and imposition whatsoever, parliamentary, parochial or otherwise, to which the lessor then was, or should, or might thereafter be liable:—Held, that the lessor was entitled to recover. *Robertson and Thorne, In re*, 47 J. P. 566.

Abatement of Nuisance.]—A tenant who covenants to pay, bear, and discharge all assessments, charges, or impositions whatever, parliamentary, parochial, or otherwise, which at any time during the continuance of the demise may be charged, assessed, or imposed on the lessor, for or in respect of the premises, is liable to recoup his landlord any expenses incurred by him in complying with an order made under the Public Health (London) Act, 1891, to abate a nuisance on the demised premises, inasmuch as such expenses are a charge on the lessor in respect of the premises. *Smith* v. *Robinson*, 62 L. J., Q. B. 509; [1893] 2 Q. B. 53; 5 R. 469; 69 L. T. 434; 41 W. R. 588; 58 J. P. 73.

A lessee who covenants with the lessor to pay "taxes, rates, duties, assessments, and impositions . . . which now are or shall be . . . assessed or imposed on or in respect of the . . . premises, or of the rent hereby reserved," is liable as between himself and the landlord to pay the costs incurred by the latter in abating a nuisance arising from drains in compliance with a notice served upon him by the sanitary authority under the Public Health (London) Act, 1891. *Payne* v. *Burridge* (13 L. J., Ex. 119; 12 M. & W. 727) followed. *Brett* v. *Rogers*, 66 L. J., Q. B. 287; [1897] 1 Q. B. 525; 76 L. T. 26; 45 W. R. 334.

"Parliamentary Tax"—What is.]—An assessment levied under an act, enabling the owners of land to raise money for repairing a bridge, to the repair of which they were liable ratione tenuræ, is not a parliamentary tax charged upon the demised premises within the meaning of a covenant in the lease to pay rent, "free and clear of and from any land tax, and all other taxes and deductions whatsoever, either parliamentary or parochial, then already taxed, charged, or imposed, or thereafter to be taxed, charged, or imposed upon the premises or any part thereof, or upon G., his heirs, executors, administrators, or assigns, in respect thereof, the landlord's property tax or duty only excepted." *Baker* v. *Greenhill*, 2 G. & D. 435; 2 Q. B. 148; 11 L. J., Q. B. 161; 6 Jur. 710.

A sewers rate, not being imposed directly by act of parliament, is not "a parliamentary tax." *Palmer* v. *Earith*, 14 M. & W. 428; 14 L. J., Ex. 256.

Liability of Assignor of Lease—Ambassador, Immunities of.]—A lease of a dwelling-house contained a covenant by the lessee to pay the sewers rate, and all other rates, taxes, and assessments, and impositions of what nature or kind soever, and whether parliamentary, parochial, or otherwise, which then were, or at any time thereafter during the time should be assessed, charged, or imposed upon the demised premises, or on the landlord in respect thereof. By a local act relating to parochial rates in the parish in which the demised premises were situated, it was provided that every rate or assessment made, laid, or assessed by virtue of the act in respect of any land, ground, house, &c., which any ambassador, envoy, resident, agent, or other public minister of any foreign prince or state, or the servant of any such ambassador, envoy, resident, agent, or public minister, or any other person not liable by law to pay such rate or assessment then did or thereafter should inhabit, should be paid by and be recoverable from the landlord, owner, lessor, or proprietor of such land, ground, house, &c. The lessee of the demised premises assigned the same to an attaché of a foreign embassy, who occupied them as his residence. The assignee having claimed exemption from liability to pay a parochial rate made in respect of the premises under the local act, the parish authorities enforced payment of the same against the lessor. In an action brought against the lessee by the lessor to recover the amount so paid by him:—Held, that payment of the rate was not enforceable against an attaché of a foreign embassy; that the rate was therefore under the local act recoverable from the lessor; and that the lessee was under the covenant bound to repay to the lessor the amount of the rate so paid by him. *Parkinson* v. *Potter*, 55 L. J., Q. B. 153; 16 Q. B. D. 152; 53 L. T. 818; 34 W. R. 215; 50 J. P. 470.

Lease of Mines.]—A lease of an iron mine made before the passing of the Rating Act, 1874 (37 & 38 Vict. c. 54), contained a covenant by the lessee to "pay or cause to be paid all manner of taxes, rates, assessments, charges and impositions whatsoever, parliamentary or parochial, which now are or which shall at any time or times hereafter during the continuance of this demise be taxed, rated, charged, assessed, or imposed upon the said demised mines and premises, the landlord's property tax only excepted":—Held, that the lessee had not "specifically contracted" to pay the whole of the poor rate on the mine, in the event of the abolition of its exemption from the poor rate, within 37 & 38 Vict. c. 54, s. 8. *Chaloner* v. *Bolckow*, 47 L. J., Q. B. 562; 3 App. Cas. 933; 39 L. T. 134; 26 W. R. 541.

The exception in s. 8 of 37 & 38 Vict. c. 54, to the right of a tenant of a mine to deduct one half of the rate newly imposed by that act, and paid by him, from the rent payable to his lessor, namely, "unless he has specifically contracted to pay such rate in the event of the abolition of the exemption," does not take effect in favour of the lessor unless the lease has in terms anticipated the imposition of this new liability, and thrown it upon the tenant; and a covenant to pay the rent, "free of and from all rates, taxes, tithe rent-charges, expenses and deductions whatsoever, parliamentary, parochial, or of any other nature," will not deprive the tenant of his right to make the deduction given by the above section. *Devonshire (Duke)* v. *Barrow Hæmatite Steel Co.*, 46 L. J., Q. B. 435; 2 Q. B. D. 286; 36 L. T. 355; 25 W. R. 469—C. A.

h. Deducting from Rent.

An agreement that, if the tenant will continue to pay his rent in full without any deduction in respect of landlord's property tax paid by him, the landlord will repay to the tenant all sums which he has paid or shall pay for the landlord's property tax, is not invalid as being contrary to the provisions of 5 & 6 Vict. c. 35. *Lamb* v. *Brewster*, 48 L. J., Q. B. 277, 421; 4 Q. B. D. 220, 607; 40 L. T. 537; 27 W. R. 478—C. A.

L., being possessed, in 1811, of premises for terms expiring at Midsummer, 1854, granted an annuity to T. and another to E. for three lives, and to secure such annuities demised the premises to T. and E., separately, for forty-three years, if the lives should last so long. In 1827 the residue of the terms granted to L. became vested in the plaintiff, subject to the annuities and underleases to T. and E. In 1825, L. having died, his executors let T. and E. into possession, and they covenanted by deed to pay off certain arrears of ground-rent and other charges, and made the same chargeable on the premises. The plaintiff, in 1830, became tenant to T. and E. of the premises at a rent payable to them in moieties. T. was the survivor of the cestuis que vie: he died in 1851, and the defendants were his executors. From his death till Midsummer, 1854, W. E., as agent for E. and the defendants, demanded and received the rents and paid over one moiety to E., and the other to the defendants, deducting payments in respect of ground-rent, rates, taxes, insurance, repairs, and commission. The plaintiff did not know of T.'s death:—Held, that he was entitled to recover back the amount of rent after T.'s death: that the plaintiff must be taken to have had notice of the deed of 1825, and to be bound by it: that the sums mentioned in it must be taken to have been paid; but that the plaintiff must be taken to have sanctioned the continued payment of the ground-rent, rates, and taxes, and that a set-off to that amount must be allowed. *Barber* v. *Brown*, 1 C. B. (N.S.) 121; 26 L. J., C. P. 41; 3 Jur. (N.S.) 18; 5 W. R. 79.

By a local act for draining lands in the county of Lincoln, it was declared, that "the taxes to be charged and assessed by virtue of the same should be paid by the tenants of the land, &c., charged with the same respectively, who might deduct and retain the same out of the rents payable to their respective landlords." Where, therefore, a tenant had quitted lands liable to a drainage tax under that act, and, after he had quitted, the collector levied the tax in arrear upon property which he had left in possession of the succeeding tenant:—Held, that the tenants to be charged with the tax were those in whose time the tax accrued due, and not the tenants for the time being, and, consequently, that the succeeding tenant might maintain an action against the landlord for money paid to his use. *Dawson* v. *Linton*, 1 D. & R. 117; 5 B. & Ald. 521.

If a tenant pays taxes which he alleges ought to have been paid by his landlord, and after-

wards pays rent for two years subsequently, without making any deduction, he cannot recover the amount against the landlord. *Saunderson* v. *Hanson*, 3 Car. & P. 314.

A broker, who, when receiving rent under a distress, deducts a sum purporting to be for land tax, is not to be considered as allowing the land tax, so as to affect the landlord's right, but as merely, from not knowing how to act, consenting to receive the money without the sum deducted. *Ib.*

Where a tenant has voluntarily paid his full rent, without deducting a landlord's tax, for upwards of a year, he can neither recover it back, nor plead it as a payment in replevin. *Andrew* v. *Hancock*, 1 Br. & B. 37; 3 Moore, 278; 21 R. R. 569. And see *Fuller* v. *Abbott*, 4 Taunt. 105.

By an agreement marsh lands were demised subject to a condition that the tenant should pay all outgoings, rates, taxes, scots, &c., whether parochial or parliamentary, which were and might be chargeable on the lands. An assessment was made by the commissioners of sewers for the permanent benefit of the lands, in certain proportions, upon the owners and occupiers. For four years the tenant paid, in the first instance, both his own share and that of his landlords, and upon each half-year's settlement of accounts, for rent due, with the landlords' agent, who was ignorant of the agreement; the sum so paid was allowed towards the rent, and the receipts were given for the balance:—Held, in an action brought upon the agreement to recover the sums so allowed as arrears of rent, that the facts supported a plea of payment of the rent. *Waller* v. *Andrews*, 3 M. & W. 312; 7 L. J., Ex. 67.

A plea in bar to a cognizance for a distress for rent, stated that divers sums had been from time to time duly assessed on the premises for land tax, and paid by the plaintiff, wherefore he deducted the amount of the tax, which the defendant, as landlord, was liable to bear in respect of rent:—Held, that this plea was bad; first, in not stating the specific periods for which the respective sums were assessed or paid; and, secondly, in not stating that the payment was made after the rent distrained for had accrued, or was then accruing due. *Stubbs* v. *Parsons*, 3 B. & Ald. 516.

By the Metropolis Management Amendment Act, 1862, s. 96, the owner shall allow the occupier to deduct out of the rent from time to time becoming due in respect of the premises the sums of money which the occupier pays to the vestry or district board for works done by them under the act:—Held, that to entitle the occupier to avail himself of that provision, the money must have been actually paid; and, consequently, that a distress for rent, which became due after service of a notice from the vestry, made before payment to the vestry clerk, was not illegal. *Ryan* v. *Thompson*, 37 L. J., C. P. 134; L. R. 3 C. P. 144; 17 L. T. 506; 16 W. R. 314.

A landlord's receiver allowed the tenant to make a deduction in respect of a payment for land tax every year for seventeen years, greater than the landlord was liable to pay, the landlord having the means of knowing all the facts:—Held, that he could not distrain for the amount erroneously allowed, though the receipt given every year shewed the amount paid and the amount deducted. *Branston* v. *Robins*, 4 Bing. 11; 5 L. J. (o.s.) C. P. 13; 29 R. R. 493.

Rent, including all Rates.]—Under a written agreement for the letting of premises at the yearly rent of 90*l.*, "including all rates and taxes":—Held, that the tenant was entitled to deduct from his rent the whole of the poor rates paid by him. *Barcroft* v. *Welland*, 12 L. R., Ir. 35.

To pay Rent without Deduction—Expenses of Remedying Unsanitary Condition of House.]—The plaintiffs were tenants of a house in Lambeth under a lease from the defendant, by which a rent of 40*l.* was reserved "to be paid without deduction, except landlord's property tax, by equal quarterly payments, free and clear from all deductions for main drainage and sewer rates, metropolitan and local improvement rates, taxes, land tax, tithes, tithe rent-charge, and commutation in lieu of tithes," and the lessees covenanted to pay "the said yearly rent of 40*l.* at the times and in manner aforesaid, free and clear of all deduction except as aforesaid," and to pay and discharge during the said tenancy all main drainage and sewers rates, &c. (following the words of the reservation). In May, 1890, the Lambeth Vestry required the defendant as owner of the premises to construct a drain into the common sewer under the Metropolis Local Management Act (18 & 19 Vict. c. 120), s. 73, and the defendant not complying, did the work themselves, and recovered the costs 17*l.* 17*s.*, from the plaintiffs under s. 96 of the amending act (25 & 26 Vict. c. 102). The plaintiffs deducted this amount from their next half-year's rent, and upon the defendant threatening to distrain, brought this action for an injunction to restrain him:—Held, that the payment in question was not within the express covenant in the lease, and the covenant to pay the rent without deduction could not be construed as a contract between landlord and tenant to exclude the tenant's right to deduct this payment from his rent under s. 96 of the act 25 & 26 Vict. c. 102. *Home and Colonial Stores* v. *Todd*, 63 L. T. 829.

Where in a college lease rent is subject to deduction for taxes, and tenant neglects to deduct, no account will be decreed. *Att.-Gen.* v. *Balliol College*, 9 Mod. 410.

Tithe Rent-charge.]—A tenant of lands who has paid the tithe rent-charge is only entitled, under s. 80 of the Tithe Commutation Act, 1836, to deduct the amount thereof from the next rent payable to his landlord; and therefore, if a tenant does not deduct it from the next rent payable, he cannot deduct it from any subsequent rent. *Dawes* v. *Thomas*, 61 L. J., Q. B. 482; [1892] 1 Q. B. 414; 66 L. T. 451; 40 W. R. 305; 56 J. P. 326—C. A.

7. Relating to Husbandry.

a. The Covenant.

i. *Express.*

To Manure.]—A covenant in a farming lease provided that the tenant should, during the demise, consume and convert into manure, and spread on the premises, all the turnips and green crops of all kinds grown thereon, but that in case he should take or sell off any part thereof, which he was at liberty to do, then that he should, for every ton of vetches, or of any green crop which should be taken or sold off from the premises, bring back and spread thereon one ton of good stable manure, within three months after the

selling or taking off such green crops, &c. In an action upon this covenant, the plaintiff set out the first part only, and assigned for breach, that the defendant carried away fourteen acres of turnips, without converting the same into manure and spreading the same on the premises :—Held, that the covenant was an alternative one, and that the plaintiff should have negatived the bringing back within the time limited an equivalent in manure. *Richards* v. *Bluck*, 6 C. B. 437 ; 6 D. & L. 325 ; 12 Jur. 963.

Where, at the sale of the stock of the defendant the tenant of a farm, W., the tenant of an adjoining farm, bought two cows, and, by the defendant's permission, left them on the defendant's farm for some weeks, bringing provender from his own farm to feed them :—Held, that the manure made by these cows was manure made on the farm, and that the removal of it by W. was a breach of a condition of a bond whereby the defendant stipulated with his landlord that he would "put and spread all the manure and compost then collected in the middenstead, or on any other part of the farm or the meadow land, and would not sell, cart, or convey away dung, compost, or manure from the farm." *Hindle* v. *Pollett*, 6 M. & W. 529 ; 9 L. J., Ex. 288.

—— **When satisfied.**]—A covenant by the lessee that he would sufficiently muck and manure the land demised with two sufficient sets of muck within the last six years of the term, the last set to be laid on the premises within three years of the expiration of the term, is satisfied by the tenant's laying on two sets of muck within the three last years of the term, if he should think proper so to do. *Pownall* v. *Moores*, 5 B. & Ald. 416.

—— **Rights between Outgoing and Incoming Tenants.**]—A tenant was bound either to consume the hay on the demised premises, or for every load of hay removed to bring two loads of manure. On quitting possession of the premises he sold part of a rick of hay then left standing to a purchaser, without mentioning his liability to bring manure. The incoming tenant refused to allow the purchaser to take away the hay until the manure was brought. After an interval of a month, during which time the hay had been considerably damaged, the latter consented that it should be removed ; the purchaser, however, then refused to accept or pay for the same :—Held, that although the bringing on the manure was not a condition precedent to the carrying off the hay, as between the landlord and tenant ; still, that, after the tenant had quitted the possession of the premises, the succeeding tenant had a right to refuse to permit the hay to be removed till after the manure was brought on ; and that as the vendor had not enabled the purchaser to remove the hay in the first instance, he was not entitled to recover the price. *Smith* v. *Chance*, 2 B. & Ald. 753 ; 21 R. R. 485. *See also cases*, ante, cols. 1093, 1094.

—— **Custom excluded.**]—A tenant held under the terms of an expired lease, by which it was stipulated that the tenant on quitting the farm should not sell or take away any of the manure in the fold, but should leave it to be expended on the land by the landlord or his succeeding tenant ; the lease contained no stipulation as to the tenant being entitled to payment for such manure. By the custom of the country the tenant would have been bound not to sell or take away the manure in the fold, but to leave it to be expended on the land by the landlord or his succeeding tenant, and would have been entitled to be paid for the same :—Held, that as an express stipulation had been made on the subject, the custom was excluded, and that the tenant was not entitled to be paid for the manure. *Roberts* v. *Barker*, 1 C. & M. 808 ; 3 Tyr. 945 ; 2 L. J., Ex. 268.

—— **Increased Rent.**]—On a covenant in a farming lease that the lessee would not sell or carry away from the demised premises any hay, straw, or manure which should be grown or produced thereon, without the consent of the lessor first had and obtained, under the increased rent of 10*l.* for every ton so sold or carried away, and so in proportion for any greater or less quantity, but that the lessee would eat and consume the hay and straw by his cattle ; the breach alleged was, that the lessee, without the consent of the lessor, did sell a large quantity of hay and straw grown and produced on the demised premises :—Held, that the covenant was one covenant which gave the lessee the right to sell the hay and straw, on payment of the increased rent, and that therefore the breach was not well assigned. *Leigh* v. *Lillie*, 6 H. & N. 165 ; 30 L. J., Ex. 25 ; 9 W. R. 55. *See also cases*, ante, col. 1003.

To Drain.]—An agricultural lease contained a covenant on the part of the lessor, that he would "drain with proper drain-tiles, one rod apart, ten acres of the lands not in rye-grass, at his cost, except the carriage of the drain-pipes, which is to be borne and paid by the lessee, and will drain the remainder of the lands demised, in manner aforesaid, upon being paid a further yearly rent of 5*l.* for every 100*l.* so expended" :—Held, that the words "in manner aforesaid" referred only to the mode of performing the work, viz. placing the drain-tiles one rod apart, and consequently that the tenant was not chargeable with the expense of carriage of the drain-pipes beyond the first ten acres. *Beer* v. *Santer*, 10 C. B. (N.S.) 435.

To restore Pasture Land — Clover.]—Where clover is sown with corn, the land is not thereby restored to a state of permanent pasture, but is still in tillage. *Birch* v. *Stephenson*, 3 Taunt. 469 ; 12 R. R. 679.

As to Sowing Grain Crops.]—A covenant in a farming lease not to sow with more than two grain crops during four years, applies to any four years of the term however taken, and not to each successive four years from the commencement. *Fleming* v. *Snook*, 5 Beav. 250.

In an action for entering a farm, a plea, after setting out a lease from A. to the plaintiff, which contained covenants by the plaintiff that he would not, at any time during the term, sow, reap, or take from the arable lands, or any part thereof, more than two crops of any sort of corn or grain successively, but would, every third year, summer-fallow or lay the arable lands down with rye-grass and clover-seeds, or would plant with potatoes, or sow with peas or beans, which should be twice well hoed ; stated that, during the term, the plaintiff sowed and took off from fifty acres of the arable lands more than two crops of corn successively ; and that he did not, nor would, every third year, summer-fallow or lay the arable lands, or any part thereof, down with rye-grass, &c., nor did nor would

plant with potatoes, nor sow with peas, which were twice well, or in any manner, hoed, &c. :—Held, that this covenant was twofold; that the tenant would not take more than two crops of grain in succession, and that he would do certain other things; that the plea correctly averred a breach of the first branch of the covenant, but did not shew a breach of the second, inasmuch as it did not negative the sowing with beans. *Hammond* v. *Colls*, 1 C. B. 916; 3 D. & L. 164; 14 L. J., C. P. 288.

Four-course System.]—Import of a covenant to farm on the four-course system. *Rankin* v. *Lay*, 2 De G. F. & J. 15; 6 Jur. (N.S.) 685; 1 L. T. 680; 8 W. R. 591.

To Cultivate.]—By a lease empowering the lessee to build, he covenanted to cultivate the part of the demised land, on which no buildings should be erected, in a husbandlike manner, and there was a clause of forfeiture for breach of covenant. The lessee built a vitriol factory on the land, with the knowledge of the lessor, but being obliged to discontinue the manufacture by an indictment, he pulled down the manufactory, and paid part of the proceeds of the building materials to the lessor, in pursuance of an agreement between them :—Held, that the lessor had not in equity precluded himself from entering for the non-cultivation of the land after the manufactory was pulled down, and an injunction to restrain an ejectment was dissolved. *Hills* v. *Rowland*, 4 De G. M. & G. 430; 22 L. J., Ch. 964; 1 W. R. 422.

A lease of a plot of moorland was granted to a lessee, who covenanted to bring it into cultivation within five years from the date of the lease, according to the most approved method of husbandry pursued in the neighbourhood of the premises, and to keep it in good farming and husbandlike condition. The former covenant was not performed by the lessee, and thirty years afterwards his assignee converted the land into a place of amusement, and constructed a running path thereon, and charged for admission thereto. The lessor filed a bill to have the covenants of the lease performed, and for an injunction to restrain the present holder of the lease from using the land as a place of public amusement :—Held, that the land not having been brought into cultivation under the first covenant there could have been no breach of the second to keep it in cultivation. *Musgrave* v. *Horner*, 31 L. T. 632; 23 W. R. 125.

The defendant held a farm under a twenty-one years' lease from the plaintiff, which contained a covenant by the lessee to cultivate the farm in a good, proper, and husbandlike manner, according to the best rules of husbandry practised in the neighbourhood. The defendant claimed the right to erect glass-houses on arable land, part of the demised premises, and to cultivate tomatoes, mushrooms, grapes, and the like for the London market, a mode of cultivation which was being practised on other farms in the neighbourhood. The plaintiff sought to restrain him from so doing :—Held, that this mode of cultivation was not prohibited by the express provisions of the lease. Held, also, that whether it did or did not amount technically to waste, it was "meliorating" waste, in respect of which an injunction ought not to be granted, and the action was dismissed with costs. *Meux* v. *Cobley*, 61 L. J., Ch. 449; [1892] 2 Ch. 253; 66 L. T. 86.

A., holding meadow and pasture lands, under a lease for lives renewable for ever, demised a part of the premises to B. for a similar term, with a covenant to keep and deliver up the premises in tenantable order, &c., and with a power of surrender at the end of every three years. The assignees of B.'s interest, being about to convert the premises into a public cemetery, the representatives of A. obtained an injunction to prevent them. *Hunt* v. *Browne*, Sau. & Sc. 179.

Covenant to cultivate on the four-course system, according to the custom of the country :—Held, to mean only so far as was universally obligatory by the custom of the country. *Newson* v. *Smythies*, 1 F. & F. 477.

Injunction refused against a verdict in ejectment upon a breach of covenant by lessee for years, as to the mode of cultivation, if admitting relief; the defendant having been prevented from proving other breaches, against which no relief could be had, as by assigning without licence. *Lovat* v. *Ranelagh* (*Lord*), 3 Ves. & B. 24.

Distinction as to injunction between landlord and tenant upon an actual lease and a mere agreement. In the latter case, no relief, if the covenant would have been violated: in the former some ground necessary, either by the conduct of the lessor or under the statute 4 Geo. 2, c. 28. *Ib.*

A renewable lease, not inconsistent with a covenant to let and manage to the best advantage; with reference to the subject, a trust for creditors. *Kirkham* v. *Chadwick*, 13 Ves. 547.

To Manage like former Tenants.] — Tenant, under an agreement to manage and quit the premises, agreeably to the manner in which the same had been managed and quitted by the former tenants, not bound by the terms upon which they held, without notice. No inquiry as to the custom of the country, where there is a written agreement. *Liebenrood* v. *Vines*, 1 Mer. 15.

To keep Farm properly Stocked—Injunction.]—An injunction will not be granted to restrain a threatened breach by a tenant of a stipulation in a farming agreement requiring him to keep on the farm a proper and sufficient stock of sheep, horses, and cattle. *Phipps* v. *Jackson*, 56 L. J., Ch. 550; 35 W. R. 378.

Specific performance refused of covenants in dean and chapter leases of long standing, to leave the same live and dead stock on the premises as when the lease was granted *Ely* (*Dean*) v. *Stewart*, 2 Atk. 44; Barn. 170.

Not to plough Pasture.]—Injunction against ploughing up pasture upon covenant to manage in a husbandrylike manner. *Drury* v. *Molins*, 6 Ves. 328.

Injunction granted on affidavit to restrain tenant from ploughing up meadow to build on, contrary to express covenant. *De Wilton* (*Lord*) v. *Saxon*, 6 Ves. 106.

An injunction to restrain a lessee from ploughing pasture lands, which had remained unploughed during the continuance of the lease for thirty years, but were ploughed within six years, prior to its commencement, refused. *Goring* v. *Goring*, 3 Swan. 661.

Injunction to restrain a tenant from breaking up land contrary to his covenant refused, where the parties had ascertained the damages. *Forbes* v. *Carney*, Wall. Lyn. 38.

Where the plaintiffs filed a bill for an injunction to restrain the defendant, their tenant, from breaking up ancient meadow and pasture land (waiving penalties), praying compensation for the waste already done, and it appeared that when the defendant proposed to take the lands, he apprised the plaintiffs that he wanted them for a tillage farm; and it also appeared that when the draft-lease prepared by the plaintiffs' attorney was read in the presence of plaintiffs and defendant, it contained a clause restraining tillage within certain limits, and the defendant having refused to agree thereto, the plaintiffs consented that it should be struck out, and the lease accordingly did not contain any clause respecting tillage; the court refused injunction, but plaintiffs to proceed at law as they might be advised. *Shew* v. *Weir*, 1 Ir. Eq. R. 213.

—— **Penalty or Liquidated Damages.**]—Where a lease contained a covenant against turning up the ground, "under a penalty of 5*l.* per acre":—Held, that strictly this was a penalty, and not in the nature of liquidated damages: and the court might interfere by injunction to stay waste. *Carden* v. *Butler*, Hay. & J. 112.

In a lease for years of land, lessee covenants not to plough pasture land, and, if he does, then to pay after the rate of 20*s.* per annum for every acre ploughed. The court will not grant an injunction against the tenant's ploughing, for the parties themselves have agreed as to the damage, and set a price for ploughing: nor will court relieve the lessee against the penalty, if he ploughs. *Woodward* v. *Gyles*, 2 Vern. 119.

The whole nomine pœnæ in a lease to a tenant to prevent his ploughing up old pasture ground shall be paid, and not at the rate of 5*l.* per cent. for the rent reserved. *Aylet* v. *Dodd*, 2 Atk. 239.

Where a lease contained a covenant against ploughing or digging up any part of the demised premises, and in case the lessee should do so that he should pay the sum of 5*l.* for every cast of clay or sand which he should so dig up, and also 5*l.* in addition to the rent for every acre, so long as any part thereof should continue to be broken or ploughed up:—Held, that the sum mentioned in the covenant being in the nature of a penalty, and not of liquidated damages, the court would interfere to restrain by injunction the lessee from violating the covenant. *Burne* v. *Madden*, Ll. & G. t. Plunk. 493.

But where it appeared that the lessee had been appointed by the grand jury of the county of Dublin, as overseer of certain roads in the county, under the 26 Geo. 3, c. 14, and had made tenders for the repair of certain of those roads with gravel and stones to be taken from the demised premises, and which tenders the grand jury had accepted, and passed presentments accordingly, the court would not interfere to restrain the lessee, so far as he acted under the authority of the act. *Ib.*

—— **Waste.**]—As to when breaking up land amounts to waste, *see* post, N. 5, *b.* i. (col. 1273).

Not to Mow Meadow Land.]—In a lease of a farm a covenant not to mow meadow land more than once a year is not an unusual covenant, so as to excuse an intended assignee from accepting the title. *Hyde* v. *Warden*, 47 L. J., Ex. 121; 3 Ex. D. 72; 37 L. T. 567; 26 W. R. 201—C. A.

Not to remove Hay, Straw, or other Dry Fodder.]—A tenant of a farm was under a written agreement to pay an additional rent of 10*l.* for every ton, or any less quantity, of "hay, straw, or other dry fodder," of the growth of the premises, which shall be sold off or taken away, or removed therefrom. At the trial of an action against him to recover damages for a breach of this covenant, it was proved that he had sold and removed a quantity, something less than a ton, of hay, which he alleged was very bad, and utterly unfit to be eaten by cattle. The jury found that the hay so sold was "not fit food for cattle," and thereupon the verdict was entered for the landlord with leave to move:—Held, that the verdict was rightly entered. What the tenant removed was hay, and came within the meaning of the covenant, although it was hay of very inferior quality, and unfit for food. *Fielden* v. *Tattersall*, 7 L. T. 718.

A farming agreement contained the following clause:—"No hay or straw to be sold off the land without consent of the landlord or his agent, except the value of the straw so sold off be returned in manure on the land":—Held, per Pollock, C.B., and Parke, B., that if the tenant sold the hay or straw, he was only bound to spend upon the land as much manure as the straw would have produced; per Alderson, B., and Platt, B., that the tenant was bound to return in manure the price or market value of the straw. *Lowndes* v. *Fountaine*, 11 Ex. 487; 25 L. J., Ex. 49; 4 W. R. 152.

A farm lease contained a covenant by the lessee that "he should not nor would, during the last year of the term thereby granted, sell or remove from the said farm and lands any of the hay, straw and fodder which should arise and grow on the said farm and lands:—Held, that the prohibition was not restricted to hay, straw and fodder which arose and grew on the farm in the last year of the term, but extended to that which had arisen and grown at any time during the term. *Gale* v. *Bates*, 3 H. & C. 84; 33 L. J., Ex. 235; 10 Jur. (N.S.) 734; 10 L. T. 304; 12 W. R. 715.

The provision that the tenant shall at no time sell or give away the hay or straw is incompatible with a right in the tenant to eloign those articles during the last year. *Roxburghe* v. *Robertson*, 2 Bligh, 156; 21 R. R. 60.

See also *Leigh* v. *Lillie*, ante, col. 1182.

—— **56 Geo. 3, c. 50, s. 11.**]—The 56 Geo. 3, c. 50 s. 11, is not confined to sales of farming stock and crops on land, let to farm by the sheriff under an execution, but applies to an ordinary sale by the tenant himself, and a purchaser from the tenant is bound by the term of the lease under which the tenant holds. *Willmot* v. *Rose*, 3 El. & Bl. 563; 2 C. L. R. 677; 23 L. J., Q. B. 281; 18 Jur. 518. *And see next case.*

—— **Sale by Trustee in Bankruptcy.**]—A lease of a farm containing a covenant by the lessee not to sell, without permission in writing of the landlord, the hay, straw, &c., grown upon the farm. A resolution was passed under the Bankruptcy Act, 1869, by the creditors of the lessee for the liquidation of his affairs by arrangement, and a trustee was appointed. The trustee disclaimed the lease, but claimed to be entitled to the hay, straw, &c., grown on the farm:—Held, that the statute 56 Geo. 3, c. 50, s. 11, which provided that the assignee

of a bankrupt should not take any hay, &c., on any farm which the bankrupt could not take, applies to a trustee in liquidation or in bankruptcy under the Bankruptcy Act, 1869, and that, notwithstanding the disclaimer of the lease by the trustee, he was not entitled to sell the hay, &c., grown on the farm. *Lybbe* v. *Hart*, 54 L. J., Ch. 860 ; 29 Ch. D. 8 ; 52 L. T. 634—C. A.

A tenant of a farm, restrained by agreement from selling the hay and straw grown on the farm, became bankrupt. The trustee in bankruptcy removed and sold a quantity of the hay, in breach of the agreement and then disclaimed the lease. The landlord sued the trustee for the removal of the hay :—Held, that the trustee was personally liable for his wrongful act in selling the hay ; that he was not protected by s. 55, sub-s. 2, of the Bankruptcy Act, 1883. *Schofield* v. *Hincks*, 58 L. J., Q. B. 147 ; 60 L. T. 573 ; 37 W. R. 157.

—— **Injunction.**]—Distinction between express covenant and implied agreement as to being enforced by injunction ; granted in the former instance, not in the latter, against tenant, removing articles contrary to the custom of the country. *Kimpton* v. *Eve*, 2 Ves. & B. 349 ; 13 R. R. 116.

Not to cut Turf.]—A lessee covenanted not to sublet without consent "in writing, or that he should forfeit and pay the additional rent of 50*l.* per annum," and also not to cut more turf than should be sufficient for the consumption of himself, his executors, administrators, and assigns, on the demised premises, without the consent in writing, "or that he, &c., should forfeit and pay the additional rent of 10*l.* for every acre which should be cut or made into turf." The representative of the lessee sublet without consent, and the additional rent of 50*l.* was regularly paid and received ever since. The representatives of the lessor having lately filed a bill against the representative of the lessee and the several under-tenants for an account, and for an injunction in the nature of a writ of estrepement, now moved that the defendants might be restrained from selling turf off the demised premises, and from burning turf for manure, and from cutting the reclaimed meadow land into turf, and from cutting more turf than allowed by the original lease, being only a sufficiency for the use of one family. The court granted an injunction until the hearing to restrain the selling of turf and burning for manure, and also cutting the reclaimed meadow land ; but on the motion refused to restrain the under-tenants from cutting turf sufficient for their own consumption on the premises, the court observing that there would be a serious question on the hearing of the cause. *Maxwell* v. *Mitchell*, 1 Ir. Eq. R. 359.

As to Waste by Cutting Turf, *see* post, N. 5. *b.* i. (cols. 1272, 1273).

Removing Dung.]—Court will not interfere to prevent tenant carrying off dung from farm, contrary to covenants of lease. *Johnson* v. *Goldswaine*, 3 Anstr, 749. But see *Geast* v. *Belfast (Lord)*, id. n. and *Onslow* v. ——, 16 Ves. 173.

A tenant may assign manure, though he may thereby subject himself to an action. *Burbage* v. *King*, 2 Chit. 246. And see *Rayner* v. *Stone*, infra.

To perform Work for Landlord.]—An agreement for an agricultural lease contained a stipulation that the tenant should perform each year for the landlord, at the rate of one day's team work with two horses and one proper person for every 50*l.* of rent when required (except at hay and corn harvest), without being paid for the same. In ejectment for a forfeiture :—Held, that the work thus to be performed meant any work for which teams are generally used, and therefore included drawing coals to the palace of the landlord. *Marlborough (Duke)* v. *Osborn*, 5 B. & S. 67 ; 33 L. J., Q. B. 148 ; 10 L. T. 28 ; 12 W. R. 418.

Held, also, that the tenant was not bound to supply a cart or other vehicle for that purpose of the work. *Ib.*

Selling Flints—Reservation of Mines and Minerals—Custom of Country.]—By an agreement for a lease, the tenant agreed to cultivate the land according to the most approved system of husbandry and to use it for agricultural purposes only, and to commit no waste. The lessor reserved "all mines and minerals, sand, quarries of stone, brick-earth and gravel pits." The farm was in a district where large numbers of flints came to the surface in the ordinary course of ploughing, and it was necessary to remove them in order to cultivate the land effectually. The tenant removed the flints which came to the surface in the ordinary course of agricultural operations and sold them, and there was evidence that it was the custom of the country for tenants to do so, when not prohibited by their leases :—Held, that such a custom was reasonable and good. *Tucker* v. *Linger*, 52 L. J., Ch. 941 ; 8 App. Cas. 508 ; 49 L. T. 373 ; 32 W. R. 40 ; 48 J. P. 4—H. L. (E.)

—— **Custom, Proof of.**]—In ascertaining the nature of an agricultural custom, regard is to be had not so much to what the witnesses state to be their opinion as to the extent of the custom, as to what they prove to have been publicly done throughout the district. *Ib.*

Sale of Stock by Landlord under Distress.]—The 56 Geo. 3. c. 50, s. 11, which makes a purchaser of farmer's stock bound by the tenant's covenant to consume such stock on the premises, does not enable a landlord to sell his tenant's hay which he has distrained for rent, otherwise than for the best price, as required by 2 Will. & M. sess. 2, c. 5. ; and therefore he cannot sell the same under a condition that it shall be consumed on the premises if by reason thereof he fails to obtain the best price, although the tenant is under a covenant to so use it on the premises. *Hawkins* v. *Walrond*, 45 L. J., C. P. 772 ; 1 C. P. D. 280 ; 35 L. T. 210 ; 24 W. R. 824.

Jurisdiction of Equity.]—Demurrer to a bill by a landlord, for a specific performance of covenants contained in a lease which had expired, to repair hedges and mansion-house, and also for an account of loppings and dung, cut or removed by the tenant, allowed, common covenants in husbandry not being the subject of equitable jurisdiction. *Rayner* v. *Stone*, 2 Eden, 128.

ii. *Implied.*

To Farm in Husbandlike Manner.]—The mere relation of landlord and tenant is a sufficient consideration to raise an implied promise on the

part of the tenant to manage a farm in a husbandlike manner. *Powley* v. *Walker*, 5 Term Rep. 373; 2 R. R. 619.

But a declaration which stated that, in consideration that the defendant had become tenant to the plaintiff of a farm, the defendant undertook to make a certain quantity of fallow, and to spend 60*l.* worth of manure every year thereon, and to keep the buildings in repair, was held bad on general demurrer, because those obligations do not arise out of the bare relation of landlord and tenant. *Brown* v. *Crump*, 1 Marsh. 567; 6 Taunt. 300.

The court will not investigate the proper mode of cultivation of a farm; and the implied term of an agricultural contract, namely, to cultivate in a proper manner according to the custom of the country, is not more specific than a general covenant to keep in repair. *Dunn* v. *Bryan*, Ir. R. 7 Eq. 143.

To preserve Agricultural Holding as such—Waste.]—The tenant from year to year of a small parcel of land, let to and treated and cultivated by him as an ordinary agricultural holding, and on which, at the time of the letting, there was only a cottage, erected or permitted to be erected certain dwelling-houses, the outer walls of which were of timber, and the foundations and partitions of brick, in which he permitted to reside the families of certain other tenants on the same estate, who had been evicted from their own holdings for nonpayment of rent. The court was of opinion, on the evidence, that these tenants were members of an illegal conspiracy, having for its object the carrying out of what was known as the "Plan of Campaign," and that these houses were erected in furtherance of the objects of that conspiracy, and that they were kept up mainly for the purpose of deterring persons from taking the evicted farms; that thereby the landlord's adjoining property was materially damaged, and that he was prevented from letting the evicted farms; that the holding in question was not suited for the erection of buildings, and that such erection made a material change in the nature of the demised premises, and converted them to a substantial extent, into a collection of dwelling-houses:—Held, that from such a letting it was to be implied that the tenant agreed with the landlord that he would preserve the premises as an agricultural holding during the demise, that the acts of the tenant were both a breach of such agreement and also waste; and the court being of opinion that the injury to the landlord was not of a trivial or temporary nature, held that such acts should be restrained by injunction. *Brooke* v. *Mernagh*, 23 L. R., Ir. 86. S. P., *Brooke* v. *Kavanagh*, 23 L. R., Ir. 97—C. A.

To repair Fences.]—A plea to a declaration against a tenant, for not using premises in a husbandlike manner, in repairing fences, &c., on his implied promise so to do; that the fences became out of repair by natural decay, and that there was not proper wood (without specifying it), which the defendant had a right to cut for repairing the fences; and that the plaintiff ought to have set out proper wood for the purpose of repairs, which he neglected to do, without averring any request to the plaintiff so to do, or a custom of the country in this respect, is bad. *Whitfield* v. *Weedon*, 2 Chit. 685.

To carry away Straw.]—A tenant may, by the general rules of husbandry, carry away straw or hay from the premises. *Gough* v. *Howard*, Peake Ad. C. 197.

To remove Soil.]—But if a tenant of a farm, during his tenancy, removes a dung-heap, and, at the time of his so doing, digs into and remove virgin soil that is beneath it, the landlord may maintain either trespass de bonis asportatis or trover for the removal of the virgin soil. *Higgon* v. *Mortimer*, 6 Car. & P. 616.

Not to remove Crops.]—Injunction granted to restrain a tenant from year to year under notice to quit, as in the case of a lessee for a longer term, from doing damages, and from removing the crops, manure, &c., except according to the custom of the country. *Onslow* v. ——, 16 Ves. 173.

To Farm according to Custom of the Country.]—In an action against a tenant, upon promises that he would occupy a farm in a good and husbandlike manner, according to the custom of the country; an allegation, that he had treated the estate contrary to good husbandry and the custom of the country, is proved by shewing that he had treated it contrary to the prevalent course of good husbandry in that neighbourhood; as by tilling half his farm at once, when no other farmer tilled more than a third, though many tilled only a fourth; and it is not sufficient to shew any precise definitive custom or usage in respect to the quantity tilled. *Legh* v. *Hewitt*, 4 East, 154; 7 R. R. 445.

The custom of the country applies to a tenancy created by lease in writing, though the witnesses who prove the existence of the custom cannot undertake to say whether it applies where the lease is in writing. *Wilkins* v. *Wood*, 17 L. J., Q. B. 319; 12 Jur. 583.

The defendant's testator being in possession of an estate, of part of which he was the owner, and another part of which consisted of Crown lands leased to him for a term expiring on the 10th of October, 1849, contracted with the plaintiff for the sale to him of the former part, and, by agreement, demised to him the Crown lands for one year from the 29th of September, 1848; and the plaintiff agreed that he would abide by, perform and keep all and singular the covenants and agreements contained in the Crown lease; and the testator agreed that, in case he should be able to obtain a further lease from the Crown for fourteen years, he would grant to the plaintiff a lease for thirteen years, subject to the same covenants. By a memorandum subsequently signed by the plaintiff, he agreed to take the Crown lands, "subject to the same rents, covenants and obligations in all respects," as were contained and provided for in the leases by which the testator held or should hold the same. The plaintiff, on taking possession, paid to the outgoing tenants, according to the custom of the country, the amount of the valuation, for fallows, &c., as well of the other lands as of the Crown lands. By the terms of the Crown lease, the custom of the country in that respect was excluded. At the desire of the plaintiff, the Crown lease was not renewed:—Held, first, that the custom of the country was not excluded by the agreement between the parties. *Fuvell* v. *Gaskoin*, 7 Ex. 273; 21 L. J., Ex. 85.

Held, secondly, that where such a custom exists, there is an implied contract on the part of the landlord, that if there is no incoming tenant, he will pay the outgoing tenant according to the custom. *Ib.*

—— **Custom—When reasonable.**]—A tenant agreed to cultivate land according to the rules of good husbandry and the custom of the country. He drained (by brick and tile draining) some parts of the land without the knowledge of his landlord. Upon an action in a county court for a proportion of the money thus expended, it was proved for the plaintiff to be the usage, that where a tenant had laid out money in tile draining the landlord was to repay him five-sevenths of the expense, whether it had been by the consent of the landlord or not: while, on the part of the defendant, witnesses said that such usage was applicable only to cases where the landlord had consented to the outlay. The judge thereupon directed the jury, that what was the custom was a question for them to determine on the evidence:—Held, that such custom was not unreasonable, and that the direction of the judge was right. *Mousely* v. *Ludlam*, 21 L. J., Q. B. 64; 15 Jur. 1107.

—— **When excluded.**]—In an action by a landlord against his tenant, the declaration stated that the plaintiff was possessed of a farm, whereon he had laid manure, and thereupon, in consideration that the plaintiff would give up possession of the farm to the defendant, and would permit the defendant to have the benefit of the manure, the defendant promised the plaintiff to pay him so much money as he deserved to have according to the custom of the country. Breach, nonpayment of the value of the manure. At the trial the plaintiff gave in evidence a written agreement, which stated that the land had been manured with eight loads of manure per acre, and that the tenant agreed that the land, when given up by him, should be left in the same state, or allow a valuation to be made:—Held, that the written agreement excluded the custom of the country, as being inconsistent with it, and that there was therefore a variance between the declaration and the proof. *Clarke* v. *Roystone*, 13 M. & W. 752; 14 L. J., Ex. 143.

No inquiry as to the custom of the country, where there is a written agreement. *Liebenrood* v. *Vines*, 1 Mer. 15.

Of New Landlord.]—Where a demise is determined by the expiration of the landlord's estate, and the tenant continues to hold under the remainderman, paying the same rent, the question whether a term contained in the former tenancy is adopted into a new contract of demise is a question of fact. If such a tenant continues to hold under the remainderman, and nothing passes between them except the payment and receipt of rent, the new landlord is not bound by a stipulation contained in the former tenancy, which is not known to him in fact, nor is according to the custom of the country. *Oakley* v. *Monck*, 4 H. & C. 251; 35 L. J., Ex. 87; L. R. 1 Ex. 159; 12 Jur. (N.S.) 213; 14 L. T. 20; 14 W. R. 406—Ex. Ch.

Outgoing and Incoming Tenant.] — S. was tenant of a farm, with a right to the use of a part of the premises without payment until the 25th of March next after the expiration of the term, "for threshing and spending the last year's crop"; and by the custom of the country he was entitled, at the expiration of the term, to be paid by the landlord or the incoming tenant for tillages. He gave up the farm to G., as incoming tenant, at Michaelmas, 1870, and before so doing valuers were mutually appointed to value the tillages as between them, with the consent of the landlord, and the valuers duly made and signed their valuation. After G. had entered into possession, but before the 25th of March, 1871, the landlord gave him notice that rent was due from S., and required him to pay the amount of the valuation, which was less than the rent due, to him the landlord, and not to S.; and this G. did on receiving an indemnity from the landlord, but without S.'s consent. S. having sued G. for the value of the tillages, was nonsuited:—Held, that the nonsuit was right, for that the contract to be implied between the incoming and outgoing tenant was subject to the right of the landlord to be paid the arrears of rent out of the valuation. *Stafford* v. *Gardner*, L. R. 7 C. P. 242; 25 L. T. 876; 20 W. R. 299.

S., on quitting the farm at Michaelmas, 1870, gave up to G., and he exercised it, the right which S. had under the lease of converting the straw on the farm (between Michaelmas, 1870, and the 25th of March, 1871) into manure with his cattle. In so converting it the cattle ate a portion of the straw, calculated to be one-third of the bulk, and which the valuers in this case valued as browse at 33*l.*:—Held, that S. was entitled to recover this sum from G. *Ib.* See also *Favell* v. *Gaskoin*, col. 1190, *and cases infra, c.*

—— **Valuation of Tenant's Crops, &c.**]—An owner in fee demised a farm for seven years, and agreed at the expiration of the term to pay for the tenant's property in and upon the farm at a valuation. He devised the land to trustees for a term of 1000 years upon trust to raise money in aid of his personal estate for payment of debts, funeral and testamentary expenses, and legacies, and subject thereto to the plaintiff for life, with divers remainders over. On the testator's death the plaintiff took possession. On the expiration of the term a new tenant could not be found. The plaintiff paid the outgoing tenant for his property in the farm, and claimed to be repaid the amount out of the testator's estate:—Held, that the liability to pay the outgoing tenant was a liability attaching to the land, and that the landlord for the time being was the person primarily liable; that the plaintiff, being in receipt of the rents and profits, was the landlord, and not the trustees of the term; that he therefore was the person primarily liable, and had no claim to be repaid, wholly or in part, either out of the testator's estate or by the persons entitled in remainder. *Mansel* v. *Norton*, 52 L. J., Ch. 357; 22 Ch. D. 769; 48 L. T. 654; 31 W. R. 325—C. A.

Primâ facie the landlord is the person liable to the outgoing tenant, at the expiration of his tenancy, for the seeds, tillages, &c., properly bestowed by him upon a farm. Although, therefore, the ordinary practice (to avoid circuity) is, for the incoming tenant to pay the outgoing tenant for the seeds, tillages, &c., upon a valuation made between them, yet a custom or usage that the outgoing tenant shall look to the incoming tenant for payment to the exclusion of the landlord's liability cannot be supported in law as being unreasonable, uncertain, and prejudicial to the interests both of landlords and tenants. *Bradburn* v. *Foley*, 47 L. J., C. P. 331; 3 C. P. D. 129; 38 L. T. 421; 26 W. R. 423.

Implied from Payment of Rent.] — Special covenants, as to cultivation, not implied from

the mere act of holding over, as they may be from payment of rent at the same period, as evidence of agreement to hold not only on same terms, but subject to same covenants. *Kimpton* v. *Eve*, 2 Ves. & B. 349; 13 R. R. 116.

b. When Extinguished.

A stipulation in a lease that the tenant shall keep a proportion of the land demised for grass, and pay so much per acre for any deficiency below such proportion, is extinguished by severance of the reversion. *Womersley* v. *Dally*, 26 L. J., Ex., 219.

c. Tillages.

Generally.]—Primâ facie the landlord is bound to pay the outgoing tenant for tillages, and the mere fact of the incoming tenant entering upon the land does not render him liable to do so; but it is a question of fact whether the contract between the outgoing tenant and the landlord subsists, or a new contract has been entered into with the incoming tenant. *Codd* v. *Brown*, 15 L. T. 536.

The outgoing tenant's remedy for tenant right is against the landlord, and not against the incoming tenant, unless by virtue of an agreement between the parties to that effect. The outgoing tenant is entitled to recover the amount of the tenant right from the landlord upon a quantum meruit; and the ascertainment of the amount by a valuation is not a condition precedent to his right to sue when it is not made such by the terms of the lease. *Sucksmith* v. *Wilson*, 4 F. & F. 1083.

An outgoing tenant, administratrix of a late tenant, having (after having had the farm for above a year) assigned to an incoming tenant, in consideration of a debt due to him, all her goods and effects, and all stock, corn, grain on the farm, and all her estate and interest thereon and therein:—Held, that this comprised tenant right, or tillages, on the farm. *Cary* v. *Cary*, 10 W. R. 669.

Where an outgoing tenant does the necessary ploughing and sows the land in the ordinary and proper course of husbandry, and leaves manure for the benefit of the landlord, which is accepted and taken by him, the law, without an allegation or proof of a custom of the country, will imply an assumpsit on the part of the landlord to pay the tenant the value, and the tenant is not deprived of that right by having held over after the expiry of the term. *Martin* v. *Coulman*, 4 L. J., K. B. 37.

In an action by an outgoing tenant against his landlord for not paying for ploughing, crops and manure, according to valuation, pursuant to a deed entered into between them, it being made conditions precedent that the tenant should deliver up possession of the farm-house and stable on a certain day, and of the farm on a later day, and should cultivate on the four-course system, according to the custom of the country:—Held, first, that the first covenant meant only the stable of the farmhouse. *Newson* v. *Smythies*, 1 F. & F. 477.

Held, secondly, that the covenant to cultivate meant only so far as was universally obligatory by the custom of the country. *Ib.*

Held, thirdly, that the landlord concurring in the valuation after the tenant had given up possession of the farm, was evidence whence the jury might infer an admission of a substantial performance of the conditions precedent. *Ib.*

See also ante, cols. 1093, 1094. *And cases* ante, cols. 1191, 1192.

Custom as to.]—A. held a farm as tenant from year to year, upon a written agreement, by which it was stipulated, that he should cultivate the farm "in the same way or manner, or as near thereto as circumstances would admit of, as Parsons (the outgoing tenant) had used and cultivated the same during his occupation thereof, and in all events, according to the rules of good husbandry used and accustomed in the neighbourhood." In an action against A. alleging for breach the cutting and carrying away of ash poles, such user not being as near to the way and manner in which Parsons used and cultivated the farm as circumstances admitted, and being contrary to the rules of good husbandry used and accustomed in the neighbourhood, it appeared that the poles in question consisted of shoots growing from old stools, which were seasonable and fit for cutting about every seventeen or eighteen years; that, by invariable custom, they belonged to the landlord, in the absence of a special agreement to the contrary; that, whilst Parsons held the farm, these poles had never been in a fit state for cutting; that two tenants who had preceded Parsons in the occupation of the farm had cut and sold them as crops; and that A. had, whilst he occupied, paid the rates for the whole farm, including the wood or spinney in which the poles grew. The judge having omitted to leave to the jury upon what terms Parsons had held the farm, the court granted a new trial. *Hood* (*Viscount*) v. *Kendall*, 17 C. B. 260; 4 W. R. 123.

A custom for the tenant of a farm in a particular district to provide work and labour, tillage, sowing, and all materials for the same, in his away-going year, and for the landlord to make him a reasonable compensation for the same, is valid in law, notwithstanding the farm is held under a written agreement, provided such agreement does not, in express terms, exclude the custom. *Senior* v. *Armytage*, Holt, N. P. 197; 17 R. R. 627.

A usage for the off-going tenant of a farm in a particular district to bestow his work, labour, and expense in manuring, tilling, fallowing and sowing, according to the course of husbandry, and for the landlord to pay him a reasonable compensation in respect thereof, is a valid and reasonable usage. *Dalby* v. *Hirst*, 3 Moore, 536; 1 Br. & B. 224; 21 R. R. 527.

Primâ facie the landlord is the person liable to the outgoing tenant, at the expiration of his tenancy, for the seeds, tillages, &c., properly bestowed by him upon a farm. Although, therefore, the ordinary practice (to avoid circuity) is, for the incoming tenant to pay the outgoing tenant for the seeds, tillages, &c., upon a valuation made between them; yet a custom or usage that the outgoing tenant shall look to the incoming tenant for payment to the exclusion of the landlord's liability, cannot be supported in law as being unreasonable, uncertain, and prejudicial to the interests both of landlords and tenants. *Bradburn* v. *Foley*, 47 L. J., C. P. 331; 3 C. P. D. 129; 38 L. T. 421; 26 W. R. 423.

A landlord and tenant entered into an agreement for renting a farm. The landlord covenanted that he or the incoming tenant should pay for the work and seeds of the off-

growing crop. By the custom of the country the incoming tenant was bound to pay for such labour and seeds. The landlord did not pay for them. The off-going tenant sued the incoming tenant on the custom for compensation:—Held, that the incoming tenant was liable. *Louth* v. *Enderby*, 3 L. J. (O. S.) K. B. 23; 26 R. R. 642.

The custom of tenant-right estate in the county of Westmoreland, during the joint lives of lord and tenants, established on appeal to House of Lords. *Lowther* v. *Raw*, Fortesc. 44.

——**When excluded.**]—A custom of a country, by which the tenant of a farm, cultivating it according to the course of good husbandry, is entitled, on quitting, to receive from the landlord or incoming tenant a reasonable allowance for seeds and labour bestowed on the arable land in the last year of the tenancy, and is bound to leave the manure for the landlord, if he will purchase it—is not excluded by a stipulation in the lease under which he holds that he will consume three-fourths of the hay and straw on the farm, and spread the manure arising therefrom, and leave such of it as shall not be so spread on the land for the use of the landlord, on receiving a reasonable price for it. *Hutton* v. *Warren*, 1 M. & W. 466; 2 Gale, 71; 1 Tyr. & G. 646; 5 L. J., Ex. 234.

Outgoing Tenant—Unconsumed Straw.]—A tenant held under a lease, which contained a covenant that he should cultivate the farm according to the custom of the country, and should with the last wheat crop lay down the same with 20 lbs. weight of good clover seed per acre, and continue the same so laid down for feeding, not to exceed three grounds belonging to the farm; and should during all the term consume with stock in the farm all the hay, straw and clover grown thereon; which manure should be used on the farm; and that the lessor and his assignees would allow the lessee to occupy half the rooms in the house, and the barn, yards and granary until Midsummer-day after the expiration of the term, if necessary, to finish the cropping of the lessee grown on the premises thereby demised. Under the custom of the country, the tenant would have been entitled to be paid for the straw and manure on leaving:—Held, the covenant containing no provisions as to straw unconsumed on quitting was not inconsistent with the custom of the country, and therefore the tenant was entitled to be paid for his straw. *Muncey* v. *Dennis*, 1 H. & N. 216; 26 L. J., Ex. 66.

Tenant Abandoning Lease.]—A tenant of a farm from year to year, who was entitled to certain tenant-rights, took a lease of the farm for seven years, under which he became entitled to larger tenant-rights and allowances. In the middle of the term, being unable to pay the rent and continue the tenancy, he left the farm, and, in effect, abandoned the position of tenant, and did not bring an ejectment against his landlord who was in possession under a distress for rent, and who remained, at the tenant's request, in possession after the distress was satisfied. No new agreement was made as to the tenant-rights and allowances:—Held that, in the absence of any new agreement, the tenant's rights arose only at the expiration of the lease and on a substantial performance by the tenant of the covenants thereof, and that, as the tenant had in effect abandoned the tenancy, he was not entitled to any tenant-rights under the lease; and, further, that any tenant-right he might have had previously while tenant from year to year was extinguished by his accepting the tenant-rights under the lease. *England* v. *Shearburn*, 52 L. T. 22; 49 J. P. 86.

Where a farm was taken for fourteen years, and the tenant was to pay a given sum for tillages and improvements done before he entered, and to receive the value of the tillages and improvements which he should leave on the farm, according to a valuation to be made at his quitting; and the tenant, in the first year of the tenancy, said that he would leave and his landlord said he might; but no new bargain was made as to his tillages and improvements:—Held, that he was not entitled to the value of the tillages and improvements which he left on quitting. *Whittaker* v. *Barker*, 1 C. & M. 113; 3 Tyr. 135.

Covenant by Landlord to Pay for—What a Condition Precedent.]—A tenant covenanted with his landlord to deliver up possession of a farm and land on a day named, and that in the meantime he would cultivate the land according to the custom of the country, and that upon the delivery up of the land he would surrender and yield up a certain agreement to be cancelled, and all his unexpired term and interest in the farm, and would afterwards, on request, execute any further deed for effectually surrendering the term; and the landlord covenanted that if the tenant did on the day named deliver up possession, and did and should in the meantime cultivate the land according to the custom of the country, and also did and should well and truly observe, perform, and keep all and singular other the covenants and agreements thereinbefore contained, and on his part to be performed, he, the landlord, would upon the delivery up of possession of the land on the day specified, so cultivated as aforesaid, and on such performance of such other covenants as aforesaid, pay the tenant for the manure, tillages, hay, clover and all other things then upon the land as were usually paid for between an outgoing and incoming tenant:—Held, that the delivery up of the agreement was not a condition precedent to payment for the manure, &c. *Newson* v. *Smythies*, 4 H. & N. 840; 28 L. J., Ex. 97.

d. Away-going Crops.

To whom belonging—Custom of the Country.]—When the tenancy of a farm expires, the tenant must give up the possession of the whole of it to the landlord—crops and everything else, unless there is a custom of the country for the tenant to hold over any part, or to take any of the crops; and the proof of the custom lies on the tenant. *Caldecott* v. *Smythies*, 7 Car. & P. 808.

If the custom of the country is for an outgoing tenant, for what is called his odd mark, to crop one-third of the arable in wheat, and to reap that wheat after the tenancy has expired, and the tenant so crops more than the proper one-third, the landlord will be entitled to have all that which was last sown, and which is above one-third, unless it is shewn that the tenant has a lien upon it for the sowing and the seed. *Ib.*

Where by the custom of the country as between outgoing and incoming farm tenants, the former was entitled to an away-going share of the crop of wheat sown by him in the last year of his tenancy; and he cut the whole of such crop, and

kept the fences of the field in repair until the whole crop was cut and carried away:—Held, that the outgoing tenant had the possession in law of the field until the crop was carried away; and therefore that his vendee of his share of the crop had a good defence to an action by the new tenant for breaking and entering the close in which the crop grew for the purpose of carrying away his share. *Griffiths* v. *Puleston*, 13 M. & W. 358; 14 L. J., Ex. 33.

If a lease contains no stipulations as to the mode of quitting, the off-going tenant is entitled to his away-going crop, according to the custom of the country, even though the terms of holding may be inconsistent with such a custom. *Holding* v. *Pigott*, 7 Bing. 465; 5 M. & P. 427; 9 L. J. (o.s.) C. P. 125.

A tenant held a farm under a lease, containing a condition that the wheat land should be summer-fallowed and well manured for the crop. By the custom of the country, a tenant who had sown his land with wheat after a crop of turnips at the wheat-seedness next before the expiration of his tenancy was entitled to cut and carry away one-half of the wheat so sown:—Held, that, as the condition in the lease was confined to the period of holding the farm, and not to the time of quitting, the tenant was entitled to the benefit of the custom, giving him a right to a proportion of the wheat sown by him, after turnips, leaving the landlord to his remedy for breach of covenant. *Ib.*

A tenant, whose tenancy is determined after Lady-day, by an agreement which is silent as to away-going crops, is not entitled to such crops under a custom which gives to the tenant such crops upon a regular expiration of a Lady-day tenancy. *Thorpe* v. *Eyre*, 3 N. & M. 214; 1 A. & E. 926.

—— Assignee in Bankruptcy of Lessee.]—Covenant in lease, that lessee should have the off-going crop from two-thirds of arable land, &c., on efflux of lease, or sooner determination of term. On lessee's bankruptcy, assignees on petition under 49 Geo. 3 (see 6 Geo. 4. c. 16, s. 75), refusing to accept lease:—Held, entitled to off-going crop, paying rent up to time when possession of premises and lease should be delivered to landlord. *Maundrell, Ex parte*, 2 Madd. 315; Buck, 83.

What constitutes giving up Possession of.]—The plaintiff, who was the grandson of the deceased tenant of a farm, remained in possession after his grandfather's death. A bargain was made between the plaintiff and M., an incoming tenant, who had agreed to take the farm from the landlord, by which bargain M. was to give the plaintiff 30*l.* for the crops, manure, &c., to be secured by the promissory note of M. and a surety, which note was to be held by D., and was to be by D. attested and handed over to the plaintiff, if the plaintiff delivered up the possession of the lands on the following morning, but he was to remain in possession of the house for a few weeks at a rent of 1*s.* a week, to be paid to M. The note was accordingly drawn with a clause of attestation, and was signed by M. and his surety, and handed to D. The next morning upon M. and D. requesting the plaintiff to give up the possession, he refused to give up the place; but there was evidence that, on that day, M.'s cattle were on the lands, and that the plaintiff's were not. The plaintiff kept possession of the house for three weeks, when he was turned out by a constable. The note was never attested, and it was not proved how the plaintiff got it into his possession:—Held, in an action by the plaintiffs against the makers of the note, that a jury was warranted in saying that the bargain had been complied with on the part of the plaintiff. *Evans* v. *Morgan*, 2 C. & J. 453; 2 Tyr. 396.

Meaning of the Words "Turnip or Fallow Breaks."]—In a lease of a farm of 600 acres a tenant bound himself by a covenant never to have more than one-half of the arable land in white crop during the same season, nor to take two white crops off the same field without a green or black crop intervening, and to take only one black crop, i.e. beans, peas, potatoes, &c., between grass and grass; and at the end of the lease, to leave the turnip or fallow breaks once ploughed for the incoming tenant:—Held, that the words "turnip or fallow breaks" meant the land which would, in the natural course of good husbandry, be ploughed and left fallow for the purpose of being planted with turnips, and that the tenant was entitled over and above the way-going cereal crop on the moiety of the lands, to have an away-going black crop in respect of 100 acres more. *Hunter* v. *Miller*, 4 Macq. H. L. 560; 9 L. T. 159—H. L. (Sc.)

e. Valuations.

See also cases ante, col. 1093.

When one of the Parties refuses to name a Valuer.]—A declaration stated, that in consideration that the plaintiff had become tenant to the defendant of a farm upon the terms that if the plaintiff should receive from the defendant notice to quit, and should have made expensive improvements upon the farm, for which the subsequent crops should not have compensated the plaintiff, the farm should on the determination of the tenancy, be looked over by two persons, one to be appointed by each party, and that the persons appointed should determine to what compensation the plaintiff should be entitled; and that the defendant promised the plaintiff that if the tenancy should be determined, and the plaintiff should have made improvements for which he should not have been compensated, the defendant would, at the plaintiff's request, appoint a person for such purposes. Averment that the tenancy was determined by the defendant; that the plaintiff had made improvements for which he had not been compensated; that the plaintiff, after the determination of the tenancy, appointed D. to determine the compensation, and D. was ready to act, of which the defendant had notice, and was then requested by the plaintiff to appoint some person on his behalf:—Held, that the declaration was bad, as stating a promise which did not legally arise from an executed consideration, and also on the ground that there was no allegation that the plaintiff had requested the defendant to appoint a valuer before the commencement of the suit. *Lattimore* v. *Garrard*, 1 Ex. 809.

Non-agreement of Valuers — Position of Tenant.]—A person entered upon the occupation of a farm under a written agreement, by which he agreed "to pay 5*l.* for every load of fodder, straw, haulm, dung, or turnips, which should be sold or carried off the premises, and

the same sum for every load of hay or wheat straw sold or carried off the premises, for which there should not be two loads of good dung or other manure (at the option of the landlord) to be spent on the premises"; and also "to purchase all the hay, sainfoin, and tares now in the yard; also all the dung and manure now on the premises; also all the straw from the crops now stacked or about to be stacked in the yard, paying a fair price for the same, to be ascertained by valuers on both sides." And the landlord engaged, on the tenant's quitting the farm, to purchase all hay, sainfoin, and tares in the yard, the produce of the farm; also all straw from the crops of the previous harvest that might be on the premises, paying a fair price for the same, to be ascertained by valuers on both sides:—Held, that the tenant, not being by the terms of the agreement entitled to be paid for the manure at the expiration of his tenancy, was only entitled to be paid for the straw at a fodder price, viz. one-half the market price. *Clarke* v. *Westrope*, 18 C. B. 765; 25 L. J., C. P. 287.

Held, also, that the incoming tenant having consumed the straw, and the valuers named by the parties not having agreed upon the valuation, or appointed an umpire, the tenant was entitled to maintain an action for it, as upon a quantum meruit. *Ib.*

Misconduct of Arbitrators.]—A usage for arbitrators appointed to determine as between outgoing and incoming tenants of a farm, the value of the away-going crop and the deductions for want of repairs of the farm buildings and fences, to make their award, on inspection of the crops and premises, without notice to the parties and without evidence, may be good; but no usage can justify arbitrators in hearing one party and his witnesses only in the absence of and without notice to the other party. *Oswald* v. *Grey* (*Earl*), 24 L. J., Q. B. 69.

How far the Court will interfere with.]—Upon a contract for the sale of a farm, it was, by a letter signed by both parties, referred to a valuer to ascertain and certify the amount of the following particulars: first, the seed, wheat and vetches sown on the several fields of A.'s late farm at Bampton previous to the 25th of December, 1847 (the day possession was given to the purchaser); secondly, the labour of ploughing and sowing the same: thirdly, the quantity and cost price at the kiln of the lime carried on the farm since Michaelmas, 1847, but not the cost of carriage: and fourthly, the value of the hay left on the farm at Christmas, 1847. "All the above are to be paid for by B. We mutually agree to abide by your valuation":—The valuer having allowed a sum for three ploughings of a portion of the land, another sum for lime, and another sum for working out and burning stroyle, the court declined to interfere. *Branscombe* v. *Rowcliffe*, 6 C. B. 523.

A. held a farm of B., subject to the following covenants, contained in a draft lease under which the former tenant had held:—First, to house the produce on the farm, and thresh, feed and fodder the same thereon, and not to sell or dispose of any part thereof, except as after mentioned. Secondly, that A. should be at liberty to sell hay and wheat straw, except that of the last year's produce, bringing back for every load of hay or straw two loads of manure; and, thirdly, that A. should on the determination of the tenancy, leave all the hay, straw, and manure arising during the last year of the tenancy, for the use of B., or the incoming tenant, being paid for the hay and wheat straw at a fair valuation, these latter words "fair valuation" being substituted in the draft lease for "consuming price." In an action by A. against B. to recover the value of hay and wheat straw left by the former tenant at the expiration of his tenancy, it appeared that a valuation had been made by an umpire, who was the only witness called at the trial, and who stated that he had valued not at a "consuming price" nor a "market price," but at a "fair valuation," and the jury returned a verdict in accordance with his valuation:—Held, that there was nothing from which the court could see that the valuation had been made upon an erroneous principle, and what was a "fair valuation" being a question, there was no ground for interfering with the verdict. *Cumberland* v. *Bowes* or *Glamis*, 15 C. B. 348; 3 C. L. R. 149; 24 L. J., C. P. 46; 1 Jur. (N.S.) 236; 3 W. R. 138.

Held, also, that the valuation of the umpire was not invalidated by the circumstance of his having altered it after he had delivered it by striking out an item which ought not to have been included therein. *Ib.*

Mistake made in—Right to recover Money Paid under.]—By an agreement made between the plaintiff and defendant, the defendant sold to plaintiff all his interest in a farm, together with the growing crops and those already harvested, the covenants and general valuation of the farm and all the stock, both live and dead; and it was agreed between them that all the aforesaid matters and things should become a subject of valuation by two indifferent persons, one to be chosen by each party, and in the event of their not agreeing, then by their referee or umpire, whose decision should be final and binding on both parties. The valuers appointed under the agreement made a valuation at a gross sum, not specifying the value of undivided items, and the plaintiff gave a promissory note for the amount, and took possession of the farm and stock. In a month or so afterwards the plaintiff re-sold the farm, and before giving up possession to the purchaser, discovered that a number of items had been included in the valuation that, according to the custom of the country, did not form a subject of valuation between an incoming and an outgoing tenant. He did not, however, claim to have the matter re-opened, but duly paid the amount of the promissory note to the defendant when it afterwards became due. He subsequently brought an action against him to recover the whole of the money paid by him as money received to his use, without previously giving any notice of the circumstances to the defendant, or claiming repayment from him:—Held, that he could not recover the whole or any part of the money which he had paid. *Freeman* v. *Jeffries*, 38 L. J., Ex. 116; L. R. 4 Ex. 189; 20 L. T. 533.

f. When Recoverable on.

Effect of Covenant to sell Manure to Incoming Tenant.]—Where the outgone tenant has covenanted with his landlord to leave the manure made by him on the farm, and sell it to the incoming tenant at a valuation to be made by

certain persons; the effect of such covenant is to give the outgone tenant a right of on-stand for his manure upon the farm; and the possession of and property in it remain in him in the meantime; and therefore, if the incoming tenant removes and uses it before such valuation, he is answerable to the outgone tenant in trespass. *Beaty* v. *Gibbons*, 16 East, 116; 14 R. R. 320.

As Goods Sold and Delivered.]—Where an agreement between an outgoing and an incoming tenant was that the latter should buy the hay, &c., of the former upon the farm, and that the former should allow to the latter the expense of repairing the gates and fences of the farm, and that the value of the hay, &c., and of repairs should be settled by third persons:—Held, that the balance settled to be due to the outgoing tenant for his hay, &c., after deducting the value of the repairs, might be recovered by him in a count for goods sold and delivered, after having failed upon his count on the special agreement, for want of including in it that part of the agreement which related to the valuation of the repairs. *Leeds* v. *Burrows*, 12 East, 1.

By whom Payable.]—Primâ facie the landlord is bound to pay the outgoing tenant for tillages, and the mere fact of the incoming tenant entering upon the land does not render him liable to do so; but it is a question of fact whether the contract between the outgoing tenant and the landlord subsists, or a new contract has been entered into with the incoming tenant. *Codd* v. *Brown*, 15 L. T. 536.

The outgoing tenant's remedy for tenant-right is against the landlord, and not against the incoming tenant, unless by virtue of an agreement between the parties to that effect. The outgoing tenant is entitled to recover the amount of the tenant-right from the landlord upon a quantum meruit; and the ascertainment of the amount by a valuation is not a condition precedent to his right to sue when it is not made such by the terms of the lease. *Sucksmith* v. *Wilson*, 4 F. & F. 1083.

Assignees of the reversion may be sued by an outgoing tenant on a contract or custom of the country, by which he is entitled to receive, on the termination of his tenancy by notice from the landlord, reasonable allowance for the value of labour bestowed on the land, and the benefit of which he loses by such termination of his tenancy, although he has paid all the rent to the original landlord and received notice from him, the assignees having renewed the notice after the conveyance to them, and possession having been given to them. *Womersley* v. *Dally*, 26 L. J., Ex. 219.

Action for, when Maintainable.]—The defendant demised a farm for a term of fourteen years; the lease contained a covenant by the lessees not to assign without licence, with a proviso for re-entry, and a covenant by the lessor at the expiration of the tenancy to pay for certain things at a valuation. At the expiration of the term, the lessees continued tenants from year to year on the terms of the original lease. They afterwards, by deed, assigned their interest in the premises, with their right to be paid for the things at a valuation, to the plaintiff. He entered into the occupation of the premises, but never paid rent; nor did the defendant ever recognise him as his tenant. The defendant gave the lessees the proper six months' notice to quit, and the plaintiff gave the defendant a similar notice:—Held, that the plaintiff could not maintain an action against the defendant for the amount of the things at a valuation, on the ground (per Mellor and Lush, JJ.) that no new tenancy had been created between them, and that the bare assignment of the parol tenancy did not pass to the assignee a right of action upon the special stipulation; and per Shee, J., on the ground that as the lessees had no power to assign without licence, they could not transfer any interest in the premises to the plaintiff. *Elliot* v. *Johnson*, 8 B. & S. 38; 36 L. J., Q. B. 44; L. R. 2 Q. B. 120; 15 W. R. 253.

The plaintiff at Lady-day, 1821, gave up possession of a farm to the defendant, having previously sown forty acres of it with wheat. At a meeting in the previous month, the plaintiff asked the defendant if he would take the wheat at 200*l.*, saying that if he would not he should not have the farm. The defendant said he would take the wheat, and being asked to whom the dead stock should be valued, replied "To me." The defendant afterwards undertook to pay for the wheat and dead stock on a specified day, and did pay 75*l.* on account generally, and eventually had possession of the farm, the wheat and the dead stock:—Held, that the contract for the dead stock, being distinct from the contract for the sale of the wheat, or the giving up of the farm, the plaintiff might recover for that amount. *Mayfield* v. *Wadsley*, 5 D. & R. 224; 3 B. & C. 357; 3 L. J. (o.s.) K. B. 31.

Liability of Incoming Tenant paying to wrong Person.]—A person who has taken a farm under a person in possession, and claiming as devisee under a will, and has paid for the manure, under a valuation, according to the custom, is liable for the value to the person who afterwards takes out letters of administration, the will having turned out to be invalid. *Searson* v. *Robinson*, 2 F. & F. 351.

Penalties for Breach of—Increase of Rent.]—*See* ante, cols. 950 et seq.

g. Pleadings and Evidence.

Claim—For Non-cultivation of Farm according to Custom.]—A breach of a covenant to cultivate land according to the custom of the country is sufficiently averred by stating that the tenant did not so cultivate without specifying instances. *Martyn* v. *Clue*, 18 Q. B. 661; 22 L. J., Q. B. 147.

In an action against a tenant upon promises to cultivate a farm according to the course of good husbandry and the custom of the country, if the declaration sets out the custom, and the defendant traverses it, the plaintiff must prove it as alleged. *Angerstein* v. *Handson*, 1 C. M. & R. 789; 5 Tyr. 583; 1 Gale, 8; 4 L. J., Ex. 118.

—— **Not Managing in Husbandlike Manner.**]—Quære, whether it is sufficient to assign a breach of an agreement to manage a farm in a husbandlike manner, and according to the custom of the country, in the words of the agreement. *Falmouth (Earl)* v. *Thomas*, 1 C. & M. 89; 3 Tyr. 26; 2 L. J., Ex. 57.

—— **Variance in.**]—A count averring that the defendant was tenant to three plaintiffs, and had

agreed to farm the lands in a husbandlike manner, and it appearing that the demise was only by two, and that the agreement was also to keep the land constantly in grass:—Held, variances. *Saunderson* v. *Griffiths*, 8 D. & R. 643; 5 B. & C. 909; 4 L. J. (o.s.) K. B. 318.

Defence—In Action for Wrongfully Removing Manure.]—A declaration stated that the defendant covenanted with the plaintiff not to sell or carry away from the premises any manure made on the premises without his consent, under the increased rent of 10*l.* for every ton so given, sold or carried away; and also covenanted that he would pay all the increased rent. Breach, that he sold a large quantity of manure made on the premises, to wit, 160 tons, and did allow the same to be carried away from the premises: and the plaintiff claims 2,000*l.* Plea, that the defendant brought upon the premises a quantity of manure, larger and better in quality than that carried away:—Held, first, that the plea was bad. *Leigh* v. *Lillie*, 6 H. & N. 165; 30 L. J., Ex. 25; 9 W. R. 55.

—— **Traverse of Custom.**]—To a declaration, charging the defendant, as tenant to the plaintiff, with carrying away, in an untenantable manner and contrary to the custom of the country, several loads of hay off the farm, without bringing back and spending on the premises an equal number of loads of dung, a plea that there was not any such custom of the country is good. *Hartley* v. *Burkitt*, 4 Bing. (N.C.) 687; 6 Scott, 497; 1 Arn. 258; 2 Jur. 642.

—— **Traverse of Tenancy.**]—A declaration stated that the defendants were tenants to the plaintiff of a farm, and by reason thereof it was their duty, as such tenants, to manage and cultivate the farm in a husbandlike manner, according to the custom of the country; and assigned breaches in over-cropping, &c.: Plea, that the defendants were not nor was either of them, tenants to the plaintiff of the messuage, &c., as alleged:—Held, this plea only put in issue the fact of the tenancy, and not the holding subject to a duty to cultivate according to the custom of the country, and that the defendants could not therefore object, on this record, that a lease, under which the land had been originally taken, was not produced by the plaintiff, in order to shew that it did not exclude the custom. *Hallifax* v. *Chambers*, 4 M. & W. 662; 7 D. P. C. 342; 1 H. & H. 417; 8 L. J., Ex. 117.

Replication—Right of Tenant to remain in Possession of Crops after Entry by Landlord.]—To an action for an assault, the defendant pleaded a justification in defence of the possession of a dwelling-house. The plaintiff new assigned that the assault was committed, not in a dwelling-house, but on a bridge, and in certain yards and fields, parcel of a farm. The plea to the new assignment stated that W. was possessed of the dwelling-house, and also of the bridge, yards and fields which belonged and were adjacent to the dwelling-house, and justified the trespass in defence of the possession of the house, bridge, yards and fields, and averred that the defendant removed the plaintiff from the bridge, yards and fields, and took him by the nearest way to a public highway, near to the dwelling-house, bridge, yards and fields. The replication alleged the seisin of W. in the farm, a demise of it by him to J. as tenant from year to year, the entry of J., an assignment by J. to B. to secure a debt of the present and future growing crops on the farm, with a power to B. in default of payment to take possession. It then alleged a default by J., that W. at the time of the default was in possession of the farm on which there then were growing crops, which belonged to J. after the date of the assignment, that the plaintiff as servant of B. took possession, and continued in possession of the growing crops for a reasonable time, and that before a reasonable time elapsed the defendant removed him, and dragged him from the dwelling-house across the bridge, yards and fields to the highway:—Held, that as the replication stood upon the right of a person, claiming under a tenant from year to year, to remain on the premises, and retain possession of the crops, after the landlord had resumed possession, it should have stated how the tenancy came to an end; that there was no presumption as to a determination by the landlord rather than by the tenant; nor, supposing that B. was entitled to them after his interest as tenant in the premises had determined, that they were ripe or fit for harvesting, or that they needed any cultivation, for which the plaintiff's continuing in possession was necessary. *Hayling* v. *Okey*, 8 Ex. 531; 22 L. J., Ex. 139; 17 Jur. 325; 1 W. R. 182—Ex. Ch.

Evidence.]—If the breach of a covenant is assigned thus, "that the defendant has not used a farm in a husbandlike manner, but on the contrary has committed waste," the plaintiff cannot give evidence of the defendant's using the farm in an unhusbandlike manner, if it does not amount to waste. *Harris* v. *Mantle*, 3 Term Rep. 307.

On a contract between outgoing and incoming tenant referring to the lease, the lease must be put in. *Tanner* v. *Washburne*, 1 F. & F. 330.

—— **As to Custom.**]—The rule of law, as to importing into the terms of a tenancy "the custom of the country," does not admit of evidence of the usage of a particular estate, or the property of a particular person, however extensive it may be, it not being shewn that the tenant was aware of it. *Womersley* v. *Dally*, 26 L. J., Ex. 219.

Where to a declaration on an agreement for not cultivating according to the custom of the country defendant only pleaded "not guilty," proof that the tenancy was from year to year, is sufficient evidence of the agreement. Where three actions were referred to an arbitrator, the defendant being the same in each, and the plaintiffs, being successive reversioners, under the same title:—Held, that the arbitrator was right in awarding damages to each reversioner. *Webb* v. *Clarke*, 4 W. R. 125.

Promise to Pay Penalties—How Supported.]—A count stated that the defendant had become tenant to the plaintiff on the terms and stipulations that the rent should be payable half-yearly, that the defendant "should not sell any straw or manure grown or produced upon the farm, without the written licence of the plaintiff, under certain penalties, and that the penalties should be considered as additional rent, and should be recoverable by distress or otherwise as rent." Averments, that in consideration thereof, the defendant promised the plaintiff to pay all such

penalties as he might be liable to to pay the plaintiff according to the stipulations; and that the defendant, without licence, sold straw on the premises during his tenancy. Breach, nonpayment of penalties in respect thereof:—Held, by Lord Campbell, C.J., and Patteson, J., that the promise to observe the terms, one of which was payment of penalties, was supported by the bygone consideration of having become tenant on these terms, and that the stipulation must be construed to be not at any time to sell straw grown during the tenancy: Erle, J., dissentiente, holding that the stipulation should be construed to be, not during the tenancy to sell straw, &c., grown during the tenancy. *Massey* v. *Goodall*, 17 Q. B. 310; 20 L. J., Q. B. 526; 15 Jur. 991.

h. Emblements.

Who entitled to—Tenant.]—The plaintiff occupied, as yearly tenant of A., who was tenant for life, a small labourer's cottage, with an acre of land, which was partly cultivated as a garden and partly sown with corn or planted with potatoes. The defendant became owner of the cottage and land on the death of A., and distrained for the proportion of rent due from the plaintiff in respect of such cottage and land between A.'s death and the expiration of the then current year of the plaintiff's tenancy, up to which time the plaintiff remained in occupation:—Held, that the plaintiff was tenant of lands in respect of which emblements might be claimed within 14 & 15 Vict. c. 25, s. 1, and that the defendant was therefore entitled to recover such proportion of rent by distress. *Haines* v. *Welch*, 38 L. J., C. P. 118; L. R. 4 C. P. 91; 19 L. T. 422; 17 W. R. 163.

When the herd of an evicted tenant held, as part of his wages, and had sown with oats and potatoes, three roods of the evicted farm, which contained fifty-eight acres, the evicted tenant was entitled to avail himself of these crops as emblements. *Kenna* v. *Nugent*, Ir. R. 7 C. L. 464—Ex. Ch.

If the landlord meant to contend that the claim to emblements was merely colourable, or that the herd held as tenant and not as servant, he ought at the trial to have required those questions to be submitted to the jury. *Ib.*

A tenant for a term determinable upon a life, sowed the land in spring, first with barley and soon after with clover. The life expired in the following summer. In the autumn the tenant mowed the barley, together with a little of the clover plant which had sprung up. The clover so taken made the barley-straw more valuable, by being mixed with it; but the increase of the value did not compensate for the expense of cultivating the clover, and a farmer would not be repaid such expense in the autumn of the year in which it was sown. The reversioner came into possession in the winter, and took two crops of the same clover after more than a year had elapsed from the sowing:—Held, that the tenant was not entitled to emblements of either of these two crops; first, because emblements can be claimed only in a crop of a species which ordinarily repays the labour by which it is produced within the year in which that labour is bestowed; and, secondly, because even if the tenant was entitled to one crop of the vegetable growing at the time of the cesser of his interest, this had been already taken by him at the time of cutting the barley. *Graves* v. *Weld*, 5 B. & Ad. 105; 2 N. & M. 725; 2 L. J., K. B. 176.

A tenant in April, 1857, sowed artificial grass on the lands which he grazed, from October, 1857, until May, 1858, when he began to preserve the grass for meadow. His tenancy expired in May, 1858:—Held, that he was not entitled to emblements of the artificial grass. *Flanagan* v. *Seaver*, 9 Ir. Ch. R. 230.

—— **Lessor.**]—A lease of lands contained a condition "that if the lessee should commit an act of bankruptcy, whereon a commission should issue, and he should be declared a bankrupt, or if he should become insolvent, or incur any debt upon which any judgment should be signed, entered up, or given against him, and on which any writ of fieri facias, or any other writ of execution should issue, it should be lawful for the lessor to re-enter into the premises, and the same again to have, re-possess and enjoy, as in his former estate." The tenant gave a warrant of attorney, upon which judgment was entered up and his goods taken in execution and sold, and a commission of bankruptcy afterwards issued against him. The lessor entered for the forfeiture:—Held, that he was entitled to the emblements. *Daris* v. *Eyton*, 4 M. & P. 820; 7 Bing. 154; 9 L. J. (O.S.) C. P. 44.

—— **Devisee.**]—A devisee of real estate is entitled to emblements growing at the time of the death of the devisor, unless the language of the devise clearly shews the intention of the devisor that they should go to some other person. *Cooper* v. *Woolfitt*, 2 H. & N. 122; 26 L. J., Ex. 310; 3 Jur. (N.S.) 870; 5 W. R. 790.

8. To Give up Possession.

Generally.]—Lease of land for term of years, with a covenant by the lessee that if the lessor should be desirous during the term to take all or any part of the land for building thereon, it should be lawful for her to come into and enter upon all or any part, to make such buildings as she should think proper, and to do all necessary acts without interruption by the lessee, provided the lessor gave six months' notice of such intention, with a proviso also that the lease should be void for nonperformance of covenants:—Held, that the lessor having agreed with a third person as to the terms of a building contract, might give six months' notice of her intention to take the whole of the land for building, and at the expiration of that time, and after refusal by the tenant to deliver up possession, might bring ejectment. *Doe* d. *Wilson* v. *Abel*, 2 M. & S. 541; 15 R. R. 343.

A clause in an agreement to let land, that the lessor might take any part for building, on making a proportionate abatement in the rent and making good the fences, operates as a covenant, and not a defeasance of the estate, if there are no words giving him a right of re-entry. *Doe* d. *Willson* v. *Phillips*, 2 Bing. 13; 9 Moore, 46; 2 L. J. (O.S.) C. P. 103; 27 R. R. 539.

Where a plaintiff had entered into possession of premises under an agreement, one clause of which was that if the rent should be in arrear for ten days it should be lawful for A. and her agents immediately to enter upon and take possession of the premises and expel the plaintiff, as effectually as a sheriff might do under a writ

of habere facias possessionem; and in case of such entry, and of any action being brought for the same by any person whomsoever, the defendants might plead leave and licence in bar, and the agreement be used as conclusive evidence of the leave and licence of the plaintiff for the entry, trespasses or other matters to be complained of in such action; and arrears of rent having become due, the defendants, as agents of A., entered and expelled the plaintiff from the premises:—Held, that this agreement was a conclusive answer under a plea of leave and licence to an action for such entry and expulsion. *Kavanagh* v. *Gudge*, 7 Man. & G. 316; 7 Scott (N.R.) 1025; 1 D. & L. 928; 13 L. J., C. P. 99; 8 Jur. 362.

A lease of land by deed contained this clause. "Covenants to repair, payment, &c. Provided, nevertheless, that in case M." (the lessor) "shall at any time be desirous of having any part of the piece of land delivered up to him, and of such his desire shall give three calendar months' notice to C." (the lessee): "then, at the expiration of the notice, C. covenants peaceably to surrender up, and that M. shall and may take peaceable possession of such part or parts of the land as shall be mentioned in the notice, M. paying to C. a reasonable compensation in respect of the moneys which may have been laid out by C. in improving the condition of so much of the land as shall be so given up, and then and from thenceforth the rent reserved shall be reduced," &c. (in proportion to the land given up). "and the remainder of the land shall be held by C. at such reduced rent, and M. shall have the same powers and remedies in all respects as if this lease had originally been granted at such reduced rent, and all the covenants, clauses, &c., shall be as valid for so much of the demised land as shall not be included in such notice, as if the reduced rent had been the original rent, and the land originally demised had been the land not included in such notice":—Held, that under this proviso, the lessor, giving notice, might resume all the demised land. *Doe* d. *Gardner* v. *Kennard*, 12 Q. B. 244; 12 Jur. 821.

On Payment of Compensation.]—The lessor served a notice requiring the lessee to give possession of the whole land at the end of three months, and adding, "I hereby offer and agree to allow you a reasonable compensation for any repairs which may have been done by you":—Held, a sufficient offer of compensation under the proviso. *Ib.*

The defendants, co-tenants, were let into possession of land under an agreement to give up possession at any time on payment of a fair equivalent for the crop:—Held, that a tender to one co-tenant only, of compensation for the crop, was a sufficient tender to the others, so as to entitle landlord to maintain ejectment. *Loddiges* v. *Lister*, 1 L. T. 548.

What is a Condition precedent to.]—A. became tenant to B. of a colliery, and also of some farm land, at distinct rents. The lease contained numerous covenants as to the payment of the rents, and as to the management of each property. The term created was forty-two years, but the tenant was to have liberty to put an end to the term on giving eighteen months' notice before the expiration of the first eight years, or any subsequent three years. The proviso which gave the tenant this liberty, after describing the giving of the notice, contained these words: "Then and in such case (all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessees having been duly observed and performed), this lease and every clause and thing therein contained shall, at the expiration of the first eighth year, and thereafter at the expiration of any such third year, cease, determine and be utterly void. . . . But nevertheless, without prejudice to any claim or remedy which any of the parties may then be entitled to for breach of any of the covenants or agreements:"—Held, that the proviso did make the performance of the covenants a condition precedent to the tenant's power to put an end to the lease. *Gray* v. *Friar*, 4 H. L. Cas. 565; 18 Jur. 1036. Affirming 5 Ex. 584; 15 Jur. 814—Ex. Ch.

Implied.]—A tenant, under a parol agreement, without any stipulation that he shall deliver up possession of the premises at the end of the term, is nevertheless bound at law to deliver up complete possession. Where, therefore, a tenant under such an agreement has underlet a part of the premises, and at the determination of both tenancies the under-tenant holds over against the will of the tenant, the landlord can recover against the tenant as damages the value of the whole premises for the time he is kept out of possession, and the costs of ejecting the under-tenant. *Henderson* v. *Squire*, 10 B. & S. 183; 38 L. J., Q. B. 73; L. R. 4 Q. B. 170; 19 L. T. 601; 17 W. R. 519.

Rebate on.]—A lease contained a proviso empowering the lessor "upon giving three months' notice of his intention to resume any portion of the premises . . . to enter into such possession." The lessor subsequently conveyed by deed his reversion to the use of himself and another as tenants in common. Shortly afterwards the tenants in common served upon the lessees a notice of resumption of the whole of the lands:—Held, that the fact that a sum per acre, which was by the lease covenanted to be allowed as rebate upon resumption, would in the case of resumption of the whole of the lands exceed the rent per acre originally reserved, would not constitute evidence of an intention to resume part only of the entirety of demised premises. *Liddy* v. *Kennedy*, L. R. 5 H. L. 134; 20 W. R. 150.

Relief against Forfeiture by.]—Relief against forfeiture for nonpayment of rent is not confined to the case impliedly referred to in the Common Law Procedure Act, 1852—namely, recovery by process of law—but extends also to peaceable resumption of premises without such process. *Howard* v. *Fanshawe*, 64 L. J., Ch. 666; [1895] 2 Ch. 581; 13 R. 663; 73 L. T. 77; 43 W. R. 645.

Where Premises wanted for Building.]—Under a proviso contained in a lease, to deliver possession if the premises should be wanted for building, a demand on the ground of having entered into a treaty, is not sufficient; otherwise, if an agreement was alleged. *Russell* v. *Coggins*, 8 Ves. 34.

Construction of covenant in a lease, that if lessor shall be minded to set out any part of the premises for a street, or to sell any part to build

upon, he may resume upon certain terms:—Held, first, that if he resumed having a bonâ fide intent to build, though that cannot be acted upon, there is no equity for tenant; secondly, the generality of the latter words are not restrained by the former to buildings of any particular species; therefore a contract with a canal company for lands resumed was enforced; warehouses being within the meaning of lease, and wharves, at least as appurtenant, and wanted for enjoyment of warehouses. *Gough* v. *Worcester and Birmingham Canal Co.*, 6 Ves. 354.

9. To Insure.

a. Construction and Operation of.

Must be Certain.]—A covenant in the lease of a house "to insure and keep insured a given sum of money upon the premises during the term, in some sufficient insurance office," is not void for uncertainty. *Doe* d. *Pitt* v. *Shewin*, 3 Camp. 134.

To Keep Insured.]—A lessee covenanted that his executors or assigns would insure the demised premises, and keep them insured during the term, and deposit the policy with the lessor:—Held, that the construction of this covenant was, not that the lessee should effect one policy, and keep that policy on foot, but that he, his executors, administrators, or assigns should always keep the premises insured by some policy or another; and that it was a breach if the premises were uninsured at any one time, and a continuing breach for any portion of the time they were uninsured. *Doe* d. *Flower* v. *Peck*, 1 B. & Ad. 428; 9 L. J. (O.S.) K. B. 60.

Amount.]—A. granted to B., by an instrument, a lease of O. for five years and a half, and of P. for sixteen years, the rent of both to be 120*l.* during the first five years and a half, and 100*l.* during the residue. B. covenanted during the terms to insure the premises in 2,000*l.* There was no provision for any reduction in the amount of the insurance after the expiration of the five and a half years' term in O.:—Held, that B. was bound to insure for 2,000*l.* during the continuance of the longer term in P., and that the covenant did not cease with the expiration of B.'s interest in O. *Heckman* v. *Isaac*, 6 L. T. 383.

Runs with the Land.]—A covenant to insure against fire premises which are within the 14 Geo. 3, c. 78, s. 83, runs with the land. *Vernon* v. *Smith*, 5 B. & Ald. 1; 24 R. R. 257.

Separate Policies by Landlord and Tenant—Fire—Exercise of Option of Purchase by Tenant—Application of Policy-moneys as Purchase Money.]—Under the terms of a lease the tenant was bound to insure against fire, and had an option of purchasing the property. He insured in a sufficient sum. The premises were damaged by fire, and it then appeared that the landlord had a policy on the premises in another office, of which the tenant had no notice. The two offices apportioned the amount of loss between the two policies, and the landlord received what was thus payable under the policy effected by him. The tenant shortly after the fire gave notice to exercise his option of purchase, and proposed that the insurance moneys under both policies should go in part payment of the purchase money. The landlord claimed to retain for his own benefit the money received under the policy effected by him, and insisted on the money under the other policy being applied in reinstating the premises, and on the tenant declining to do this brought ejectment against him:—Held, that the landlord was not entitled to retain for his own benefit the moneys received under the policy effected by him, nor to insist on the moneys being applied in reinstating the property after the tenant had exercised his option of purchase. *Reynard* v. *Arnold*, L. R. 10 Ch. 386; 23 W. R. 804.

b. Breach.

What Amounts to.]—Where a lessee covenanted to insure, and effected an annual policy in the usual form, allowing fifteen days' grace, which policy expired on the 25th March, but did not pay the premium for a renewal till the 25th April:—Held, that the covenant was broken by reason of the non-payment of the premium on or before the 9th April, and that the lease was forfeited upon a clause of re-entry. *Doe* d. *Pitt* v. *Shewin*, 3 Camp. 134.

But where a lessee covenanted to insure a specified sum upon the premises, and effected an insurance, the policy containing a memorandum, that, in case of the death of the assured, the policy might be continued to his personal representative, provided an indorsement to that effect was made upon it within three months after his death, and he died, and an indorsement continuing the policy to his personal representative was made after the expiration of three months:—Held, that there was no breach of the covenant to keep the premises insured. *Doe* d. *Pitt* v. *Laming*, 4 Camp. 73; 15 R. R. 728.

Under a lease with a proviso of forfeiture, if the covenants are broken, forfeiture is incurred if the lessee covenants to insure the buildings from time to time, and at all times, and leaves a part uninsured for two months after execution of the lease. And it is not any answer that the greater part of the premises was already insured at the requisite amount by a policy expiring at the end of two months, and that, on its expiration, a new policy was effected, covering all the premises which were then insured at the stipulated amount. *Penniall* v. *Harborne*, 11 Q. B. 368; 17 L. J., Q. B. 94; 12 Jur. 159.

So, if the covenant is to insure against fire in the names of the lessors A., B. and C., and the lessee adds his own. *Ib.*

If a lessee having incurred these forfeitures (though the lessor has taken no step to enforce them), contracts to sell his term, the purchaser, on becoming acquainted with them, may refuse to complete his contract, and may reclaim his deposit. *Ib.*

A covenant by the lessee to insure premises in the names of himself and the lessor, although not performed literally by an insurance in the name of the lessor only, is yet so far substantially performed for the benefit of the lessor, and he could not recover for a breach of covenant, the stipulation for the insurance in the name of the lessee being for the exclusive benefit of the latter, and which he is at liberty to dispense with. *Havens* v. *Middleton*, 10 Hare, 641; 22 L. J., Ch. 746; 17 Jur. 271; 1 W. R. 256.

Waiver.]—When a tenant under a lease containing a covenant to insure, had, in consequence of his agent's embezzlement, failed to pay a premium, and so the premises were left for a time uninsured, but the landlord had, on discovering this, afterwards paid the premium, and allowed the tenant to repay him:—Held, that this was such a waiver of a forfeiture under the covenant as to bring the tenant within the exception in 22 & 23 Vict. c. 35, s. 6, and preclude him from obtaining relief under 23 & 24 Vict. c. 126, s. 2. *Mills* v. *Griffiths*, 45 L. J., Q. B. 771.

The 22 & 23 Vict. c. 35, s. 6, is satisfied by an actual waiver, and it is not necessary to have any formal document expressly waiving the forfeiture. *Ib.*

The mortgagee of a tenant who had incurred a forfeiture cannot be heard on an application for relief under 23 & 24 Vict. c. 126, s. 2, and cannot be made a party to the action of ejectment under Ord. XVI. r. 13, of the Judicature Act, 1875. *Ib.*

A lessee covenanted to insure, and the premises were uninsured for a week:—Held, in an ejectment for a forfeiture for a breach of this covenant, that the lessor could not recover, if he, by his conduct, had led the lessee to believe that the premises were properly insured by himself. *Doe* d. *Pitman* v. *Sutton*, 9 Car. & P. 706. See *Doe* d. *Knight* v. *Rowe*, 2 Car. & P. 246; R. & M. 343.

The receipt of rent is not a waiver of a forfeiture, unless it is of rent due on a day after the forfeiture was incurred; and therefore the acceptance of rent due from the under-tenants had not the effect of a distress, so as to operate as a recognition of the existence of the tenancy on the 23rd of December, when the money was received. *Price* v. *Worwood*, 4 H. & N. 512; 28 L. J., Ex. 329; 5 Jur. (N.S.) 472; 7 W. R. 506.

Continuing.]—A lessee of buildings covenanted in a lease to insure and continue insured such buildings, in the joint names of himself and the lessor, his executors, administrators or assigns, and there was a proviso for re-entry on breach of the covenant. The lessee insured in his own name singly, but shewed the policy to the lessor, who approved of it, and accepted rent during the next three years, ending at Christmas, 1842. The premiums of insurance were duly paid up to that time, the premium at Christmas, 1842, covering 1843, and the policy continuing unaltered. In January, 1843, the lessor assigned, and the assignee in the same year brought ejectment for a forfeiture incurred by not insuring in the joint names. No notice had been given to the lessee to alter the policy:—Held, that the covenant to insure in the joint names was a continuing covenant, and was not waived by the conduct of the lessor, except as to past breaches, and that the ejectment lay. *Doe* d. *Huston* v. *Gladwin*, 6 Q. B. 953; 14 L. J., Q. B. 189; 9 Jur. 508.

In ejectment against a tenant for forfeiture by non-insurance, brought on the 24th of December, 1858, it was proved that on two occasions, the first a year and a half before action and the second in August, 1858, the defendant had admitted that he was uninsured. On the latter occasion he stated that he wanted the money for other purposes. Notice was given to the defendant to produce the policy at the trial, which he failed to do. On the 23rd December, 1858, the plaintiff received some rent from the under-tenants of the premises "on account of rent due at Michaelmas":—Held, that there was evidence from which a jury might presume a continuing breach of the covenant to insure, on the 24th of December, at the time of action brought. *Price* v. *Worwood*, 4 H. & N. 512; 28 L. J., Ex. 329; 5 Jur. (N.S.) 472; 7 W. R. 506.

Relief against—in Equity.]—A court of equity would not interfere to modify a strict contract to insure against fire by a lessee, where, by breach of it, the lessor might enter, it being for the interest of all parties that a sacred regard should be had to the strict obligations of the contract. *Meek* v. *Carter*, 4 Jur. (N.S.) 992; 6 W. R. 852.

The court has jurisdiction to relieve against a breach of covenant to insure, committed after the passing of the 22 & 23 Vict. c. 35, arising on a lease dated before the passing of the act. *Page* v. *Bennett*, 2 Giff. 117; 29 L. J., Ch. 398; 6 Jur. (N.S.) 419; 8 W. R. 339.

The court will not relieve a tenant against the breach of a covenant to insure. *Green* v. *Bridges*, 4 Sim. 96.

No relief by injunction against a forfeiture for breach of covenant to keep insured. *White* v. *Warner*, 2 Mer. 459.

Injunction against an ejectment for breach of covenant to insure against fire refused. *Reynolds* v. *Pitt*, 19 Ves. 134; 2 Price, 212, n.

No relief given against covenant to insure. *Rolfe* v. *Harris*, 2 Price, 206, n.

In January, 1857, the defendant agreed with D., that as soon as he had erected thirty-seven houses, in eight blocks, on certain land, he would grant him eight leases of the land and houses. The leases were to contain covenants to insure against fire in the Law Fire Insurance Office, in the joint names of the defendant and D. or his assigns; and if D. failed to erect the houses within the time specified, the defendant was to have the power of re-entry. In April, 1858, the number of the houses was, by agreement between the parties, altered; and as to seventeen, D. was to roof them in by the 24th June, and complete them by the 29th September; and the defendant agreed to grant to D., or his nominee, a lease for four carcases of houses standing on block No. 1; and also, as soon as D., or his assigns, should have erected and roofed in any of the carcases of the houses in any of the blocks, to grant a lease of the block to D., or his nominee, in the same manner as if the houses were finished. At that time there were, in addition to the four carcases on block No. 1, three standing on block No. 4, and D. gave the name of the plaintiff as his nominee. The defendant agreed, as soon as D. would be entitled to require the same, to grant leases of the seven houses to the plaintiff, and D. assigned to the plaintiff the two plots of land, Nos. 1 and 4, and all the benefit of the agreements of January, 1857, and April, 1858, in relation thereto. The seven houses on the two blocks were completed within the time specified, but none of the remaining houses were erected. On the 23rd September, 1858, the plaintiff insured the premises in the Phœnix Office, and in his own name only. The defendant discovered the latter circumstance, as the plaintiff alleged, two days afterwards, but as the defendant himself alleged, not till the 1st December. The defendant's solicitor, in January, 1859, wrote

to the plaintiff's solicitor, claiming a forfeiture; and on the 2nd February the seven houses were insured in the Law Fire Office, in the names of the plaintiff and the defendant. On the 10th March the defendant commenced an ejectment for the forfeiture, and he asserted his right to re-enter upon any part of the property for breach of the covenant to build the thirty-seven houses, and of the covenant to insure. The plaintiff thereupon filed a bill for an injunction, and for specific performance of the agreement to grant a lease:—Held, that, as between the plaintiff and the defendant, the agreement related only to the seven houses, and that the plaintiff was bound by the stipulations of D. only so far as they related to the seven houses; and a decree was made in the terms of the prayer. *Rogers* v. *Tudor*, 6 Jur. (N.S) 692; 2 L. T. 303.

—— **Under Conveyancing Acts.**]—*See* ante, J. 2, *i.* iii., cols. 1029 et seq.

Proof.]—In ejectment for not insuring it is sufficient, in order to shew that the lessee's premises are not insured, to call a clerk of the insurance office who enters the policies and premiums and has searched the books; but it being necessary to shew that neither the lessee nor his assignee had insured:—Held, not sufficient that the clerk had searched under the name of the lessee alone; and although the defendant's attorney could be asked if there was a policy, and if it was in court, he could not be called upon to produce it, nor on his refusal be asked to prove a copy. *Chaplin* v. *Reid*, 1 F. & F. 315.

A lease for years, to commence at Michaelmas, 1845, was by a decree for a specific performance at the instance of the lessee, executed on 12th January, 1847, bearing date as of 29th September, 1845. The lease contained a covenant to insure the premises, and keep them insured during the term, and a power of entry on breach. The landlord brought ejectment, and proved that the premises were not insured until the 18th of February, 1847. The lessee gave no evidence to account for the delay:—Held, that assuming that the covenant might be construed as a covenant to insure within a reasonable time only after the execution of the lease, the onus of shewing that the delay from 12th January to 18th February was reasonable, lay on the defendant, and that no evidence being given to explain the delay, it was right that the judge should direct a verdict for the plaintiff. *Doe* d. *Darlington* v. *Ulph*, 13 Q. B. 204; 18 L. J., Q. B. 106; 13 Jur. 276.

In ejectment for not insuring according to covenant, it lies upon the plaintiff to prove that no insurance has been effected; and the circumstance that the defendant refused to shew the policy when the plaintiff required him, and the non-production of it at the trial, after notice, are not primâ facie evidence against him. *Doe* d. *Bridger* v. *Whitehead*, 3 N. & P. 557; 8 A. & E. 571; 1 W. W. & H. 521; 7 L. J., Q. B. 250; 2 Jur. 493.

In ejectment, the execution by the defendants of the indenture of underlease and payment of rent thereunder to C. is sufficient evidence for the jury that C. was solely entitled to the reversion expectant upon the determination of the underlease. *Logan* v. *Hall*, 4 C. B. 598.

Presumption as to.]—Where the original lessee covenants to keep the premises insured, and afterwards a sub-lease is granted by his executor, without any covenant to insure; undisturbed possession under this sub-lease for twenty years will entitle a court to presume that no breach of covenant took place during the life of the original lessee. *Montresor* v. *Williams*, 1 L. J. (O.S.) Ch. 151.

c. Liability of Executors.

A lessee was bound to insure. The insurance expired on the 25th of March, and he died on the 27th, without having paid the premium. The premium was not paid by his executors, and the house was burnt down on the 26th of May:—Held, that the executors were not personally liable for not having kept up the insurance. *Fry* v. *Fry*, 27 Beav. 146; 28 L. J., Ch. 593; 5 Jur. (N.S.) 1047.

d. Damages for Breach.

A lessee under covenant to insure against fire in his own name and that of the lessor jointly, assigned to the defendant, who covenanted to keep the covenants in the lease. The defendant having neglected to keep up a fire policy which had been effected, the lessee effected a fresh one, but in his own name only. No fire happened. The lessee brought an action against the defendant for neglecting to insure. He pleaded payment of a farthing into court:—Held, though the lessee had no claim to be indemnified specifically for the sum expended by him in effecting the fresh policy, the jury was at liberty to award more than nominal damages for the risk to which he had been exposed by the defendant's default. *Hey* v. *Wyche*, 2 G. & D. 569; 12 L. J., Q. B. 83; 6 Jur. 559.

A., being lessee of a messuage under the corporation of London, demised it, in 1829, to B., C. and D., for twenty-one years, the lessees covenanting to repair and insure in 2,500*l.* at the least, in the Protector Fire Insurance Office, or in such other respectable insurance office in London or Westminster as B., C. and D. (the lessees), their executors, administrators or assigns should think fit, with a proviso for re-entry for breach of any of the covenants. In 1835 C. granted an underlease to E. and F. for the residue of the term, wanting one day, the underlease containing the like covenants to repair and to insure in 2,500*l.* at the least, in the Protector Fire Insurance, or in such other respectable fire insurance office in London or Westminster, as E. and F., their executors, administrators or assigns should think fit, and also a proviso for re-entry for breach of any of the covenants. The messuage being out of repair and uninsured, the executors of A., in 1843, brought ejectment and recovered possession:—Held, that C. was not entitled to recover against E. and F. the value of his reversionary interest, the loss thereof not being the result of their breaches of covenant, but of the breaches of covenants by C., to which covenants they were no parties. *Logan* v. *Hall*, 4 C. B. 598.

See also INSURANCE.

10. IN RESTRAINT OF TRADE.

See CONTRACT *and* VENDOR AND PURCHASER.

a. Against Trading in General.

Licence.]—A lease contained a covenant on the part of the lessee that he would not, without the consent of the lessor, use, exercise or carry on in the demised premises any trade or business

whatsoever, nor convert the dwelling-houses into a shop, nor suffer the same to be used for any other purpose than dwelling-houses. One of the dwelling-houses was converted into a public-house and a grocery shop, and the lessor, with full knowledge of it, for more than twenty years received the rent. The plaintiff having purchased the reversion of the lessor, brought an action of ejectment for the breach of the covenant:—Held, that the user of the premises in their altered state for more than twenty years, with the knowledge of the lessor, was evidence from which a jury might presume a licence. *Gibson* v. *Doey*, 2 H. & N. 615; 27 L. J., Ex. 37; 6 W. R. 107.

Covenant against using premises as a shop or warehouse for any trade, without licence in writing, or permitting anything which may grow to the annoyance or damage of the lessors or any of their other tenants. Breach, though not a nuisance in law, public or private, being an annoyance, not protected by injunction, there being no licence; and permission of one trade not to be construed a general licence for any trade. Nor will the court enter into a comparison which is more or less offensive. *Macher* v. *Foundling Hospital*, 1 Ves. & B. 188.

Representations—Collateral Agreements.]—S. purchased from commissioners by several conveyances the fee simple of several houses forming one block of buildings upon a site laid out in accordance with a building scheme, each conveyance containing a covenant by S. not to carry on or permit to be carried on upon the premises conveyed any trade or business but to keep the house as a private dwelling-house only, and not to do or suffer to be done upon the premises conveyed anything which might grow to the annoyance of any person who might be or become the owner, tenant, or occupier of any part of the premises then or late belonging to the commissioners. S. afterwards granted to the respondent a lease of one of the houses containing a restrictive covenant of the same nature and a block plan of the houses. During the negotiations for the lease statements were made by S.'s solicitors to the respondent whereby he became aware that similar restrictive covenants were contained in all the leases granted by S. of houses in that block, and also became aware of the terms of the conveyances of the respondent's house from the commissioners to S.:—Held, that although the statement made to the respondent did not amount to a collateral contract with him as to the future management of the estate, the respondent was from the nature of the transaction entitled to an injunction restraining S. from authorising any of the other houses in the block to be used for the purpose of trade. The principles defined by Hall, V.-C., in *Renals* v. *Cowlishaw* (9 Ch. D. 129) approved. *Spicer* v. *Martin*, 58 L. J., Ch. 309; 14 App. Cas. 12; 60 L. T. 546; 37 W. R. 689; 53 J. P. 516—H. L. (E.)

What amounts to Breach—School.]—Where a lessee of a house and garden for a term of years covenanted with the lessor not to use or exercise, or permit or suffer to be used or exercised, upon the demised premises, any trade or business whatsoever, without the licence of the lessor; and afterwards, without the licence of the lessor, assigned the lease to a schoolmaster, who carried on his business in the house and premises:—Held, that the assignment was a breach of this covenant, and the lessor was entitled to re-enter, under a proviso for re-entry, for non-performance of covenants. *Doe* d. *Bish* v. *Keeling*, 1 M. & S. 95; 14 R. R. 405.

An owner of an estate covered it with houses, and sold some of them subject to a covenant not to carry on any trade, business or calling therein, or to otherwise use or suffer the same to be used, to the annoyance, nuisance or injury of any of the houses on the estate:—Held, that the carrying on of a girls' school in one of the houses was a breach of the covenant. *Kemp* v. *Sober*, 1 Sim. (N.S.) 517; 20 L. J., Ch. 602; 15 Jur. 458.

A covenant contained in a lease was not to convert the demised premises into a shop or public-house, or permit any person to carry on within or upon the dwelling-house or premises any public trade or business whatsoever; and that the dwelling-house and premises should be occupied and used as a private dwelling-house only. The house was used as a young ladies' day-school, where dancing and music were taught; it was also advertised as an academy for dancing in connection with a literary institution:—Held, that this was a breach of the covenant. *Wickenden* v. *Webster*, 5 El. & Bl. 387; 25 L. J., Q. B. 264; 2 Jur. (N.S.) 590; 4 W. R. 562. See also *Johnstone* v. *Hall*, 2 K. & J. 414; 25 L. J., Ch. 462; 2 Jur. (N.S.) 780, post, col. 1220; and *Van* v. *Corpe*, 3 Myl. & K. 269; 6 L. J., Ch. 208; 1 Jur. 101, 149, ante, col. 1090.

—— **Teacher of Music—Constructive Notice—Parties.**]—In 1857 A. granted a lease of a house for a term of ninety-three years, with a restrictive covenant against the user of the house for any art, trade, or business. The term granted by the lease became vested in B., and in October, 1883, B. granted a lease of the house to C. for twenty-one years, with an express permission that he might use the house in his profession of teaching music and singing, and with the usual covenant for quiet enjoyment. There was constructive notice of the original lease in the underlease, but C. had no personal knowledge or notice of the restrictive covenant. A breach of the covenant having been committed by C., the devisees in trust of A. brought an action against B. and C., claiming an injunction and damages:—Held, that the plaintiffs were entitled to an injunction against C., and damages against B., who was a proper party to the action. *Tritton* v. *Bankart*, 56 L. T. 306; 35 W. R. 474.

—— **Receiving Pupils as Lodgers.**]—Receiving as lodgers the governesses and pupils of a neighbouring school:—Held, a breach of a covenant to use a house for no other purpose than a "private residence." *Hobson* v. *Tulloch*, 67 L. J., Ch. 502.

—— **Hospital.**]—A hospital, the patients of which make small payments according to their means, is a "business" within the meaning of a covenant by lessee with lessor not to carry on upon the demised premises "any trade, business, or dealing whatsoever, or anything of the nature thereof." *Bramwell* v. *Lacy*, 48 L. J., Ch. 339; 10 Ch. D. 691; 40 L. T. 361; 27 W. R. 463.

A covenant not to use a house for the "exercise or carrying on of any art, trade or business, occupation or calling," is broken by using the house for the purpose of a hospital association, established without a view to profit, to provide accommodation for patients able and willing to pay for it. *Portman* v. *Home Hospitals Association*, 27 Ch. D. 81, n.; 50 L. T. 599, n.

—— **Sale by Auction.**]—A covenant to use a house as a private house only is not broken by an auction sale on the premises of the furniture belonging to the house. *Reeves* v. *Cattell*, 24 W. R. 485.

In a retail shop sales by auction are allowable unless prohibited by the agreement between landlord and tenant. *Keith* v. *Reid*, L. R. 2 H. L. Sc. 39.

—— **Charitable Institution where no Payment received.**]—The lease of a house contained a covenant that the lessee should not use, exercise, or carry on upon the premises any trade or business of any description whatsoever:—Held, that a charitable institution called a "Home for Working Girls," where the inmates were provided with board and lodging, whether any payment was taken or not, was a business, and came within the restrictions of the covenant. *Rolls* v. *Miller*, 53 L. J., Ch. 682; 27 Ch. D. 71; 50 L. T. 597; 32 W. R. 806—C. A. Affirming 48 J. P. 357, 518.

It is not essential that there should be payment in order to constitute a business: nor does payment necessarily make that a business which without payment would not be a business. *Ib.*

—— **Putting Notice in Window.**]—A sub-lessee who was bound by a covenant in a lease to use a particular house as a dwelling-house only, put up a notice in the window of it as follows: "Alpheus Andrews, Coal-office; and at the Coal Exchange." Orders were taken by him for coal at the house, but no coal was actually supplied there to customers, and the house was, in other respects, used as a dwelling-house. Upon a motion by the reversioner for an injunction to restrain the lessee and sub-lessee from putting up the notice, or using the house otherwise than as a dwelling-house only:—Held, that the injunction must be granted. *Wilkinson* v. *Rogers*, 10 Jur. (N.S.) 5; 9 L. T. 434; 12 W. R. 119.

By Lessee with Owner—Corresponding Covenants subsequently entered into by Owner with Purchasers—Right of late Owner to enforce against Assignee with Notice.]—S., an owner in fee simple of land, demised it for ninety-nine years to a lessee, who assigned it with the lessor's consent, the assignee covenanting with the lessor, "his heirs and assigns, as owner for the time being of land forming part of" the E. estate that the assignee, his executors, administrators, and assigns, would not "for the space of ten years from the date thereof use or allow to be used the said premises for any trade or business other than that of a poulterer and cheesemonger." The assignee's executrix and universal legatee agreed to let the premises for three years to a tenant who agreed to use them as a cheesemonger's and poulterer's shop only. The tenant assigned his interest to B., who signed a memorandum indorsed on the agreement, agreeing to perform the covenants contained therein. He subsequently used the premises as a grocer's shop, and for the sale of wines and spirits under an off-licence. The shop in question formed one of a row of shops which had belonged to S., and each of which was limited by covenant to a particular trade, and S. on selling some of the other shops had covenanted with the purchasers that the shop now occupied by B. should not be used for the purpose for which B. was now using it. S. had subsequently disposed of all his interest in the E. estate. He now brought an action against B. for an injunction to restrain him from using the shop except as a cheesemonger's and poulterer's. The defendant contended that S. having parted with all his interest in the estate could not enforce the covenant:—Held, that, though the plaintiff had parted with his interest in the estate, he had still an interest in enforcing the covenant previously entered into with him as owner, inasmuch as he had, by his subsequent covenants to the same effect, made himself liable to be sued by the purchasers of the other shops in case the covenant should be infringed, and the defendant having taken the premises with notice of the title of which the restrictive covenant formed part, the plaintiff was accordingly entitled to the injunction he asked for. *Spencer* v. *Bailey*, 69 L. T. 179.

"Unless adjoining House should be turned into Shop."]—A lease of a house contained a covenant by the lessee to use the house as a private dwelling-house only, provided that if any of the adjoining houses of the lessor should be converted into a shop, the lessee might convert the demised premises to a similar use. One of the adjoining houses of the lessor was afterwards let to a photographer, who exhibited photographs outside, and used the ground-floor room for the exhibition of photographs and the sale of album-cases and frames, the door being kept open by day, but no alteration was made in the building. Semble, that a conversion into a shop might be effected by user, without any structural alterations of the house, and that there had been such a user of the house for the sale of goods as to be a conversion into a shop within the meaning of the proviso. *Wilkinson* v. *Rogers*, 2 De G. J. & S. 62; 10 Jur. (N.S.) 162; 9 L. T. 696; 12 W. R. 284.

Not to use Premises except as Post-office—When broken.]—By a lease in 1852, premises were demised to the postmaster-general for 1,000 years, at the rent of one shilling, and the postmaster-general covenanted that he and his successors would at all times during the term use the premises as a post-office for the district, and would not use the premises for any other purpose. Ejectment having been brought on a proviso for re-entry for the breach of the covenant, on the ground that the excise duties and licences for dogs, men-servants, horses, &c., had been received and granted on the premises by the post-office clerks:—Held, that there had been no breach of the covenant. *Wadham* v. *Postmaster-General*, 40 L. J., Q. B. 310; L. R. 6 Q. B. 644; 24 L. T. 545; 19 W. R. 1082.

Use of Premises otherwise than as Hotel.]—By agreement dated 1889, the plaintiffs agreed to let to the defendant the dwelling-house and premises known as the P. Hotel, the lease to contain a covenant not to assign without leave and a covenant not to carry on certain specified trades. The premises during the previous eighty years had sometimes been used as an hotel, sometimes as separate tenements, and once as an asylum. The defendant entered into an agreement with the War Office to provide accommodation for several non-commissioned officers and their wives and families, and for this purpose made certain structural alterations by erecting wooden partitions and cooking-stoves:—Held, that the defendant was not bound by the agreement to use the premises solely as an hotel, and that the acts of waste complained of were either

meliorative or trivial. *Grand Canal Co.* v. *McNamee*, 29 L. R., Ir. 131—C. A.

Not to Affix any outward Mark or Shew of Business.]—The plaintiff, who was lessee of a house known as 15, C. Street, and 1, E. Street, under a lease which was about to expire, but which he expected would be renewed, entered into an agreement with D. to grant him a lease of certain rooms on the ground floor of the house. The agreement provided that the lease to be granted should contain certain specified covenants, "and all such other covenants and conditions as shall be contained in the lease about to be granted" to the plaintiff, "with such additions as may be necessary and proper in an underlease." It was also provided that on nonpayment of rent or nonperformance of any of the agreements therein contained on the part of the tenant, it should be lawful for the plaintiff to re-enter and eject all tenants and occupiers, and that a similar provision should be inserted in the lease about to be granted to D. The renewed lease was granted to the plaintiff, and contained a covenant by the lessee that he would not carry on upon the premises certain specified trades "or any other open, noisy or offensive trade or business whatsoever, or convert the same into a shop, or affix or permit any outward mark or shew of business to be affixed thereon." It contained a proviso for re-entry by the lessors on nonpayment of rent, or if the lessee should not "observe, perform or keep all and every the covenants and agreements" therein contained. Soon after D. granted a lease of two of the rooms comprised in the agreement, with use of the door in C. Street, to B., a tailor. B. then put up in a window looking into A. Street a wire blind on which was, "H. Browne & Co., late Storey, Browne & Co., Entrance, 15, Clifford Street"; and on a roller-blind, "H. Browne & Co., 15, Clifford Street." On the railings outside the entrance in C. Street, B. put a brass plate, on both sides of which was, "H. Browne & Co., late Storey, Browne & Co., tailors, from 157, New Bond Street":—Held, that the agreement must be construed as containing the covenant in the lease not to affix or permit to be affixed "any outward mark or shew of business," and also the proviso for re-entry on nonperformance or non-observance of the covenants, and that the blinds and brass plate constituted a breach of the covenant. *Evans* v. *Davis*, 48 L. J., Ch. 223; 10 Ch. D. 647; 39 L. T. 391; 27 W. R. 285.

By the writ and statement of claim the plaintiff claimed an injunction, damages, and to recover possession of the premises comprised in the agreement. In the statement of claim he alleged that he had "always been and is ready and willing to grant" the lease to D. The plaintiff had not, up to the trial of the action, granted a lease to D.:—Held, that he had claimed inconsistent relief, and had submitted to act on the agreement, and was therefore entitled to an injunction only against both D. and B. and without costs. *Ib.*

—— **Enforcing — Affirmative and Negative Covenants.**]—In adjudicating upon covenants in the nature of restrictive covenants, where an affirmative covenant has a negative element in it, or where a covenant is partly affirmative and partly negative, the court will in a proper case enforce the negative portion of the covenant. *Clegg* v. *Hands*, 59 L. J., Ch. 477; 44 Ch. D. 503; 62 L. T. 502; 38 W. R. 433; 55 J. P. 180—C. A.

Suit by Reversioner of Freehold.]—A court of equity will not, at the instance of a person having a mere reversionary interest in the freehold, interfere to restrain the breach of a covenant entered into by the tenant with the lessor against carrying on any business upon the demised premises, unless special damage is shewn. *Johnstone* v. *Hall*, 2 Kay & J. 414; 25 L. J., Ch. 462; 2 Jur. (N.S.) 780; 4 W. R. 417.

In a case resting simply upon covenant, if the party seeking specific performance be entitled in possession, he has a right to the enjoyment of the property, modo et formâ, according to his covenant; but if he be entitled in remainder only, he must shew, that he has sustained some material damage by reason of the breach to entitle him to relief of this nature. *Ib.*

Demise of land for 999 years, at a yearly rent of 33*l.* odd, and covenant by lessee not to carry on, or suffer to be carried on, in any building to be erected on the premises, any of several noxious or objectionable trades and employments, "or any other trade, business or employment whatsoever," but to use the premises solely for private dwelling-houses. The lessor died, having devised the premises to one for life, and to the plaintiffs in remainder. The defendant, as sub-lessee, carried on upon the premises a school for girls. A bill for an injunction, living the tenant for life (who was not a plaintiff), dismissed with costs, upon the ground that, having regard to the circumstances that the plaintiffs were merely entitled in remainder, the relief prayed was too minute, there being no case of waste, but only a possibility of the respectability of the neighbourhood being in some measure affected; and the argument from acquiescence could not apply, the plaintiffs having no right of re-entry. *Ib.*

Semble, if there had been any injury to the material of the house and premises, or if a grossly noxious trade had been carried on, the plaintiff might be entitled to relief, although claiming in remainder only, and not in possession. *Ib.*

Whether Usual.]—*See* ante, col. 1089.

b. Against Particular Trades.

How far Binding on Lessee's Executors.]—On a covenant that (in consideration of a weekly payment to A. and his executors for a term certain) A. shall not exercise a particular trade, the executors of A. are not bound to abstain from exercising it. *Cook* v. *Caleraft*, 2 W. Bl. 856; 3 Wils. 380.

How far Binding on Sub-lessee.]—A sub-lessee of a house, whose immediate lessor is bound by covenant not to carry on a particular trade, will be restrained from carrying on such trade, although he took his lease without notice of the covenant, at least unless it appears that he made careful inquiries at the time of taking his lease, and learnt nothing which should have set him on further investigation. *Parker* v. *Whyte*, 1 H. & M. 167; 32 L. J., Ch. 520; 8 L. T. 446; 11 W. R. 683.

Where a lessee covenants not to exercise a particular trade on the premises, and then makes an underlease without express notice of the covenant, the underlessee being precluded by the agreement from the full investigation of the title, the underlessee is bound by the covenant, although it does not run with the land. *Clements* v. *Welles*, 11 Jur. (N.S.) 991; 14 W. R. 187.

In 1808, the dwelling-house No. 1, Merrion Square East, in the city of Dublin, "and also the coach-house and stable belonging thereto," were demised for a term of years, the lessee covenanting to keep the premises in good repair, and so deliver them up at the end of the term. The coach-house and stable lay at the rear of the house, but were separated from it by other buildings. There were no restrictive covenants in the lease, although the lessor was himself lessee of the premises as well as of the ground covered by the intervening buildings, under a lease of 1806, which contained covenants against using the front of any of the houses as a shop, and against that of a butcher, involving, at the option of the head landlord, forfeiture or an additional rent while the trade should be carried on. The lease of 1808 contained a reservation of all royalties to the head landlord, but made no direct reference to that of 1806. In 1875 the owner of the lessee's interest in the lease of 1808 made a sub-lease of the coach-house and stable, authorising their conversion into a butcher's shop. On their having been so converted, and their structure altered, the owner of the reversion upon the lease of 1808 filed a bill for an injunction, when the Master of the Rolls made a decree perpetually restraining the use of the altered premises as a butcher's shop, although some of the intervening buildings which fronted the street had been used as shops, but not as butchers' shops, for a number of years. The sub-lessee of 1875 having appealed: —Held, that the decision should be affirmed, with the addition to the decree of a clause prohibiting any of the trades specified in the lease of 1806 from being carried on upon the premises sub-demised to the owner. *Maunsell* v. *Hort*, 1 L. R. Ir. 88.

Not to use House as Public-house or Beer-shop.]—A lease contained a covenant that a house, to be built immediately adjoining the house in which the lessor lived, should be built fit for a private family, under a penalty of 10*l.* yearly additional rent, unless the lessor should convert his house to any public use:—Held, that this was a continuing covenant, and bound the lessee as well to keep as to build the house as a private dwelling-house, and was broken by his converting it into a public-house. *Bray* v. *Fogarty*, Ir. R. 4 Eq. 544; 18 W. R. 1151.

Held, also, that the 10*l.* a year additional rent was a penalty, and not liquidated damages, and that the lessor was not restricted to suing for the additional rent, but was entitled to an injunction to restrain the tenant's converting the house into a public-house. *Ib.*

—— **Acquiescence.**]—The lessee built another house, not adjoining the house of the lessor, on the plot of ground demised by the lease. The second house was converted into a public-house, with the assent of the lessor:—Held, that this was not such acquiescence in the breach of the covenant as to debar the lessor from relief in respect of the other house. *Ib.*

—— **What amounts to a Breach of.**]—A person who had entered into a covenant not to use a house as a public-house, tavern or beer-house, opened a grocer's shop there, at which he carried on the sale of beer to be drunk off the premises as an ancillary business to his grocer's business:—Held, that this was no infringement of the covenant. *Holt* v. *Collyer*, 50 L. J., Ch. 311; 16 Ch. D. 718; 44 L. T. 214; 29 W. R. 502; 45 J. P. 456.

An owner in fee of a house subject to a covenant not to use it for certain offensive trades, or any trade which might be deemed a public nuisance, or as a public-house for the sale of beer, without the consent of the original vendors, taking out an excise licence for the sale of beer not to be drunk on the premises, is not a breach of the covenant. *Pease* v. *Coates*, 12 Jur. (N.S.) 684; 14 L. T. 886; 14 W. R. 1021.

A lease contained a covenant by the lessee not to allow any house on the land demised to be used as a beer-shop. The lessee carried on the trade of a grocer in a house on the demised premises in partnership with his brother. The brother took out an excise licence to sell beer in the house by retail to be consumed off the premises; and did so sell beer there:—Held, a breach of the covenant. *St. Albans* (*Bishop*) v. *Battersby*, 47 L. J., Q. B. 571; 3 Q. B. D. 359; 38 L. T. 685; 26 W. R. 678.

—— **Whether Running with the Land.**]—The owner of a freehold house had entered into a covenant with the plaintiff, who was a previous owner, that the building should not be used as a beershop. The house was afterwards let to a tenant from year to year without express notice of the covenant:—Held, that although the covenant might not at law run with the land, he was bound by it in equity. *Wilson* v. *Hart*, 35 L. J., Ch. 569; L. R. 1 Ch. 463; 12 Jur. (N.S.) 460; 14 L. T. 499; 14 W. R. 748.

A covenant by a purchaser of land not naming his assigns, that no building erected on the land shall be used as a beershop, does not run with the land. *Ib.*

See also *Fielden* v. *Slater*, infra, and *Jay* v. *Richardson*, infra.

"Retailer of Wine, Spirits or Beer."]—The lessee of a theatre bought an adjoining piece of ground, which was subject to a covenant, of which he had notice, that "the trade of an innkeeper, victualler, or retailer of wine, spirits or beer," should not be carried on there. He erected on this piece of ground a building the object of which was to furnish convenient egress from the theatre; but on each floor he set up a counter for selling wine, spirits and beer, which could not be approached directly from the outside, but at which any person who paid for admittance to the theatre when open for theatrical performances could purchase refreshments:—Held, that the lessee was carrying on the trade of a retailer of wine, spirits and beer, and must be restrained from doing so. *Jones* v. *Bone* (L. R. 9 Eq. 674) distinguished. *Buckle* v. *Fredericks*, 44 Ch. D. 244; 62 L. T. 884; 38 W. R. 742; 55 J. P. 165—C. A. See also *Zetland* (*Earl*) v. *Hislop*, infra.

Wine Business.]—Injunction granted to restrain a breach of covenant against carrying on a wine business secured by forfeiture of the lease and a penalty. *Barrett* v. *Blagrave*, 5 Ves. 555.

Prohibition of Sale of Malt and Spirituous Liquors — Working Men's Club — Supply of Liquors to Members.]—A club of working men were the lessees of premises the lease of which contained a covenant that they should not be used for the sale of wines, malt or spirituous liquors. The rules provided for the purchase of liquor and its distribution at fixed prices among the members by whom it was consumed upon the premises, the profits being applied to the

general purposes of the club:—Held, that this was not a sale within the meaning of the covenant. *Ranken* v. *Hunt*, 10 R. 249.

Not to use Premises as a Coffee-house—Breach—Injunction.]—A lessee covenanted not to use the demised premises as a coffee-house:—Held, that carrying on a business consisting mainly of the sale of tea and coffee in packets as groceries, but consisting also, as incidental and ancillary thereto, of the sale of cups of tea and coffee, and of such eatables as slices of bread with butter or cheese, rolls, eggs, sandwiches and pork-pies, to be consumed on the premises, was a breach of the covenant. *Buckle* v. *Fredericks* (44 Ch. D. 244) followed; *Stuart* v. *Diplock* (43 Ch. D. 343) distinguished. *Fitz* v. *Iles*, 62 L. J., Ch. 258; [1893] 1 Ch. 77; 2 R. 132; 68 L. T. 108—C. A.

Not to allow Houses in Street to be used as Eating-house.]—B. demised an eating-house for a term of twenty-one years, and covenanted that he would not during the term let any house in the same street for the purpose of carrying on the business of an eating-house, provided always that the covenant should be binding only on B., and not on his heirs, administrators or assigns. Subsequently B. let the adjoining house for twenty-one years to another person, who covenanted with him not to carry on there any trade or business without B.'s licence. The first lease was subsequently assigned to K., and the second to G. K. brought an action against B. and G. to restrain G. from carrying on an eating-house on the premises comprised in the second lease, and B. from permitting him to do so:—Held, that the covenant could not be treated as a covenant that none of the houses should during the term be used as an eating-house, and that as B. had not let the second house for the purpose of an eating-house, the covenant was not broken by G.'s carrying on there the business of an eating-house, nor by B.'s not interfering with his doing so. *Kemp* v. *Bird*, 46 L. J., Ch. 828; 5 Ch. D. 974; 37 L. T. 53; 25 W. R. 838—C. A.

Not to carry on Business of Confectioner.]—It is no breach of covenant not to carry on the business of a wholesale or retail confectioner for a grocer and tea-dealer to sell a particular kind of sweetmeat in which a confectioner may happen to deal. *Lumley* v. *Metropolitan Ry.*, 34 L. T. 774—C. A.

A grant to A. and his heirs to the use, intent and purpose that the trade or business of a baker or confectioner should not at any time be carried on upon the premises granted, amounts to a covenant by the grantee not to carry on such a trade upon the premises. *Hodgson* v. *Coppard*, 29 Beav. 4; 30 L. J., Ch. 20; 9 W. R. 9.

The grantee had let the property to a tenant who had committed and was committing the breaches complained of, but who was not made a party to the suit:—Held, that an injunction might be granted to restrain the grantee, his agents or servants, from carrying on such a trade, but that the injunction could not be extended to his tenants. *Ib.*

Not to carry on Trade of a Butcher.]—A covenant in a lease that the lessee shall not exercise the trade of a butcher upon the premises, is broken by his selling raw meat by retail, although no beasts were there slaughtered. *Doe* d. *Gaskell* v. *Spry*, 1 B. & Ald. 617; 19 R. R. 404.

Against Sale by Auction.]—The circumstance that a lessor has a right of re-entry for breach of a covenant not to use the premises for the purpose of a sale by auction, does not preclude him from coming to a court of equity to restrain the commission of the breach. *Parker* v. *Whyte*, 32 L. J., Ch. 520; 2 N. R. 157; 8 L. T. 446; 11 W. R. 683.

Covenant by lessee not to permit sale by public auction on the demised premises not broken by a sale by auction of goods and chattels on the premises by trustees under an assignment of the goods and chattels, there being no evidence that the lessee knew of or permitted the sale. *Toleman* v. *Portbury*, 39 L. J., Q. B. 136; L. R. 5 Q. B. 288; 22 L. T. 33; 18 W. R. 579—Ex. Ch.

Ladies' Outfitter—Overlapping Business.]—The sale by a hosier in the ordinary course of his business of certain articles sold by a ladies' outfitter, is not a breach of a covenant not to carry on the business of a ladies' outfitter, even if the articles sold form a substantial part of the business of a ladies' outfitter. *Fielden* v. *Slater* (L. R. 7 Eq. 523) distinguished. *Stuart* v. *Diplock*, 59 L. J., Ch. 142; 43 Ch. D. 343; 62 L. T. 333; 38 W. R. 223—C. A.

Covenant in Conveyance of Fee—Breach by Lessee of Purchaser.]—The plaintiff conveyed an estate in fee simple to the defendant and his heirs, to the use that certain trades should not be carried on upon the premises. The defendant underlet the premises to a tenant who carried on one of the restricted trades. Upon a bill for an injunction:—Held, to amount to a covenant on the part of the defendant not to carry on the restricted trades, but that the defendant alone could be restrained, the tenant not being a party to the bill. *Hodson* v. *Coppard*, 7 Jur. (N.S.) 11; 9 W. R. 9.

A lessee is bound to inquire into, and is fixed with notice of all covenants into which his lessor has entered in respect of the land. In 1854 a dwelling-house and a shop were conveyed by the plaintiff to A. in fee, in consideration of the payment by A. to the plaintiff of a perpetual yearly rent-charge; and the conveyance contained a covenant by A., his heirs, executors and administrators, with the plaintiff, his heirs and assigns, that he and they would not use or occupy, or permit to be used or occupied, the building "as an inn, public-house or tap-room, or for the sale of spirituous liquors or ale or beer." In 1857 B. became tenant from year to year of the house, using and occupying it for the business of a grocer. In 1862 A. demised the house and shop to B. for twenty-one years at a yearly rent; the only restrictive covenant being a covenant by B. that "no offensive business or occupation or nuisance shall be carried on or committed on the said premises, and that the same shall be used as a dwelling-house and shop only." In 1866 B., as the agent of a firm of London wine merchants, began, in the course of his business of a grocer, to sell on the premises wine and spirits, but in bottle only. On a bill for an injunction against A. and B., it was found, as the result of the evidence, that B. had no knowledge of the covenant in the original deed:—Held, notwithstanding, that he was put upon inquiry, and was fixed with constructive notice of the covenant. *Fielden* v. *Slater*, 38 L. J., Ch. 379; L. R. 7 Eq. 523; 20 L. T. 112; 17 W. R. 485.

Held, also, that the words, "for the sale of

spirituous liquors," did not prevent the sale of wine, but extended to the sale of spirituous liquors in bottle; and injunction granted accordingly. *Ib.*

Held, also, that the original grantor having filed a bill to restrain the lessee from breach of a restrictive covenant contained in the original grant, the original grantee was not a necessary party to the suit. *Ib.*

Covenant by Lessor not to allow Hotel within a certain Distance—Breach by Purchaser of part of the Estate.]—A purchaser in fee of a piece of land cannot, by the purchase of a lease granted of the same land, avoid covenants which his vendor had taken from his tenants over a wide area, in aid of covenants which he had entered into with third parties. *Jay* v. *Richardson*, 30 Beav. 563; 31 L. J., Ch. 398; 8 Jur. (N.S.) 689; 6 L. T. 177; 10 W. R. 412.

A. demised a plot of land for a term of forty years for the erection of an hotel, with a covenant that he, his heirs, or assigns, would not, during the term, let any house, building, or land for the erection of an hotel or inn, or for the sale of ale or beer or spirits, within a quarter of a mile of the plot of land so leased. A. demised another plot of land to S., who covenanted that he would not allow any building to be erected thereon to be used for the sale of beer, without the written authority of A., his heirs, or assigns. R., with notice of the covenants, purchased the reversion in S.'s lot, and afterwards bought up his lease. He afterwards commenced building an hotel thereon. Upon a bill by the owner of the hotel, a perpetual injunction was granted, during the continuance of his lease, to restrain R. from using the building as an hotel, or for the sale of beer. *Ib.*

Not to be engaged in a Trade within a given District—Lending Money to Person trading within District.]—A covenant not to be engaged in a specific trade "or in any matter or thing whatsoever in anywise relating thereto," within a given district, does not prevent the covenantor from lending money to a person engaged in such trade within the limits, upon mortgage of his trade premises, although he may know that the mortgagor has no means of paying the debt except out of the profits of the business. *Bird* v. *Lake*, 1 H. & M. 338.

A mortgagor expressly charging the debt upon such profits would be a breach of covenant. *Ib.*

Semble, that there is nothing in such a covenant to prevent the covenantor from buying any number of houses within the district, fitting them up and selling them for the purpose of the trade in question, provided he has no direct interest in the businesses carried on in them after such sales respectively. *Ib.*

Scots Law—Covenant in Feu Charter against Trade of Publican—Right of Superior to enforce.]—A restriction in a feu charter, purporting to bind not only the original contracting feuar and his heirs, but also his assignee or any tenant or possessor of the houses to be erected on the feu, and power to enforce or dispense with it, is given not to the disponer or his heirs, but to the superior for the time being; the restriction, unless repugnant to the nature of the estate taken by the feuar or to public policy, is a condition of the feu, and runs with the land against singular successors. In all cases of restrictive conditions in a feu charter, the superior must have power to enforce them, or to dispense with them according to his own will or not, whether the charter is so expressed or not, unless the benefit of them and the right to enforce them are communicated to other feuars. *Tailors of Aberdeen* v. *Coutts* (1 Rob. App. Cas. 296), followed. *Zetland (Earl)* v. *Hislop*, 7 App. Cas. 427—H. L. (Sc.)

A restraint against carrying on the trade of a publican is as good in law, and as capable of running with the land, as a restraint against carrying on any other business; and the fact that restrictions are placed by statute upon the freedom of that particular trade constitutes no reason why a private contract to prevent it from being carried on, without the consent of the superior, should be held invalid or contrary to law. *Ib.*

Feu rights of land in Grangemouth, a town of 5,000 inhabitants, contained restrictions against retailing malt or spirituous liquors, or allowing the same to be sold or retailed within the buildings erected on the feus without the superior's permission. The superior sought an interdict to prohibit the defenders, the feuars, from continuing to sell any kind of malt or spirituous liquors, &c., alleging that the whole of the town was built on ground held of him as superior; that he was proprietor of certain houses in the heart of the town at a rental of 750*l.*; that he had still a large extent of ground in and adjacent to the town available for feuing, and that his mansion-house was within half a mile of the town; and that these properties were damaged by the existence of so many public-houses. The defenders pleaded no interest to sue the action, acquiescence, and prescriptive use. On the question of relevancy:—Held, first, that the restrictions sought to be imposed were not personal, or inconsistent with public policy, nor repugnant to the pursuer's estate, they relating to the use and employment of buildings erected on the land; secondly, that the interest to sue the action was connected with patrimonial rights, and that the superior's case, as shewn on the record, was sufficient to entitle him to the relief which he prayed. *Ib.*

Held, also, that it was the plain intention of the contracting parties that the superior should determine, whether there are to be public-houses upon any of the feus, and if so, their number and position, and accordingly the superior in granting his licence to certain feuars to sell liquor was in no sense departing from or waiving the prohibition. But it was a different question in all or some of the cases, whether the pursuer might not be seeking to enforce the restrictions under circumstances, or in a manner which ought to deprive him of the assistance of the court, there being facts averred, from which, if proved or admitted, it might be legally inferred, that successive superiors had so acquiesced in the feuar's use of their premises for the sale of liquor that the prohibition must be held to have been unconditionally discharged. But the record leaving it open to the superior to adduce evidence which might give a different colour to these facts, the parties must proceed to proof before the questions of acquiescence and waiver and prescriptive use, could be decided. *Ib.*

c. Against Offensive Trades.

What a Breach of—Depositing Dangerous Substances.]—Using premises for depositing

large quantities of lucifer-matches, whereby the premises are rendered so dangerous as to be uninsurable against fire, is not a breach of a covenant not to carry on any noisome or offensive trade, the word "dangerous" not being in the covenant. *Hickman* v. *Isaacs*, 4 L. T. 285.

—— **Public House.**]—In a lease for years of a messuage and premises in a public street, the lessee covenanted that he, his executors, administrators or assigns, should not permit or suffer any person or persons to inhabit the same, who should carry on therein certain enumerated trades or businesses, "or any other trade or business that might be, or grow or lead to be, offensive, or any annoyance or disturbance, to any of the other tenants of the lessor." The lessee granted an underlease of the premises (subject to the like covenant) to A., who opened them as a public-house, in the business of a licensed victualler, which was not one of the businesses enumerated in the covenant:—Held, that such an act did not amount to a breach of the covenant. *Jones* v. *Thorne*, 3 D. & R. 152; 1 B. & C. 715; 1 L. J. (O.S.) K. B. 200; 25 R. R. 546.

—— **Lunatic Asylum.**]—The converting of a demised house into a lunatic asylum is not a breach of a covenant not to "use or exercise any trade or business of butcher, baker, slaughterman, melter of tallow, tallow-chandler, tobacco-pipe maker, soap-boiler, or any other offensive trade. *Doe* d. *Wetherell* v. *Bird*, 4 N. & M. 285; 2 A. & E. 161; 4 L. J., K. B. 52.

In such a covenant the words "trade" and "business" must be taken to be used in different senses, and the former must be confined to a business conducted by buying and selling. *Ib.*

—— **Hospital.**] — The establishment of a hospital for the treatment of outdoor patients suffering from diseases of the throat, nose, ear, skin, and eye, fistula, and other diseases, is a breach of a covenant in a building lease against carrying on certain specified trades, or doing any act "which shall or may be or grow to the annoyance, nuisance, grievance, or damage of the lessor, his heirs or assigns, or the inhabitants of the neighbouring or adjoining houses," and will be restrained by injunction. The covenant is not confined to the lessor and his own sub-tenants, but would be broken by annoyance to the inhabitants of neighbouring or adjoining houses. *Tod-Heatley* v. *Benham*, 58 L. J., Ch. 83; 40 Ch. D. 80; 60 L. T. 241; 37 W. R. 38—C. A.

In order to enforce such a covenant it is not necessary to show that actual damage or pecuniary loss has been sustained. It is sufficient without proving actual risk of infection that sensible people feel a reasonable apprehension of risk, and interference with the pleasurable enjoyment of their houses for ordinary purposes, as distinguished from a mere fanciful feeling of distaste entertained by sensitive persons. *Ib.*

—— **Mock Auction.**]—A. being in possession of a house on the understanding that a lease would be granted, underlet to B., and B. underlet to C. In the lease subsequently granted was a covenant that neither T. nor her executors, administrators, nor permitted assigns should permit any offensive trade to be carried on, nor underlet without licence. D., who had become tenant without the knowledge of T., subsequently to the date of the lease carried on a mock auction, which being complained of by other tenants, the lessors filed a bill and moved for an injunction to restrain D. from carrying on the trade, and P. from permitting it to be carried on, or underletting without licence. Motion as to T. refused with costs, and no order made as to D., who did not appear. *Moses* v. *Taylor*, 11 W. R. 81.

How far Binding on Sub-lessee.—A lease contained a covenant by the lessee and his assigns "not to use, exercise, or carry on upon the demised premises, or permit or suffer any part thereof to be occupied by any person who shall use, occupy, or carry on therein any noisome or offensive trade." E. purchased an underlease of the premises with notice of the covenant in the original lease, and made a further sub-demise, containing a similar covenant, to M. M., after being in occupation some months, began to carry on an offensive business on the premises. In an action by the original lessor, claiming an injunction against both E. and M.:—Held, that no injunction ought to be granted against E., there being no evidence to show that E. had authorised or sanctioned M. to occupy the premises to carry on therein an offensive business; and that E. was not to be compelled by means of an injunction to bring an action of ejectment against M. The doctrine of *Tulk* v. *Moxhay* (2 Ph. 774), explained. *Haywood* v. *Brunswick Building Society* (8 Q. B. D. 403), and *Austerberry* v. *Oldham Corporation* (29 Ch. D. 750), followed. *Hall* v. *Ewin*, 57 L. J., Ch. 95; 37 Ch. D. 74; 57 L. T. 831; 36 W. R. 84—C. A.

Semble, that the words "shall not suffer or permit," in a covenant of this kind ought not to be construed as equivalent to "shall hinder and prevent," but rather as "shall not authorise or sanction." *Ib.*

Construction of.] — The defendants were assignees of the lease of certain premises which had been demised by the plaintiffs for a term of years, the reddendum being as follows: "yielding and paying a yearly rent of 30*l.* by equal quarterly payments" on the usual quarter-days, "and a like yearly rent of 25*l.* by like equal payments in case any of the trades, occupations, or things hereinafter covenanted not to be carried on or done upon the said premises shall be carried on or done." The lessees, among other usual covenants, covenanted not to carry on upon the premises certain specified trades or businesses, nor any offensive, noisome, or noisy trade or business whatsoever, nor do nor suffer to be done anything which might be or grow to the damage or annoyance of the lessors. The lease contained a condition of re-entry if the said yearly rent of 30*l.* or the said further rent of 25*l.*, in case the same should become payable, were in arrear, or if and whenever there should be a breach of any of the covenants thereinbefore contained on the part of the lessees. The defendants having carried on upon the demised premises a business within the terms of the above-mentioned covenant, the plaintiffs sued to recover the premises upon a forfeiture of the lease:—Held, that the lease could not be construed as meaning that the defendants were entitled to carry on the business in question upon payment of the additional rent mentioned in the reddendum, and that the plaintiffs were entitled to re-enter under the condition for re-entry should they choose to exercise that option, instead of requiring the payment of the additional rent. *Weston* v. *Metropolitan Asylum District Mana-*

gers, 51 L. J., Q. B. 399; 9 Q. B. D. 404; 46 L. T. 580; 30 W. R. 623; 46 J. P. 564—C. A.

In construing a covenant not to carry on any offensive trade or business on premises demised, much will depend on the situation of the premises; and in construing such a covenant it is particularly worthy of consideration, whether such trade as that complained of was carried on there at the time of the demise. *Gutteridge* v. *Munyard*, 7 Car. & P. 129; 1 M. & Rob. 334.

"Nuisance."]—*Harrison* v. *Good* (L. R. 11 Eq. 388), in limiting the term "nuisance" in a restrictive covenant to that which is a legal nuisance questioned. *Tod-Heatley* v. *Benham*, 58 L. J., Ch. 83; 40 Ch. D. 80; 60 L. T. 241; 37 W. R. 38—C. A.

Enforcing by Injunction.]—Per Lindley, L.J.:—Without deciding that the existence of an hospital is per se an annoyance, the apprehension of risk of infection entertained by reasonable men amounts to a breach of the extra protection intended to be given to the covenantee by the introduction into the covenant of the words "annoyance" and "grievance" in addition to "nuisance or damage." *Ib.*

d. Other Restrictions.

To Buy all Beer, Wine or Spirits from Landlord—How Satisfied.]—A covenant by the tenant of a public-house to purchase of his landlord all beer to be sold or consumed in or upon the premises is not broken by the tenant buying through an agent, without the knowledge of the landlord, beer made by the landlord. *Edwick* v. *Hawkes*, or *Edridge* v. *Hawker*, 50 L. J., Ch. 577; 18 Ch. D. 199; 45 L. T. 168; 29 W. R. 914.

—— **Implied Covenant on Part of Landlord.**]—Semble, that where such a covenant is entered into by a tenant there is, in the absence of express stipulation, an implied obligation on the part of the landlord to supply the tenant with such kinds of beer as he requires, and if this obligation is not fulfilled, the tenant is at liberty to buy the beer which he requires elsewhere. *Ib.*

A covenant to take all beer consumed on premises is conditional on a proper supply of a marketable article. *Luker* v. *Dennis*, 47 L. J., Ch. 174; 7 Ch. D. 227; 37 L. T. 827; 26 W. R. 167.

A contemporaneous counter-covenant to supply imports a condition precedent that it will be performed in lieu of the condition otherwise implied. *Ib.*

A continual breach of such condition amounts to a release of the covenant to take. *Ib.*

—— **Binding on Assignee.**]—A. and B. on a demise to them of the Sutton Arms covenanted to take from the landlord or his assigns all beer consumed in the Sutton Arms and also the Milton Arms (a public-house held by A. alone, of different landlords):—Held, that an assign from A. of the Milton Arms, who had notice, was bound by the covenant. *Ib.*

And see also *White* v. *Southend Hotel Co.*, infra.

—— **Enforcement by Assignee.**]—In a lease of a public-house by brewers, therein described as the lessors, including in such term "assigns," the lessee covenanted not to buy or sell on the premises any ale or stout other than such as should be bonâ fide purchased of the said lessors, or from them or either of them, either alone or jointly with any other person or persons who might thereafter become a partner or partners with them or either of them, provided they or he should at such time deal in or vend such liquors, and should be willing to supply the same of good quality and at a fair market price. The lessors sold the goodwill of their business and the reversion of the public-house to a brewer carrying on business at a neighbouring brewery, and expressly assigned to him the benefit of this covenant. In an action by the lessors and their assignee to restrain a breach of the covenant:—Held, that the covenant was assignable, and was not confined to persons carrying on business at the lessors' brewery, and that the plaintiffs were entitled to an injunction. *Doe* d. *Calvert* v. *Reid* (10 B. & C. 849), distinguished, Semble, the covenant ran with the land, and could be sued upon by an assignee of the reversion. *Clegg* v. *Hands*, 59 L. J., Ch. 477; 44 Ch. D. 503; 62 L. T. 502; 38 W. R. 433; 55 J. P. 180—C. A.

A covenant by the lessee of an hotel with the lessor, his heirs and assigns, not to sell or permit to be sold upon the demised premises during the term any wines or spirits other than shall have been supplied by or through the lessor (a wine and spirit merchant), or his successors or assigns, is a covenant touching the land, it runs with the land, and is binding on the assigns of the lessee, although assigns were not named in the covenant. The principles laid down in *Tatem* v. *Chaplin* (2 H. Bl. 133), *Clegg* v. *Hands* (59 L. J., Ch. 477; 44 Ch. D. 503), and *Fleetwood* v. *Hull* (58 L. J., Q. B. 341; 23 Q. B. D. 35), applied. *White* v. *Southend Hotel Co.*, 66 L. J., Ch. 387; [1897] 1 Ch. 767; 76 L. T. 273; 45 W. R. 434—C. A.

—— **Severance of Ownership of Reversion and of Lessor's Business.**]—The fact that the ownership of the reversion to the demised property has become severed from the ownership of the business of the lessor does not prevent the lessor or his representatives from enforcing such a covenant. *Ib.*

—— **Abatement of Rent on Observance of Covenant.**]—The assigns of the lessee, if they comply with the covenant and purchase their wines and spirits from the successors in business of the lessor, will be entitled to the benefit of a proviso for abatement of rent contained in the lease to which the lessee was entitled on his observance of the covenant. *Ib.*

The lease of a public-house contained a covenant that the lessee and his assigns would, during the term, purchase all beer required for the business from the lessors, a proviso for re-entry or nonpayment of rent, or nonperformance of the covenants, and a provision for reduction of the rent so long as the lessee should purchase beer from the lessors:—Held, that the covenant to purchase beer was an absolute one, and that the lessee had not the alternative of dealing with a rival brewer and paying the unreduced rent. *Hanbury* v. *Cundy*, 58 L. T. 155.

Covenant not to do anything whereby Licence "may be Forfeited."]—The lessee of a public-house covenanted not to "do or suffer to be done on the premises any act whereby the licences necessary for using the said premises as an inn, tavern, or public-house may be forfeited

or the renewal thereof withheld." He was twice convicted of offences as such tenant, and the convictions were indorsed on his licence. He assigned his lease, and a subsequent occupant of the premises obtained a renewal of the licence:—Held, that he had committed a breach of the covenant. *Harmann* v. *Powell*, 60 L. J., Q. B. 628; 65 L. T. 255; 56 J. P. 150.

The lessee of an inn covenanted to use and keep it open as an inn during the term, and not to do any act whereby the licences might become forfeited. The lessee having threatened to do certain acts, inconsistent with the first branch of the covenant, the lessor obtained an ex parte injunction restraining him from discontinuing to use and keep open the premises as an inn, and from doing any act whereby the licences might become forfeited, or be refused. But the injunction was afterwards dissolved, the court having no jurisdiction to restrain a person from discontinuing to use premises as an inn, which was the same in effect as ordering him to keep an inn; and no intention having been shown on the part of the defendant to violate the negative part of the covenant. *Hooper* v. *Brodrick*, 11 Sim. 47; 9 L. J., Ch. 321.

See also *Fleetwood* v. *Hull*, 58 L. J., Q. B. 341; 23 Q. B. D. 35; 60 L. T. 790; 37 W. R. 714; 54 J. P. 229 (ante, col. 1097).

11. As to Building.

a. By Lessee.

Not to erect Buildings — Hoardings.]—The erection of wooden hoardings for the purpose of advertisement fastened to the demised premises constitutes a breach of a covenant not to "erect or make any other building, or erection, on any part of the demised premises." *Pocock* v. *Gilham*, 1 Cab. & E. 104.

—— **Erection of Trellis-work Screen.**]—The erection of a wooden trellis-work screen which is substantial, and intended to be permanent, is a breach of a lessee's covenant not to erect or build on the demised premises or any part thereof any other building whatsoever except a stable or coach-house. *Wood* v. *Cooper*, 63 L. J., Ch. 845; [1894] 3 Ch. 671; 8 R. 517; 71 L. T. 222; 43 W. R. 201.

A screen of this kind interfered with the access of light to a neighbouring house let by the lessor to another tenant, and irrespective of such interference it was held to be a breach of a covenant not to do anything which might be an annoyance to any tenant of the lessor, on the ground that a reasonable person, having regard to the ordinary use of such house for pleasurable enjoyment, would be annoyed by it. *Tod-Heatley* v. *Benham* (40 Ch. D. 80) applied. *Ib.*

To Erect Buildings—Whether Running with the Land.]—*See* ante, col. 1098.

To Build within Specified Period.]—A builder agreed to take some land on a building lease, and to erect houses within a specified period, the landowner making him an advance; there was a clause of forfeiture, in default of their being completed within the time:—Relief against a forfeiture was refused to the builder, it appearing that the landowner had fully performed his part of the contract. *Croft* v. *Goldsmid*, 24 Beav. 312.

A. having a leasehold estate, on which he had covenanted to erect buildings within a certain time, bequeathed it and also his personal estate (subject as to the latter, to the payment of his debts), to trustees for B. for life, with several limitations over. A. died before the time expired, leaving the covenant unperformed in part:—Held, that his general personal estate was liable to the performance of the covenant. *Marshall* v. *Holloway*, 5 Sim. 196.

To New Build.]—Where a man in a building lease covenants to new build the brick messuages on the premises, rebuilding some and repairing others is not a sufficient performance of the covenant; for the lessee must rebuild the whole; neither is the pulling down and rebuilding the fore and back fronts a rebuilding within the covenant; upon such a covenant the lessors are entitled to a specific performance. Sed secus of a covenant to repair. In this case, however, the court, instead of decreeing a specific performance, left it to a jury to ascertain the damages sustained, and directed an issue accordingly. *London City* v. *Nash*, 3 Atk. 512; 1 Ves. 12.

To build Houses of Particular Style.]—Injunction to restrain the breach of a covenant that buildings shall be erected upon a general plan refused, the covenantee having acquiesced in a partial deviation from the plan and not having made immediate application to the court. *Roper* v. *Williams*, Turn. & R. 18; 23 R. R. 169.

A landlord who relaxes in favour of some of his tenants, a covenant entered into for the benefit of all, is not entitled to an injunction to restrain the other tenants from infringing that covenant. *Ib.*

Equity will execute a covenant that lessee's erection shall correspond with adjoining houses. *Franklyn* v. *Tuton*, 5 Madd. 469.

By an indenture, a messuage and outbuildings in the city of London were demised by the plaintiff to the defendants, for the purpose of being pulled down and new buildings erected on the site. The lease contained a covenant that the defendants would, within four years, "rebuild on the site of the messuage in a substantial, workmanlike manner, a new house and premises, suitable for merchants' and dealers' counting-houses, and sale-rooms":—Held, first, that the covenant did not involve any obligation to erect the new house in the same manner and in the same style and shape, and with the same elevation as the old building. *Low* v. *Innes*, 4 De G. J. & S. 286; 10 Jur. (N.S.) 1037; 11 L. T. 217.

Held, secondly, that even if it did, the implication would have been rebutted in the case before the court, inasmuch as the covenant stipulated that the new house and premises should be suitable for a purpose to which the old building was not applied. *Ib.*

The lease contained an agreement that such of the windows and lights in the new house and premises as occupied the site of ancient lights were to be considered as and should have all the rights of ancient lights:—Held, that this was merely an agreement between the parties amounting to an engagement by the lessees that, so far as they were concerned, and so far as they were owners of the adjoining property, the lights of the windows of the new house which should occupy the site of ancient lights should have the character of ancient lights; and that the extent of the covenant must be limited to such rights and such estate and interest as the landlords themselves might possess in the adjoining land. *Ib.*

The lease also contained a provision that certain entrances from the demised messuage and the yard in its rear into an adjoining court and gateway, and the right of carriage-way in respect of the messuage through such court, should be preserved:—Held, that the covenant must be construed with reference to the right of way, and the user of the right of way which had existed as far back as could be traced by evidence in respect of the demised premises. *Ib.*

Land let for specified Purpose—Erections inconsistent therewith—Injunction.]—An agreement between A. and B. provided that "Whereas the said A. is minded to provide a suitable residence and holding for the Roman Catholic officiating clergyman at and upon A.'s estate at L., and for that purpose to grant and let unto B. in trust for that purpose" certain lands at L. at a yearly rent, "to hold for and during such time and at all times hereafter, as there shall be and remain stationed at and upon the said hereby granted and demised lands and premises an officiating Roman Catholic clergyman at the chapel of L. duly appointed," &c. A clergyman in occupation of the land under this agreement placed upon it twenty movable huts which were occupied by tenants who had been evicted from their holdings upon A.'s estate:—Held, that the agreement was to grant and let for the specified purpose only; that the erection and maintenance of the huts constituted a user for a purpose other than that specified, and was a breach of the agreement which could be restrained by injunction. *Kehoe* v. *Lansdowne* (*Marquis*), 62 L. J., P. C. 97; [1893] A. C. 451; 1 R. 294; 57 J. P. 708—H. L. (Ir.)

Specified Number of Houses of specified Value.]—A lessee of land covenanted to build thereon two houses, with the approbation and under the inspection of the lessor's surveyor, and to expend in such building 400*l.* With the surveyor's approbation he built five houses on the land, no two of which were worth so much as 400*l.*, though all together were worth much more:—Held, that the covenant was substantially performed, and that there was no objection, on the ground of the deviation from its terms, under the circumstances, to the lessor's title. *Hume* v. *Bentley*, 21 L. J., Ch. 760; 16 Jur. 1109.

To make Area—Implied Obligation to keep open.]—An owner of a manor demised lands, part of the manor, for a long term, with a covenant to build houses thereon, and to make an area round such houses. The houses were built and an area made, according to the terms of the lease. The lessee subsequently subdemised one of the houses, by an instrument which did not recite, or refer to, the original lease, or contain any covenant respecting the area, but did contain a covenant to do suit and service at the courts of the manor. The sublessee, more than twenty years before the commencement of the suit, built over a portion of the area, and subsequently assigned his sub-lease to the defendant:—Held, that the covenant to make an area imposed a continuing obligation to keep the area open. *Herbert* v. *Maclean*, 12 Ir. Ch. R. 84.

Held, also, that the covenant to do service in the manor courts was sufficient to have put the sub-lessee and his assignee on inquiry, and that the assignee was bound to carry out the terms of the original lease. *Ib.*

To build Wall.]—Agreement for a lease, with a covenant that the lessee should build a wall round the land. A lease was executed by the lessor, but not by the lessee, which did not contain the covenant to build:—Held, after the death of the lessee, that a suit could not be maintained against his administrator having assets for a specific performance of the original agreement. *Blosse* v. *Prendergast*, 13 Ir. Ch. R. 373.

Liability of Mortgagee of Building Lease.]—Mortgagee of a building lease, where the lessee died insolvent, was decreed to build on the ground, and not to quit the lease, though content to lose his money. *Anon.*, 2 Freem. 253.

Scots Law—Restrictions in Feu Contract—Enforcement by Feuars of Adjoining Plots.]—It is settled by a series of decisions in the law of Scotland that where it appears that the restrictions in a feu contract are entered into for the benefit of other feus, either already existing, or to be created by the superior thereafter, the restrictions may be enforced by each co-feuar as far as his interest is concerned. But the fact of several feuars of neighbouring plots of building land in the same street holding from a common superior does not, by itself, entitle one of those feuars to claim the benefit of restrictions contained in the feu contract of another, unless some mutuality and community of rights and obligations is otherwise established between them, which can only be done by express stipulations in their respective contracts with the superior, or by reasonable implication from reference in both contracts to a common plan or scheme of building, or by mutual agreement between the feuars themselves. *Hislop* v. *Leckie*, 6 App. Cas. 560—H. L. (Sc.)

A.'s author was a party to a feu contract of a piece of land upon which a house was already built, and he was taken bound not to build any other buildings on the said piece of land except offices. The adjoining pieces of land were feued off, some being taken not to build and others having that right. It was not indicated in A.'s feu that the restrictions were imposed for the benefit of the co-feuars, beyond the facts that the feus were all given out nearly at the same time; that some of the conditions inserted in the feus are similar to each other; and that the houses being built in a square, produce a considerable degree of uniformity. B. and C., proprietors of a neighbouring feu, sought to prevent A. building a carriage show-room on the ground intervening between his house and the street of the square, and raised an interdict with the "consent and concurrence" of the superior; there was no condescendence or pleas in law for the superior:—Held (1), that the restrictive conditions as to building in A.'s feu contract were not in any sense jus quæsitum tertio; and (2), that the superior was not a party complainant in the action for own separate interest; and therefore B. and C. being strangers to A.'s contract, A. ought to have been assoilsied from the action. *Ib.*

b. By Lessor or on Severance of Land.

Not to build on Adjoining Land.]—Injunction granted to restrain the commissioners of woods from building on part of the site of Carlton Palace, in violation of one of the terms of an

agreement entered into by them with the plaintiffs for a building lease of an adjoining part of the site. *Rankin* v. *Huskisson*, 4 Sim. 13.

An act of parliament empowered the commissioners of woods and forests to make certain new streets according to a particular plan therein referred to, and to lease and enter into agreement for leasing the grounds in the lines of the new streets. Under this power leases were granted of two plots of ground upon which the lessees erected two particular houses in the line of one of the new streets. Each of the leases described the plot of ground which it demised, as being "on the north side of a new street then forming there, called," &c., "and as fronting towards the south on the said new street." The plan referred to in the act of parliament exhibited an open space in front of the sites of these houses, but that plan was not mentioned in either of the leases. The intended streets were completed, and the space in front of the houses was left open. The commissioners of woods and forests, and the paving committee of the parish, afterwards gave permission to certain persons to erect an equestrian statue in the open space, and those persons proceeded to place it upon a part of that open space, but without interfering with the line of the carriage way of the new street in which the houses stood. The lessees of the houses thereupon filed a bill to restrain the erection of the statue, alleging, that upon the treaty for the leases, the lessees were shewn the plan of the intended new street, and parts adjacent, by which it appeared that the space in question was to be quite open and free from all obstructions, and that it was upon the treaty represented and stated, that opposite the two houses a free passage would be left of certain dimensions, which would be contracted by the erection of the statue: they also alleged that the proposed erection would diminish the value of their property, and be a public and a private nuisance:—Held, that these circumstances did not entitle the lessees to an injunction to restrain the erection of the statue. *Squire* v. *Campbell*, 1 Myl. & C. 459; 6 L. J., Ch. 41.

Demise of a plot of ground, particularly described in the map drawn in the margin of the lease, with a covenant by the lessee to build and keep in repair, and a covenant by the lessor that the lessee should enjoy vistas through the adjoining trees as on the map, on which two points were marked A. and B., with a note that between those points a vista was to be maintained, the trees in it not to exceed a height of fourteen feet. A hedge and a space of five feet on other lands of the lessor adjacent to the boundary of the demised lands were marked on the map, with a note: "This hedge to be maintained by the grantor;" which note was not signed or incorporated by a reference in the lease. The lessor subsequently demised the adjacent land to C., who cut down the hedge and erected a wall between it and the boundary. The lessee filed an injunction to restrain C. from destroying the hedge, and from erecting the wall or any building inconsistent with the hedge being maintained for the benefit and advantage of the lands demised:—Held, that the court would not decree the specific performance of such a covenant, as being too vague, and in the nature of a covenant to repair. *Armstrong* v. *Courtenay*, 15 Ir. Ch. R. 138.

The defendant held two plots of building land, B. and C., under a lease which contained a covenant to build the houses not less than thirty feet apart, the effect of which was to secure to the houses on plot B. a sea view over plot C. H. having entered into a treaty with the defendant for an underlease of B., made inquiries of the defendant as to what could be built on the land in front. The defendant replied that he could not build on C. closer than thirty feet, as his lease did not allow it. H., after having inspected the original lease, took an underlease of B., containing a covenant by the defendant that he, his executors, administrators and assigns, would observe the lessee's covenants in the original lease. The defendant afterwards surrendered his lease to the ground landlord, took a new lease not containing the old restrictions, and commenced building on C. in a way which would obstruct the sea view from the houses on B. belonging to the plaintiff, who was the assignee of H.:—Held, that the rights of H. under the defendant's covenant to observe the covenants in the original lease, were not affected by the defendant's surrender of that lease, and that the plaintiff was on that ground entitled to an injunction to restrain the defendant from building in contravention of those covenants. *Piggott* v. *Stratton*, 1 De G. F. & J. 33; 29 L. J., Ch. 1; 6 Jur. (N.S.) 129; 1 L. T. 111; 8 W. R. 13. Affirming 1 Johns. 341.

Held, also, that even if, by reason of the surrender, the covenant was gone, the plaintiff was entitled to an injunction on equitable grounds, for that what the defendant had said to H. amounted to a representation that the defendant could not, during the term of his lease, build otherwise than in a particular way, which representation he was bound to make good. *Ib.*

The building lease contained a covenant by lessor to perform all the covenants contained in the original lease:—Held, that this was limited in its operations to the period during which the original lease was subsisting unsurrendered. *Ib.*

Erecting Wall instead of Houses.]—Land was sold, subject to a covenant entered into with a neighbouring landowner, that "no buildings, except dwelling-houses" to front a certain road, should be built thereon. The purchaser threw the land into his garden, and inclosed it by erecting thereon, along the side of the road, a wall 8 ft. 6 in. high for the greater part, but carried up in one part to the height of 11 ft. 6 in., for the purpose of forming the back of vineries and a greenhouse. In a suit for an injunction to restrain the wall from continuing:—Held, that the boundary garden wall 8 ft. 6 in. high was no breach of covenant, but the raising it for the purpose of the vineries was; but no substantial injury being caused, the court awarded damages instead of granting an injunction in respect of the breach. *Bowes* v. *Law*, 39 L. J., Ch. 483; L. R. 9 Eq. 636; 22 L. T. 267; 18 W. R. 640.

Erecting Stable instead of Houses.]—A covenant to the effect that private houses only, of a certain minimum value, are to be built on certain plots of land, is not broken by the erection on one of them of a stable with a bedroom over it, of such dimensions and in such a position that it would still be possible to build a house of the stipulated value upon the plot. *Russell* v. *Baber*, 18 W. R. 1021.

Covenant to erect Mill—Pleading.]—A., who was lessee of a farm, covenanted with B., his

lessor, to convey and carry all such materials as should at any time during the continuance of the term, be required in erecting a certain thrashing mill, which mill B. covenanted with A. to erect during the continuance of the term for the use of A. and the occupier of an adjoining farm. B. pleaded first, that within a reasonable time from the date of the deed, and during the continuance of the term, he began to provide the necessary materials for erecting the mill; and whilst it was in progress, A. desired him not to erect it until he should be requested by A.; and lastly, a plea of leave and licence during the term. Upon special demurrer it was held that both these pleas were insufficient. *Cordwent* v. *Hunt*, 8 Taunt. 596; 2 Moore, 660; 20 R. R. 578.

12. As to Timber and Trees.

Who has Property in.]—The general property in trees, or that which is likely to become timber, is in the landlord; and the general property in bushes or trees, not timber, is in the tenant; and the landlord cannot maintain trespass against a stranger for cutting bushes and thorns growing in a hedge, although cut improperly, if afterwards assented to by the tenant. *Berriman* v. *Peacock*, 2 M. & Scott, 524; 9 Bing. 384; 2 L. J., C. P. 23.

The landlord of a tenant from year to year, although there is no reservation of the timber on the premises, may support an action against a third person for carrying it away after it has been cut down. *Ward* v. *Andrews*, 2 Chit. 636.

A farmer who raises young fruit trees on the demised lands for filling up the lessee's orchards is not entitled to sell them. *Wyndham* v. *Way*, 4 Taunt. 316; 13 R. R. 607.

Otherwise of a nurseryman by trade. *Ib.*

Where a tenant from year to year is a nurseryman and market gardener, and plants trees for carrying on his business in both these trades, he may, at the determination of his tenancy, remove the young trees planted in the way of his business as a nurseryman, which were planted there for sale, but not those which he uses as a market gardener. *Wardall* v. *Usher*, 3 Scott (N.R.) 508; 10 L. J., C. P. 316; 5 Jur. 802.

And should any of the growing trees planted with the former object be left in the ground, so as to become fruit-bearing trees, it is then a question for the jury, in what character they were at the time of their asportation; whether they were saleable in the course of the business of the outgoing tenant as a nurseryman, or whether they belonged to the landlord, and the taking of them away constituted a trespass. *Ib.*

Where no custom is alleged of a tenant's power to cut down timber, it must be taken according to the common law, by which he has no power over it. *Edwards* v. *Heather*, Sel. Ch. Ca. 3.

Covenant not to cut, remove, or destroy.]—A covenant in an indenture of lease for twenty-one years from Michaelmas, that the tenant should not during the term cut down any of the coppice of less than ten years' growth, or at any unseasonable time of the year, but the landlord agreeing to pay to the tenant at the end of the term the value "of all such growth of coppice as should be then standing and growing," was held, according to its grammatical construction (uncontrolled by any other part of the instrument shewing a different intent), to bind the landlord, to whom the words of the covenant were to be attributed, to pay the tenant for the value of all the coppice of less than ten years' growth left standing on the demised premises at the end of the term, though no special consideration appeared on the face of the deed for the landlord's agreeing to make a compensation to the tenant for the value of such part of the coppice as the tenant was not entitled to cut. *Love* v. *Pares*, 13 East, 80.

A covenant in a lease to deliver up at the end of the term all the trees standing in an orchard at the time of the demise, "reasonable use and wear only excepted," is not broken by removing trees decayed and past bearing from a part of the orchard which was too crowded. *Doe* d. *Jones* v. *Crouch*, 2 Camp. 449.

A covenant not to remove or grub up trees is broken by removing trees from one part of the premises to another; and so it is by taking away the trees, even if the lessee plants a greater quantity than he takes away, unless those taken away were dead. *Doe* d. *Wetherell* v. *Bird*, 6 Car. & P. 195.

A lease was granted of a farm and tenement, and the quarries of paving and tile-stone in and upon the premises, with liberty and power to open and work the quarries, subject to a rent, excepting the quarries, and to the payment of a royalty for the stone obtained. Out of this demise was reserved and excepted "all timber trees likely to become timber, saplings, and all other wood and underwood which then were, or which should at any time thereafter be standing, growing, and being on the premises, and all mines or minerals which should thereafter be opened and found;" and the lease contained a covenant not "to commit any waste, spoil, or destruction, by cutting down, lopping, or topping any timber trees, or trees likely to become timber, saplings, or any other wood or underwood," and a power of re-entry for non-payment of rent, or if the lessee should commit any waste, spoil, or destruction by any of the ways or means aforesaid, and should not perform and keep the covenants contained in the lease. Assignees of the term having cut down and grubbed up saplings, wood and underwood for the necessary purposes of working a quarry on the premises:—Held, that the effect of the covenant was that the tenant should not so cut any of the trees excepted, so that such cutting should amount to the excess of the right which it was intended that he should exercise, and therefore that cutting them in a manner necessary to a reasonable exercise of the power to get the stone was no breach of the covenant. *Doe* d. *Rogers* v. *Price*, 8 C. B. 894; 19 L. J., C. P. 121.

Licence to cut — Lessor having Option to purchase.]—Under a liberty in a lease for the lessee to cut down and dispose of all timber and coppice, where there was also a proviso to give notice, in writing, to the lessor of the lessee's intention that the former might have the option of purchasing, a lessee gave a bonâ fide notice, and the lessor disclaimed any intention of purchasing:—Held, that the lessee might afterwards proceed to cut down the whole, without giving a fresh notice, at such seasons as suited his convenience even though the lessor had in the meantime parted with his interest to another. *Goodtitle* d. *Luxmore* v. *Saville*, 16 East, 87; 14 R. R. 305.

To pay for Trees planted by Tenant.]—A covenant by the lessor to pay for all trees planted by the lessee does not run with the land. *Grey* v. *Cuthbertson*, 2 Chit. 482; 1 Selw. N. P. 498; 4 Dougl. 351.

Covenant by Lessor to provide Timber for Repairs.]—Covenant to deliver timbers (growing on the premises) sufficient for the repairs thereof; averment, that there was timber growing on the premises sufficient for the repairs, but defendant had not delivered it. Plea, that there was not timber growing on the premises sufficient and proper for the repairs. Semble, that the covenant meant that the timber should be sufficient in quality as well as quantity, and that the plea was good (not having been demurred to) without stating that there was not timber sufficient for any part of the repairs. *Snell* v. *Snell*, 7 D. & R. 249; 4 B. & C. 741; 4 L. J. (o.s.) K. B. 44.

A lessor devised land by deed, excepting all timber, timber trees, and other trees, bushes and thorns, other than such bushes and thorns as should be necessary for the repair of the fences; the lessee covenanted to keep the fences in repair during the term, finding all materials, except that the lessor should find rough wood for such repairs, if growing upon the premises; and the lessor covenanted, during the term, to provide the lessee sufficient rough timber stakes and bushes, if growing on the premises, for doing such repairs:—Held, that the provision as to bushes and thorns necessary for repairs was not an exception out of the exception; but that all trees, bushes and thorns were excepted out of the demise, whether part of the fences or not, or whether necessary for repairs or not; and that on the trial of an action against wrongdoers, for cutting some of the bushes and thorns, a direction by the judge, that, if they were cut by them, the landlord was entitled to a verdict, was right, without previously putting any question to the jury whether the bushes, &c., were part of the fence, or were necessary for repairs. *Jenney* v. *Brook*, 6 Q. B. 323; 1 New Sess. Cas. 323; 13 L. J., Q. B. 376; 8 Jur. 782—Ex. Ch.

Tree delivered as House-bote.]—The bailiff of a manor assigned to a servant in April, pursuant to the terms of a lease, a tree for house-bote; the bailiff was discharged in July, and the tenant cut down the tree in October:—Held, a sufficient delivery, and that the tenant was entitled to fell the tree in October. *Courtenay* v. *Fisher*, 4 Bing. 3; 5 L. J. (o.s.) C. P. 4; 29 R. R. 487.

Cutting—When Waste.]—It is not waste in a lessee to cut down trees and timber, unless they are planted for the ornament or shelter of the house, or perform some important function, such as supporting a bank or the like, and provided also, that he cuts them so as not to destroy the germinative or reproductive power of the stools. Trees, even of the kinds that may become timber by attaining a growth of twenty years, may, if under that age, be cut by a lessee, provided they are cut seasonably, that is, according to what has been done either with the same trees, if springing from old stools, or other trees in the same place or the same neighbourhood, on former occasions. *Dunn* v. *Bryan*, 7 Ir. R., Eq. 143.

The principle that the cutting of saplings or young timber unfit to be felled is, under certain circumstances, equitable waste, does not apply to cases between landlord and tenant when the cutting of them is seasonable. *Ib.*

The mere cutting of a hedge in such a manner as that it will grow again is not waste; but grubbing up the thorns of which it is composed, or allowing the germins to be destroyed by the cattle, or cutting them so unseasonably or improperly as that they will not grow again and replace what has been cut, is waste. *Ib.*

Exception of Trees.]—If trees are excepted out of a demise, waste cannot be committed by cutting them down; and, therefore, ejectment cannot be brought as for waste committed in or upon the demised premises. *Goodright* d. *Peters* v. *Vivian*, 8 East, 190.

By an exception of "all trees, woods, coppice wood, grounds, of what kind or growth soever," apple trees are not excepted. *Wyndham* v. *Way*, 4 Taunt. 316; 13 R. R. 607.

An exception in a lease of lands in Dorsetshire of "all timber trees and other trees, but not the annual fruit thereof," does not include apple trees. *Bullen* v. *Dening*, 8 D. & R. 657; 5 B. & C. 842; 4 L. J. (o.s.) K. B. 314.

Where trees are excepted in a lease, the land on which they grow is necessarily excepted also; consequently, if the tenant cuts down the trees, the landlord may maintain trespass for breaking and entering his close and cutting down the trees. *Rolls* v. *Rock*, 2 Selw. N. P. 1287.

A demise "reserving all wood and underwood, timber and timber trees, standing, growing, or being on the demised premises, or at any time thereafter to stand or grow thereon, with full and free liberty of ingress and egress to take and carry away the same," secures to the owner of the inheritance the benefit of such trees as were upon the premises at the time of the demise. *Galway* v. *Baker*, West, 467; 7 Cl. & F. 379.

By a lease of a tenement, described as containing nineteen acres, save and except all timber trees, woods, underwoods, &c., six acres of the soil which, at the time of the lease, were covered with growing woods, are not excepted, but pass to the lessee. *Legh* v. *Heald*, 1 B. & Ad. 622; 9 L. J. (o.s.) K. B. 98.

A parol demise of land reserved to the landlord "all the hedges, trees, thorn-bushes, fences with lop and top":—Held, that such reservation operated as a licence to enter the land for the purpose of cutting and carrying away the trees. *Hewitt* v. *Isham*, 7 Ex. 77; 21 L. J., Ex. 35.

Remedies for Injuries.]—If a lessor, during the term, cuts down trees growing upon the demised premises, which are fit only for firewood, and the lessee takes them away, trespass will not lie against the lessee, at the suit either of the lessor or his vendee. *Chapman* v. *Patch*, 8 D. & R. 651. *S. C.*, nom. *Channon* v. *Patch*, 5 B. & C. 897; 4 L. J. (o.s.) K. B. 316.

A lessor during the term cut down some oak pollards growing upon the demised premises, which were unfit for timber:—Held, that as a tenant for life or years would have been entitled to them if they had been blown down, and was entitled to the usufruct of them during the term, the lessee could not, by wrongfully severing them, acquire any right to them, and consequently that he or his vendee could not maintain trespass against the tenant for taking them. *Ib.*

A tenant for a term of years cannot maintain trespass de bonis asportatis for timber cut down

on the demised premises. *Evans* v. *Evans*, 2 Camp. 491 ; 11 R. R. 777.

In an action of waste for cutting timber, the defendant cannot give in evidence, even in mitigation of damages, that the timber was cut for the purpose of necessary repairs, or that, turning out to be unfit for that purpose, it was exchanged by the lessor's consent for other timber, which was applied to the repairs. *Simmons* v. *Norton*, 7 Bing. 640 ; 5 M. & P. 645 ; 9 L. J. (o.s.) C. P. 185.

—— **Action by Executor.**]—An executor is entitled to sue a lessee of his testator on a covenant not to fell, stub up, lop, or top timber trees, excepted out of the demise, such breach having been committed in the lifetime of the testator. *Raymond* v. *Fitch*, 2 C. M. & R. 588 ; 5 Tyr. 985 ; 5 L. J., Ex. 45.

—— **Injunction against Landlord — Consent to Tenant's Plan of Improvement.**]—Injunction to restrain the landlord from cutting ornamental trees on a lawn during the term, upon his conduct amounting to a consent to the tenant's plan of improvement, laying out the lawn, &c. Sending a surveyor to mark out trees is a sufficient ground for an injunction. *Jackson* v. *Cator*, 5 Ves. 688.

13. Relating to Game—*See* Game.

14. To pay Rent—*See* ante, H.

15. For Renewal—*See* ante, E. 4.

16. Other Covenants.

a. Express.

That Trains should stop at Station.]—In a lease by a railway company of their refreshment-rooms at Swindon, the company covenanted with the lessee that all trains carrying passengers, not being goods trains, or trains to be sent express, or for special purposes, and except trains not under the control of the company, which should pass the Swindon station either up or down, should, save in case of emergency or unusual delay arising from accidents, stop there for refreshment of passengers for a reasonable period of about ten minutes, and that as far as the company could influence the same, trains not under their control should be induced to stop for the like purpose. The postmaster-general, having in the exercise of his power required that trains carrying mails should not stop at Swindon more than five minutes :—Held, first, that those trains were not as regards stopping under the control of the company ; and secondly, that the company was not by their covenant prohibited from carrying passengers by such trains. *Phillips* v. *G. W. Ry.*, 41 L. J., Ch. 614 ; L. R. 7 Ch. 409 ; 26 L. T. 157 ; 20 W. R. 562.

To leave Stock.]—Decree against lessee of alum works to prevent a breach of covenant, to leave stock of a certain amount at the expiration of lease. *Ward* v. *Buckingham* (*Duke*), cited 10 Ves. 161.

To raise China Clay and make Merchantable.]—A lease of china clay granted to the lessees licence to "dig, work, and search for china clay," . . . and "to raise and . . . wash, cleanse, prepare, and make merchantable and fit for sale, and to dispose of the same and to exercise the powers" granted by the lease, subject to the rent and royalties thereby reserved ; and the lessees covenanted to work for china clay in the most proper and effective manner, and with a reasonable number of able-bodied men kept employed on the works at all reasonable and usual working time so that the china clay might be raised and made merchantable as speedily as possible. There was a proviso for forfeiture and re-entry on failure in the performance of the covenants. For some months no fresh clay was got, but only the old stock was worked. Jessel, M.R., having refused to restrain the lessors from having possession, on the ground of forfeiture for breach of covenant : —Held, on appeal, that the refusal was right. *Kinsman* v. *Jackson*, 42 L. T. 558 ; 28 W. R. 601 —C. A.

To get Clay.]—A covenant in a lease binding the lessee to "get the demised clay to the fullest practicable extent consistent with the means of sale of bricks and tiles to be made therefrom," does not bind the lessee to go on working at a loss, even though a means of sale (at an unremunerative rate) might have been found for bricks made out of the demised clay. *Newton* v. *Nock*, 43 L. T. 197.

Fences—Enforcing Performance by Mandatory Injunction.]—Where the lessee of a brickfield, contrary to the covenants in his lease, caused the fall of one of the fences bounding the field by excavating the clay from under it :—Held, that a mandatory injunction in a negative form should be granted to compel the restoration of the fence to its former condition. *Ib.*

To make Road—Power to alter Roadway for particular Purpose.]—A lease contained a covenant by the lessors to make a road, and power was reserved to the lessors to alter the roadway for a particular purpose, provided they made another. Grantees of the lessors proposing to alter the roadway :—Held, that though the particular purpose specified in the covenant might not be their real motive, yet if they chose for its sake to do the particular act mentioned in the covenant, the lessee had no right to prevent their altering the roadway accordingly. *Butt* v. *Imperial Gas-light Co.*, 15 W. R. 92.

Power to take land for a particular purpose under a covenant is distinguishable from the same power under an act of parliament. *Ib.*

By Lessor to make Street within One Year—Breach, whether continuing.]—Lands described as bounded by a proposed new street were demised in 1872 to a lessee, whose interest became vested in the plaintiff in 1888. By the lease the lessor covenanted to make the new street within one year from the date thereof. The lessor died in 1878. The trustees of his will and his executor assigned his interest in the lease to the defendants. The street not having been constructed, the plaintiff sued the defendants in 1892 for breach of the covenant to make the street within one year :—Held, that the covenant was broken once for all when the year had elapsed, and long before the plaintiff's title accrued, and that therefore the plaintiff was not entitled to recover. *Morris* v. *Kennedy*, [1896] 2 Ir. R. 247—C. A.

Covenant in Lease of Chapel that no one should officiate but Regular Clergyman.]—The plaintiffs were the owners of a proprietary chapel, and in 1801 granted a lease of the chapel to one B., containing a covenant by the lessee not to "permit or suffer any clergyman or person to officiate in the said chapel, or perform public divine service therein, but such as shall be a regular clergyman of the Church of England." The lease was afterwards assigned to the defendants G. and F., who allowed D. to preach and perform divine service in the chapel. D. was a clergyman of the Church of England who had been inhibited by the bishop from performing divine service within the diocese in which the chapel was situated. The vicar of the parish had not consented to the performance by D. of service within the chapel:—Held, that "regular clergyman" meant a person who could officiate in the chapel without being guilty of irregularity, and that, as it was irregular of D. to pray and preach in defiance of the inhibition and without the vicar's consent, D. was not a regular clergyman, and must be restrained by injunction from continuing to officiate. *Foundling Hospital* v. *Garrett*, 47 L. T. 230—C. A.

To use Opera House only for Operas, and improve for that purpose—Non-user, whether a Breach.]—A lease of the Opera House contained a covenant by the lessee, that he would not convert the same to any other use than for performing operas, but would use his utmost endeavours to improve the same for that use and purpose:—Held, that the covenant was not broken by the lessee not opening the theatre for two seasons, and that it ought to be limited to keeping the house itself properly decorated and improved, with scenery and all appointments necessary to an opera house, and not that a lessee should be bound, at a loss, to keep it open for theatrical performances. *Croft* v. *Lumley*, 6 H. L. Cas. 672; 27 L. J., Q. B. 321; 4 Jur. (N.S.) 903; 6 W. R. 523.

To employ Particular Person to draw Assignments and Underleases—Assignment of Underlease.]—A lease granted by the warden and commonalty of the Mercers' Company contained a covenant that on the assignment of the lease or the grant of any underlease thereunder, the clerk to the company should be employed or a fine of 5*l.* be paid. The purchaser from an under-lessee of his underlease raised the objection that the assignment should be prepared by the clerk to the Mercers' Company or the penalty paid:—Held, that the objection was untenable as the covenant did not apply to the assignment of an underlease. *Collett* v. *Young*, 33 W. R. 543. Cp. *Haywood* v. *Silber*, 30 Ch. D. 404; 54 L. T. 108; 34 W. R. 114—C. A.

To employ Porter to perform certain Duties—Specific Performance.]—The defendants demised to the plaintiff a residential flat, the lease containing a covenant by the lessors to appoint a resident porter who should act as the servant of the tenants, and be constantly in attendance, either by himself or, in his temporary absence, by some trustworthy assistant. The defendants appointed as porter a man who spent a large part of his time elsewhere in performing other duties, and did not provide an efficient assistant:—Held, that this was not a contract of which the court would decree specific performance, and that the plaintiff must be left to his remedy in damages. *Ryan* v. *Mutual Tontine Westminster Chambers Association*, 62 L. J., Ch. 252; [1893] 1 Ch. 116; 2 R. 156; 67 L. T. 820; 41 W. R. 146—C. A.

To pay for Damage done in working Mines—Enforcement — Parties.] — Lease of lands is granted, reserving mines, &c., and a power of working them, lessor paying for damages done, which mines were leased to B. On bill for performance of covenants against representatives of lessor, B. need not be party. *Green* v. *Poole*, 5 Bro. P. C. 504.

Covenant violating Restrictions of Prior Settlement.]—Equity will not decree specific execution of a covenant in a lease violating the restrictions of a prior settlement, of which the lessee had notice. *Crafford* v. *Oliver*, 1 Ridgw. P. C. 315.

Licence to take Ice from Canal.]—A canal company, in consideration of the lessee's expenditure on certain ice-houses on the banks of the canal, granted a lease thereof, with licence to take ice from a part of the canal:—Held, that the licence was not exclusive, but that it was a grant of sufficient ice to enable the lessee to fill the ice-houses; and that, so long as the lessee was able and willing to take this quantity of ice, the lessors could not derogate from their grant by subsequent licences which would interfere with it. *Newby* v. *Harrison*, 1 John. & H. 393; 4 L. T. 397; 9 W. R. 849. Affirmed, 4 L. T. 424.

To keep Trespassers off Plantation.] — A dwelling-house, with grounds and ornamental water, were demised, together with the control of a plantation (which was on the opposite side of the ornamental water, and belonged to the lessor, but was not demised to the lessee), for the purpose of preventing trespassers thereon, but so as not to interfere with the persons employed by the lessor, his heirs or assigns. The lease referred to a plan on which the plantation was represented:—Held, that on the construction of the lease, as explained by the plan, the lessor was not at liberty, during the term, to destroy the plantation; and an injunction was granted to restrain him from so doing. *Nicholson* v. *Rose*, 4 De G. & J. 10.

Impossibility of Performance.]—The defendants agreed to let certain gardens and music-hall to the plaintiffs on four specified days to come, for the purpose of giving a series of concerts, at and for a specified rent for each of the days. The defendants were to provide a band of music and certain entertainments, and to issue advertisements of the entertainments. The plaintiffs were to pay 100*l.* in the evening of each of the days, to receive and take all the money paid by persons entering the gardens, and to provide the necessary artistes for the entertainments. After the agreement was entered into, and before the day arrived for the first concert, the music-hall was accidentally destroyed by fire:—Held, that as the existence of the hall was necessary for the performance of the contract, the defendants were excused from liability in respect of its non-performance, and that no action would lie against them. *Taylor* v. *Caldwell*, 3 B. & S. 826; 32 L. J., Q. B. 164; 8 L. T. 356; 11 W. R. 726.

Effect of Notice to Treat.]—A lessee is not freed from his covenants by a notice to treat, served by a railway company until the actual assignment of his interest. *Mills* v. *East London Union*, 42 L. J., C. P. 46; L. R. 8 C. P. 79; 27 L. T. 557; 21 W. R. 142.

Contract of Indemnity—Sub-Tenant—Covenants in Original Lease.]—The contract of a sub-tenant to perform the covenants of the head lease is a contract of indemnity. The plaintiff let certain premises to the defendant by a lease, which contained a covenant to repair. The defendant underlet the premises to H., by an agreement made "subject in all respects to the terms of the existing lease and the covenants and stipulations contained therein." The plaintiff sued the defendant for breaches of the covenant to repair; and notice of the plaintiff's claim was given by the defendant to H., who was subsequently made a third party under Ord. XVI. r. 18. The two cases were tried separately by an official referee, who reported that 54*l*. 2*s*. 6*d*. was due in each case as damages for non-repair. Judgment was given for the plaintiff for that sum against the defendant, who, in his pleadings, claimed from the third party the amount of the judgment and the costs of defending that action:—Held (per Brett, L.J., and Cotton, L.J.), that the defendant could recover these costs from the third party as damages, since the agreement between them amounted to an implied contract to indemnify him against such costs. *Hornby* v. *Cardwell*, 51 L. J., Q. B. 89; 8 Q. B. D. 329; 45 L. T. 781; 30 W. R. 263—C. A.

Insertion of Pursuant to Agreement.]—*See* ante, D. 7 (cols. 791 et seq.).

b. Implied.

That Property fit for Purpose for which it is Let.]—On a demise of land, or the vesture of land (as the eatage of a field), for a specific term at a certain rent, there is no implied obligation on the part of the lessor that it shall be fit for the purpose for which it is taken. *Sutton* v. *Temple*, 12 M. & W. 52; 13 L. J., Ex. 17.

Therefore, where A. agreed in writing to take the eatage of twenty-four acres of land from B. for seven months, at a rent of 40*l*., and stocked the land with beasts, several of which died a few days afterwards from the effects of a poisonous substance which had accidentally been spread over the field without B.'s knowledge:—Held, that A. was not entitled, therefore, to throw up the land, but continued liable for the whole rent. *Ib.*

There is no contract, still less a condition, whereby a lease would be void, implied by law on a demise of ascertained real property only, that it is fit for the purpose for which it was let. *Hart* v. *Windsor*, 12 M. & W. 68; 13 L. J., Ex. 129; 8 Jur. 150.

Where an intended lessor of a particular house knows that the house is in a ruinous state, and dangerous to occupy, and that its condition is unknown to the intended lessee, and that the intended lessee takes it for the purpose of residing in it, he is not bound to disclose the state of the house to the intended lessee, unless he knows that the intended lessee is influenced by his belief of the soundness of the house in agreeing to take it, or unless the conduct of the lessor amounts to a deceit practised upon the lessee. *Keates* v. *Cadogan* (*Earl*), 10 C. B. 591; 20 L. J., C. P. 76; 15 Jur. 428.

Not to use Adjoining Property so as to Injure Tenant's Goods.]—A landlord who lets part of his property for the purpose of a particular trade, is not to be taken as having entered into an implied contract precluding him from a reasonable and ordinary use of the remainder, on the ground that such use injures a particular class of his tenant's goods, it not having been known to him at the letting, and not being a matter of common knowledge that that particular class of goods was liable to be so injured, nor is such user by the landlord a breach of his covenant for quiet enjoyment. *Robinson* v. *Kilvert*, 58 L. J., Ch. 392; 41 Ch. D. 88; 61 L. T. 60; 37 W. R. 545—C. A.

To procure Land.]—A lease of a colliery contained an implied covenant on the part of the lessor to procure land by compulsory powers, in order to enable the lessees to make a railway to a neighbouring canal, without which they had no access to any available market. The lessor did not procure the land, but brought an action against the lessees for rent. The lessees, acting under the advice of their solicitor, paid the rent, and subsequently proceeded to arbitration under a clause in the agreement, and an award was made in their favour. The lessor having commenced a second action for rent, the lessees applied to the Court of Chancery for an injunction to restrain the action; for specific performance of the agreement to provide the land; for a declaration that the award was binding, and for a rectification of the lease if necessary:—Held, that the colliery being valueless without the land, and the provision of the latter being the basis of the agreement, the documents did not carry out the intention; that the whole matter was a failure, and the parties, as far as possible, must be put back in their original positions. *Acraman* v. *Price*, 24 L. T. 487; 19 W. R. 364.

That no Weeds grow on Farm.]—There is no implied warranty on the part of a lessor who lets land for agricultural purposes, that no noxious plants are growing on the demised premises. *Erskine* v. *Adeane*, 42 L. J., Ch. 835; L. R. 8 Ch. 756; 29 L. T. 234; 21 W. R. 802.

Letting Furnished Apartments.]—In an agreement to let a furnished house there is an implied condition that the house shall be fit for occupation at the time at which the tenancy is to begin, and if the condition is not fulfilled the lessee is entitled thereupon to rescind the contract. *Wilson* v. *Finch Hatton*, 46 L. J., Ex. 489; 2 Ex. D. 336; 36 L. T. 473; 25 W. R. 537.

The defendant agreed to rent the plaintiff's furnished house for three months from the 7th of May, but having at the beginning of the intended tenancy discovered that the house was unfit for habitation, owing to defective drainage, he refused to occupy it. The plaintiff repaired the drains, and on the 26th of May tendered the house in a wholesome condition to the defendant, who refused to occupy or to pay any rent. The plaintiff having sued for the rent and for use and occupation:—Held, that the state of the house at the beginning of the intended tenancy entitled the defendant to rescind the contract, and that he was not liable for the rent or for use and occupation. *Ib.* *See further*, post, cols. 1281 et seq.

To burn Lime.]—Where a lessee covenanted that he would, at all times and seasons of burning lime, supply the lessor and his tenants with lime at a stipulated price, for the improvement of their lands and repair of their houses:—Held, that this was also an implied covenant that he would burn lime at all such seasons; and that it was not a good defence to plead that there was no lime burned on the premises out of which the lessor could be supplied. *Shrewsbury* (*Earl*) v. *Gould*, 2 B. & Ald. 487; 21 R. R. 367.

Licence to Remove Fixtures.]—An underlease of a nursery ground contained an express covenant by the under-lessee to deliver up all landlord's fixtures thereon at the end of the term:—Held, that a representation and covenant by the grantors of the underlease that the under-lessee should be at liberty without hindrance from any one, to remove trade fixtures during the term, and that the grantors had not entered into covenants inconsistent with such right, could not be implied. *Porter* v. *Drew*, 49 L. J., C. P. 482; 5 C. P. D. 143; 42 L. T. 151; 28 W. R. 672; 44 J. P. 267.

To raise Certain Amount of Coal or Clay in each Year.]—A declaratiom alleged, that the plaintiff, being lessee of a coal-mine, underlet his interest in the same to the defendant, who covenanted to raise and work 13,000 tons of coal in each year, and pay at the rate of 8*d.* per ton royalty for the same, or pay that amount, namely, 433*l.* 6*s.* 8*d.*, as fixed rent, whether the coals should be wrought or not, and also 9*d.* for each ton over and above that quantity, to whatsoever extent the same might be wrought. Breach, that he had not raised 13,000 tons in each year, and paid at the rate of 8*d.* per ton for the same, or paid 433*l.* 6*s.* 8*d.*, as fixed rent. The defendant pleaded that, by the fair and proper working and getting of the coal claimed, the same was, before and at the commencement of the half-year, greatly exhausted, and a small portion only, being less than a fourth part of such 13,000 tons, was left, and remaining to be worked and raised:—Held, that this was an absolute covenant by the defendant, that he would raise 13,000 tons of coal yearly; or, if not, that he would pay the fixed rent; and that there was no implied condition that there existed coals to the amount of 13,000 tons yearly capable of being worked. *Bute* (*Marquis*) v. *Thompson*, 13 M. & W. 487; 14 L. J., Ex. 95. S. P., *Mellers* v. *Devonshire* (*Duke*), 16 Beav. 252; 22 L. J., Ch. 310; 1 W. R. 44.

A. demised to B. certain pits of clay on his land for twelve years, B. to pay 2*s.* 6*d.* per ton for all clay raised half-yearly. B. covenanted to raise not less than 1,000 tons, nor more than 2,000 tons yearly:—Held, that this was not an absolute covenant by B. that he would raise 1,000 tons of clay yearly, or, if not, that he would pay the rent, and that there was an implied condition that there existed clay to the amount of 1,000 tons yearly, capable of being raised. *Clifford* v. *Watts*, 40 L. J., C. P. 36; L. R. 5 C. P. 577; 22 L. T. 717; 18 W. R. 925.

Not to seek Reversionary Lease.]—The reservation of a reversion by the intermediate landlord does not create an implied contract between him and the sub-lessee, that the latter shall not seek to obtain for his own benefit a reversionary lease of the premises from the head landlord. *Maunsell* v. *O'Brien*, 1 Jones, 176.

To pay Fine over and above Rent.]—A covenant by a lessee, his heirs and assigns, to pay a fine of 40*l.* upon the expiration of a term of sixty-one years, does not amount to a reservation obligatory upon the tenant in possession, to pay the fine over and above the rent reserved. *Inchiquin* v. *Burnell*, 3 Ridgw. P. C. 376.

N. OTHER RIGHTS AND LIABILITIES OF LANDLORD AND TENANT.

1. Tenant's Power to Dispute Title.

Principle.]—A tenant may not deny his landlord's title, because, if that title is bad, the tenant's first duty is to give up possession which he received from the landlord, and not to defend an action against him. *Agar* v. *Young*, Car. & M. 78.

Who Estopped—Assignee.]—An assignee of a lease by indenture is estopped by the deed which estops his assignor. *Taylor* v. *Needham*, 2 Taunt. 278; 11 R. R. 572.

An assignee of a void lease, who has, on coming into possession, had notice that the lease was held under a particular person, to whom the former tenant has paid rent, is estopped from disputing the title of that person in replevin. *Johnson* v. *Mason*, 1 Esp. 89.

A., gaining possession under an assignment of a lease for years, and paying rent under it, shall not be allowed to change the nature of such possession, and to set up a title to the fee by accepting a conveyance of the fee from persons claiming adversely to those under whom the lease is held, although the right be in such persons; nor will the act of A., and those under whom he derives, treating such interest as freehold for several years, conveying and settling it as such, give a title different from that under which the possession was originally gained. *Saunders* v *Annesley* (*Lord*), 2 Sch. & Lef. 73.

Tenants, by agreement among themselves, doing anything to embarrass the tenure, landlord has a right to the assistance of equity. *Ib.*, 108.

—— **Lessee.**]—Ejectment for two stamping-mills on the demise of H. The mills had been let to a mining company by H. from year to year, and notice to quit had been given by him to the company. On the day of the demise in the declaration H. was a partner in the company, and the defendant who was another partner, defended on behalf of the company. At the trial, it was ruled that the defendant was estopped from disputing the title of H., although H. had admitted, in an answer in chancery which was in evidence, that he had no legal title:—Held, that the defendant was estopped from disputing H.'s title, notwithstanding H. was a partner with him in the company. *Francis* v. *Doe* d. *Harvey*, 4 M. & W. 331; 1 H. & H. 362.

A lessee, after executing a lease, cannot dispute the title of either of his lessors. *Wood* v. *Day*, 1 Moore, 389; 7 Taunt. 646.

But he may shew that his landlord's title has expired. *Neave* v. *Moss*, 1 Bing. 360; 8 Moore, 389; 2 L. J. (o.s.) C. P. 25.

Where A. claimed to hold lands under B. as a security for a debt:—Held, that he could not defend an ejectment by the assignees of B. after his bankruptcy, on the ground that the grant under which B. derived his title from the crown

was void. *Doe* d. *Biddle* v. *Abrahams*, 1 Stark. 305.

Upon non est factum pleaded, the lessee in possession cannot controvert the title of his lessor to demise. *Friend* v. *Eastabrook*, 2 W. Bl. 1152.

A tenant covenanted in a lease to deliver up at the expiration of his term certain fixtures on the premises. The term expired on the 1st April. On the 10th the landlord demanded possession. On the 13th the tenant received notice from a mortgagee that he was entitled to possession, and that he demanded payment of the rent, and on the same day the tenant bought the mortgagee's interest. The landlord having afterwards brought an action for breach of the covenant, in not delivering up the fixtures:—Held, that the tenant was not estopped from denying the landlord's title to the fixtures. *Watson* v. *Lane*, 11 Ex. 769; 25 L. J., Ex. 101; 2 Jur. (N.S.) 119; 4 W. R. 293.

R., who had possession, but no title, let lands by parol to the defendant for a term of two years, within which period R. by deed assigned the lands to the plaintiff, who, before the expiration of the two years, demanded possession from the defendant and brought an ejectment against him:—Held, that the defendant was estopped from denying the title of R., under whom the plaintiff derived his title, and that the plaintiff was entitled to recover. *Ward* v. *Ryan*, Ir. R. 10 C. L. 17—Ex. Ch.

Where a person entitled as coparcener to a portion of the rents and profits of land makes a lease of the whole, under which the tenant enters and pays rent as for the whole until lessor's death, the tenant is estopped from denying that the heir, and privy in blood to the lessor is entitled to the whole of the land. *Weeks* v. *Birch*, 69 L. T. 759.

Upon an information to set aside a lease for ninety-nine years of charity lands, the defendants, the lessees, set up a title adverse to the lease; upon the merits it was held that there was no ground for the defence; but the court was of opinion that if the merits had been otherwise, the defendants were estopped, and could not dispute the title, while they retained the possession. *Att.-Gen.* v. *Hotham*, 3 Russ. 415. Affirming Turn. & R. 209; 24 R. R. 21.

Semble, the lessees ought not to have been permitted to enter into evidence, upon the principle that the plea of nil habuit in tenementis could not have been pleaded at law. A mere husbandry lease of charity land for ninety-nine years at a uniform rent cannot be supported. *Ib.*

The act of a tenant disclaiming his landlord's title, and admitting title in a third person, shall not affect his landlord's title, if the landlord have no knowledge of, or does not acquiesce in, such act. *Horenden* v. *Annesley* (*Lord*), 2 Sch. & Lef. 624.

But if the landlord, having notice of such act of disclaimer, does not proceed for the forfeiture, but acquiesces, the Statute of Limitations will run against him, as in ordinary cases. *Ib.*

Lessee cannot dispute the title of his landlord. *White* v. *Foljambe*, 11 Ves. 344. S. P., *Wilson* v. *Townshend* (*Lord*), 2 Ves. J. 696; 3 R. R. 31.

Evidence of the existence of a tenancy is conclusive in favour of the landlord's title; and after such evidence to the satisfaction of a jury, the tenant cannot be allowed to prove even a title in himself to the premises in question, during any part of the time covered by the tenancy. *Doe* d. *Humphrieys* v. *Hawkes*, 4 L. J. (O.S.) K. B. 216.

A tenant, though threatened with suits at law on a title adverse to his landlord's, cannot make them interplead, semble. *Smith* v. *Target*, 2 Anstr. 529.

A tenant cannot file an interpleading bill against his landlord. Where one claimant seeks a certain rent from the tenant in possession, and the other unliquidated damages for use and occupation, he cannot make them interplead. *Johnson* v. *Atkinson*, 3 Anstr. 798.

Tenant cannot file a bill of interpleader against his landlord on notice of ejectment by a stranger, under a title adverse to that of the landlord. On suspicion of collusion an inquiry into the circumstances was directed, and, the report confirming the fraud, the bill was dismissed with costs to the landlord, as between attorney and client, to be paid by the plaintiff and his solicitor, the latter to shew cause why he should not be struck off the roll. *Dungey* v. *Angove*, 2 Ves. J. 303; 2 R. R. 217.

A. B. leases to C. D. the T. ferry and all the rights of shore thereunto appertaining, with a covenant by A. D. not to erect any building upon the ferry or landing place without the consent in writing of A. B. C. D., upon obtaining verbal permission from A. B., commenced building a bridge upon the foreshore; and subsequently, in January, 1852, executes a deed tendered to him by A. B.'s solicitor, acknowledging, in consideration of permission to complete the bridge, the right to insist upon its removal, and agreeing to pay C. D. the yearly rent of 20*l.* for the concession, and 500*l.* on failure to remove the bridge after notice. C. D. subsequently discovers that the title to the foreshore upon which the bridge is built is claimed by the Crown—a circumstance in the knowledge of A. B. in January, 1852—obtains a lease of the soil from the Crown, but continues to pay rent to both A. B. and the Crown. Upon notice from A. B. to remove the bridge, and action brought for the 500*l.* penalty accruing from non-compliance, C. D. files a bill against A. B. to set aside the deed of January, 1852, for an account of the rent paid, and in restraint of the action:—Held, upon demurrer, that C. D. being in possession either under the original lease or the deed of 1852 could not set aside that contract without also giving up possession; and that in order to retain possession, he could not set up the adverse title of the Crown. The bill containing no offer to restore the property to A. B., demurrer allowed. *Willoughby* v. *Chamberlaine*, 5 W. R. 328.

To an action of debt for rent, a plea admitted the demise by the plaintiff and stated that afterwards the plaintiff petitioned the Court of Insolvent Debtors, and that an assignee was appointed to whom the premises were assigned; and that the plaintiff having been permitted to remain in possession and authorised by the assignee to demise, afterwards the assignee gave notice to the defendant to pay the rent to him, whereby he became liable to pay to the assignee:—Held, bad, for as on the plea it was admitted that the demise by the plaintiff still existed, and as there was no direct allegation that the demise was made by the plaintiff as agent to the assignee, the defendant was not at liberty to set up the title of the assignee against the claim of the plaintiff under the demise. *Partington* v. *Woodcock*, 4 L. J., K. B. 239.

Party in possession under the title of A., taking a conveyance, though for valuable consideration, from one who claims a title adverse to that of A., is guilty of covin, which would avoid the transaction at law. *Underwood* v. *Courtown* (*Lord*), 2 Sch. & Lef. 64.

A. B. having been in possession of a dwelling-house from 1822, without paying any rent for the same, by his will, dated in 1837, devised the same upon trust for sale for the benefit of his wife for life, and afterwards for his children. A. B. died in 1837, and his widow took out letters of administration with the will annexed, and entered into possession of the house, a portion of which she let in 1850 to C. D., the eldest son of A. B., as a weekly tenant. The widow died in 1852, and thereupon C. D. claimed the house as occupant, contending that A. B. had not at his death a devisable interest in it:—Held, that it must be taken that the widow had been in possession under the will, and that C. D. was her tenant, and therefore that C. D. could not claim as occupant. *Hawkshee* v. *Hawkshee*, 23 L. J., Ch. 521.

Where a lease, renewable for ever, had expired by the dropping of the lives, so that, in fact, only a tenancy from year to year existed, but the owner in fee of the lands, the tenants, and their sub-tenants, had all been acting for years on the terms of the lease, which was at length duly renewed:—Held, that no one of them could subsequently set up in equity claims adverse to the several characters they bore under such lease and the sub-lease. *Archbold* v. *Scully*, 9 H. L. Cas. 360.

An owner in fee of land, prior to mortgaging it for a term of years, put A. into possession. A. occupied for twenty-five years without payment of rent or written acknowledgment of the mortgagor's title. A. then conveyed in fee to the plaintiff, and after attorning to him as his tenant gave up possession for a sum of money to B., the representative of the mortgagor, and to C., the executor of the mortgagee (whose mortgage had been kept alive by payment of interest). B. and C. afterwards joined in a conveyance of the premises to the defendants:—Held, in ejectment, that the defendants were not estopped from setting up their title to the premises. *Ford* v. *Ager*, 2 H. & C. 279; 32 L. J., Ex. 269; 9 Jur. (N.S.) 804; 8 L. T. 546; 11 W. R. 1073.

—— **Under-lessee.**]—If B., claiming under A., lets lands for a year to C. and dies, and A. afterwards brings an ejectment against C., C. cannot dispute the title of A. *Barwick* d. *Richmond Corporation* v. *Thompson*, 7 Term Rep. 488; 4 R. R. 499. And see *Bryan* d. *Child* v. *Winwood*, 1 Taunt. 208; 9 R. R. 751.

Where a tenant occupied apartments in a house belonging to a wife, and paid rent to the husband, who subsequently granted a lease of the whole house to the plaintiff:—Held, that having occupied with notice of the lease, he could not impeach its validity, nor controvert the plaintiff's title. *Rennie* v. *Robinson*, 1 Bing. 147; 7 Moore, 539; 1 L. J. (O.S.) C. P. 30; 25 R. R. 604.

—— **Parties to an Arbitration.**]—Where the lessor of the plaintiff and the defendant in ejectment have before referred their right to the land to an arbitrator, who has awarded in favour of the lessor; the award concludes the defendant from disputing the lessor's title in an ejectment. *Doe* d. *Morris* v. *Rosser*, 3 East, 15.

—— **Tenant by Attornment.**]—A tenant who attorns to a party from whom he did not receive the possession, is not estopped from shewing want of title in such party. *Cornish* v. *Searell*, 1 M. & Ry. 703; 8 B. & C. 471; 6 L. J. (O.S.) K. B. 254.

Where the avowants proved an attornment made by the plaintiff after ejectment brought against him seven years before the commencement of the replevin suit, during which period it did not appear that the rent had been demanded; and the plaintiff offered to prove a feoffment to himself by the person under whom the avowants claimed; and certain letters written by such persons, containing expressions adverse to the avowants' claim, were rejected, on the ground that the plaintiff could not be permitted to dispute his tenancy after an attornment:—a new trial was granted. *Gravenor* v. *Woodhouse*, 7 Moore, 289; 1 Bing. 38; 25 R. R. 582.

—— **Lessor.**]—In ejectment, a person defending as landlord is bound by the same estoppel as the tenant in possession. *Doe* d. *Manvers* v. *Mizen*, 2 M. & Rob. 56.

A lessor in an ejectment brought to recover a cellar is not estopped by his deed from going into evidence to shew that the cellar was not intended to be demised. *Doe* d. *Freeland* v. *Burt*, 1 Term Rep. 701; 1 R. R. 367.

On Payment of Rent.]—Payment of rent is primâ facie evidence of the title of the landlord. *Doe* d. *Clun* v. *Clarke*, Peake's Add. Cas. 239.

A tenant who has paid rent cannot set up the title of a third person, in bar of an ejectment by his lessor. *Doe* d. *Bristowe* v. *Pegge*, 1 Term Rep. 760, n.; 4 Dougl. 309.

The plaintiff had been let into possession of premises, as tenant for a year, by N., six months' notice to be given on either side, and had paid rent to him. Before the end of the year the defendant went to the plaintiff and claimed title, and desired that the rent in future should be paid to himself. The plaintiff, in order to be satisfied of the truth, went with the defendant to N., who admitted the defendant's title, and that the plaintiff must consider him landlord:—Held, that the plaintiff, who assented and subsequently paid rent to the defendant, could not contest his title. *Hall* v. *Butler*, 2 P. & D. 374; 10 A. & E. 204; 8 L. J., Q. B. 239. See *Jew* v. *Wood*, 1 Cr. & Ph. 185; 5 Jur. 954.

P., N., and the plaintiff, occupied successively premises, under a lease that had been granted in 1809, by parties having no right to make a lease. The defendant in 1827 became possessed of the fee. In 1829 and 1831 respectively, the defendant distrained on P. and on N. for arrears of rent, which they paid:—Held, that these payments amounted to such an acquiescence by P. and N. in the title of the defendant, that they, and those deriving possession from or under them, were estopped from disputing it; and this although the defendant himself produced the lease of 1809, and failed to shew that it had been assigned to him. *Cooper* v. *Blandy*, 4 M. & Scott, 562; 1 Bing. (N.C.) 45; 3 L. J., C. P. 274.

G. demised premises to D., who entered and paid him rent. During the term, a third party, T., disputed G.'s title, and they agreed to be bound by the opinion of a barrister, who decided in T.'s favour. G. thereupon delivered up the title deeds, and permitted T.'s attorney to tell D., the tenant, that he must, in future, pay the rent to T. as his lord. D. then paid rent accordingly,

but G. afterwards distrained upon him for the same rent:—Held, that G.'s claim of title as landlord to D. had expired; that his conduct amounted to an admission of that fact, and that D. was not estopped from alleging it; and, per Lord Denman, C.J., that G. was estopped from setting up his relation of landlord against the defendant, having himself induced D. to pay rent to another person. *Downs* v. *Cooper*, 2 Q. B. 256; 1 G. & D. 573; 11 L. J., Q. B. 2; 6 Jur. 622.

Land was vested in trustees to apply the rents to the repair of a parish church. Those trustees in 1818 demised to S. for ten years, and again in 1828 for ten years more, which lease expired in 1838. During the lease S. assigned to the plaintiff, and after the expiration of it the plaintiff continued in possession under the trustees, paying rent to them. The trustees afterwards, and after the 59 Geo. 3, c. 12, came into operation, viz. in 1842, assigned by deed to new trustees, two of whom were the churchwardens of the parish at the time that a distress for rent was made:—Held, that the payment of rent to the old trustees was evidence of a new taking under them as tenant from year to year, which precluded the plaintiff from contesting the title of the old trustees, and that the new trustees, who claimed under them by deed of assignment, had a good title by estoppel. *Gouldsworth* v. *Knights*, 11 M. & W. 337; 12 L. J., Ex. 282.

—— **Assignee of Reversion—Jus tertii.**]—Where a person claiming to be assignee of the reversion receives rent from the tenant by fraud or misrepresentation, such payment is no evidence of title; but where there is no fraud or misrepresentation such payment is primâ facie evidence of title and the tenant can only defeat that title by shewing that he paid the rent in ignorance of the true state of the title, and that some third person is the real assignee of the reversion and entitled to maintain ejectment. Hence, in an action for rent by the alleged assignee of the reversion, where rent had been paid by the tenant to the agent of the alleged assignee, it was held to be no defence for the tenant merely to shew that the alleged assignee had no title to the reversion. *Carlton* v. *Bowcock*, 51 L. T. 659.

Other Acknowledgment of Title.]—The defendant, in March, 1832, took premises from F. and B., "agents for the trustees of the joint estates of T. and S. B." Upon the trial of an action for use and occupation by the plaintiffs, "as trustees of the joint estate of T. and S. B." against the defendant, it appeared by the plaintiffs' own evidence that in 1831 they were trustees for the estate of S. B. only:—Held, that the defendant was estopped from taking advantage of this discrepancy, having, in 1832, taken the premises of the plaintiffs as trustees of the joint estate. *Fleming* v. *Gooding*, 4 M. & Scott, 455; 10 Bing. 549; 3 L. J., C. P. 214.

If one party takes an interest in land under another, although that interest is wrongfully acquired, he cannot afterwards dispute the title of the person under whom he took that interest. *Doe* d. *Johnson* v. *Baytup*, 4 N. & M. 837; 3 A. & E. 188; 1 H. & W. 270; 4 L. J., K. B. 263.

A. having, without title, entered upon land, and built a cottage, afterwards accepted a lease (by indenture) from B.; C., claiming the land as his own, paid to A. 20*l.* to give up the possession to him:—Held (in ejectment by B. against C.), that A. estopped himself from controverting the title of B., and that C. was bound by the estoppel, as having come in under and received the possession from B. *Doe* d. *Bullen* v. *Mills*, 4 N. & M. 25; 2 A. & E. 17; 1 M. & Rob. 385; 4 L. J., K. B. 10. See *Doe* d. *Rutzen* v. *Lewis*, 6 N. & M. 764; 5 A. & E. 277; 2 H. & W. 162.

In replevin, the landlord's title, under which the tenant has gained possession of the premises, cannot be disputed, although the tenant is prepared with evidence to shew that the premises have been fraudulently conveyed to the landlord, and that the actual title is vested in another person. *Parry* v. *House*, Holt, N. P. 489.

Previously to 1812, a person built a house on a piece of waste ground, and, before he acquired a title to it, gave up possession to the tenant of the adjoining land, who held it under a lease granted in 1812. The latter let the premises to the defendant:—Held, in ejectment by the landlord of the adjoining land against the defendant, that the latter was estopped from denying the title of the tenant, and the tenant from disputing that of the landlord. *Doe* d. *Wheble* v. *Fuller*, 1 Tyr. & G. 17.

On Mistake or Misrepresentation.]—Where a tenant, by mistake or misrepresentation, pays rent to a person not entitled to demand it, he is not precluded by such payment from giving evidence, on a plea of non tenuit, in replevin against the supposed landlord, to shew that the latter is not entitled to the rent. *Rogers* v. *Pitcher*, 1 Marsh. 541; 6 Taunt. 202.

An acknowledgment of title by a tenant, in one who claims as heir-at-law of the person under whom the tenant had previously held, will not preclude the latter from calling in question the title of the claimant, under a plea of non tenuit, if it appears that the acknowledgment proceeded from a misrepresentation or misapprehension of the nature of the title set up. *Gregory* v. *Doidge*, 11 Moore, 394; 3 Bing. 474; 4 L. J. (O.S.) C. P. 159.

Payment of rent to, or even an express agreement with, one who claims to be landlord, does not preclude the tenant from afterwards shewing that the party claiming had no title, and that the payment or other acknowledgment was induced by misrepresentation or made under mistake, the tenant not having been originally let into possession by the claimant. *Claridge* v. *M'Kenzie*, 4 Scott (N.R.) 796; 4 Man. & G. 143; 11 L. J., C. P. 72.

A. demised a house and lands to B., and afterwards, being embarrassed, assigned the premises and all his personal estate to C. A. told B. that he had assigned the premises, and requested him to give C. an acknowledgment, whereupon B. gave C. a shilling, and subsequently agreed with C. to give up possession to him of the house and lands respectively, at the usual times, reserving an allowance for his improvements. Afterwards, and while the premises were still in B.'s occupation, A. became bankrupt, and C. brought ejectment. The assignees under A.'s commission defended as landlords, and contended that the assignment to C. was invalid, A. having become bankrupt when he made it:—Held, that the acknowledgments above mentioned did not estop B., or the assignees as representing him, from contesting C.'s title on the above ground, such acknowledgments having been made in consequence of A.'s representations, in which he suppressed the facts rendering the assignment

invalid. *Doe* d. *Plevin* v. *Brown*, 2 N. & P. 592; 7 A. & E. 447; W. W. & D. 677; 8 L. J., Q. B. 49.

A landlord of premises dying, the tenant, whose term had not expired, paid rent to the devisee, and signed an agreement for a further period of occupation, on being told that the premises were devised to him:—Held, that, in ejectment against the tenant by the devisee, he could not offer evidence that the devise was void by reason of incapacity in the testator, no ground being shewn for imputing fraud to the devisee in the communication made by him to the tenant. *Doe* d. *Marlow* v. *Wiggins*, 4 Q. B. 367; 3 G. & D. 504; 12 L. J., Q. B. 177; 7 Jur. 529.

Title or Interest, Limited or Defective.]—A lessee for years, who covenants to deliver up possession of the premises, at the expiration of the term, to his lessor, his heirs and assigns, is not estopped by such covenant from shewing, after the death of the lessor or the determination of the lease, that the lessor was only tenant for life of the premises demised. *Doe* d. *Strode* v. *Seaton*, 2 C. M. & R. 728; 1 Tyr. & G. 19; 1 Gale, 303; 5 L. J., Ex. 73.

The interest of a tenant for life and a reversioner are the same, and therefore a lessee who has paid rent to the first cannot set up title in another person as an answer to an action by the latter after the death of the former. *Doe* d. *Colemere* v. *Whitroe*, D. & R., N. P. C. 1; 25 R. R. 769.

If a lessor, who has only an equitable title, grants a lease, he has, as against his lessee, a good title by estoppel. *Doe* d. *Marriott* v. *Edwards*, 6 Car. & P. 208; 3 N. & M. 193; 5 B. & Ad. 1065.

A., having mortgaged to B., demised to C., reserving a power of re-entry, and afterwards mortgaged to D. all his interest. C. may set up the title of D. as an answer to an ejectment brought by A. under the clause for re-entry. *Ib.*

W., a lessee of premises for a term of seventy-five years, mortgaged the lease to T., and joined with him in an indenture, by which, after reciting the mortgage, the premises were demised to J. for twenty-one years. The mortgage was assigned to S., and by indenture, to which S. and W. were parties, after reciting the lease to J., that lease was assigned to M. This assignment contained a covenant by M. and W., that M. would not demise or assign the premises without the licence and consent of W., with a proviso for re-entry if he did. M. paid rent to W., and afterwards assigned the premises to K. without the licence or consent of W. In ejectment by S. and W.:—Held, first, that M. was not estopped from shewing that W. was not the legal owner of the reversion, but mortgagor only, and that W., having a mere equitable interest, could not recover. *Saunders* v. *Merryweather*, 3 H. & C. 902; 35 L. J., Ex. 115; 11 Jur. (N.S.) 655; 13 W. R. 814.

Held, secondly, that S. could not recover, because no right of re-entry was reserved to him. *Ib.*

In an action for use and occupation, under the issue of non assumpsit, the defendant may give in evidence that the plaintiff had mortgaged the premises before the defendant came into occupation, and that the mortgagee had given notice to the defendant not to pay to the plaintiff any rent becoming due after such notice. *Waddilove* v. *Barnett*, 2 Bing. (N.C.) 538; 2 Scott, 763; 4 D. P. C. 347; 1 Hodges, 395; 5 L. J., C. P. 145.

Obedience to the mortgagee's notice as to rent due before the notice must be specially pleaded. *Ib.*

A lease, granted under a power contained in a settlement, recited the title of the lessor, and shewed that he had only an equitable interest; a right of re-entry for a breach of covenants in the lease was reserved to the lessor and his assigns:—Held, that the lessee was not estopped from disputing the title of the lessor so disclosed in the lease. *Greenaway* v. *Hart*, 14 C. B. 940; 2 C. L. R. 370; 23 L. J., C. P. 115; 18 Jur. 449; 2 W. R. 702.

By a will, a power was given to a tenant for life to demise for twenty-one years, and to executors to mortgage in fee or for years. In 1812, after the testator's death, the tenant for life made a grant for ninety-nine years, if he should so long live; in 1814, he demised, under his power, for twenty-one years; in 1828, the executors mortgaged for 1,000 years, under their power. To an action by the mortgagee for rent arising under the lease for twenty-one years:—Held, that the lessee could not set up as a defence the interest of the grantee for ninety-nine years. *Bringloe* v. *Goodson*, 4 Bing. (N.C.) 726; 6 Scott, 502; 1 Arn. 322.

If A. is put into possession of a cottage by parish officers, and the lord of the manor prevails on A. to give up possession of the cottage to him, and the lord of the manor puts B. into possession, and the parish officers bring an ejectment against B., B. cannot set up a title in the lord of the manor, as, under these circumstances, neither the lord of the manor nor B. can set up any title which A. could not set up; and if the cottage really belonged to the lord of the manor, he must bring an ejectment for it. *Doe* d. *Haden* v. *Burton*, 9 Car. & P. 254.

Where an occupier of a house paid rent to churchwardens, and the latter afterwards demised the house by lease for a term to A., with notice to the tenant that he must consider A. as his landlord:—Held, that the tenant might impeach the lease, and shew that the lessee had no title derived from the churchwardens. *Phillips* v. *Pearce*, 8 D. & R. 43; 5 B. & C. 433; 29 R. R. 284.

In defence to an ejectment it may be shewn that the parties under whom the plaintiffs claim had no title when they conveyed to him, although the defendant himself claims by a conveyance from the same parties, if the latter conveyance was subsequent to that which the defendant seeks to impeach. *Doe* d. *Oliver* v. *Powell*, 1 A. & E. 531; 3 N. & M. 616.

Although the lessee when sued in covenant by the lessor cannot dispute the lessor's title, yet, when sued by the assignee of the lessor, he may deny that the lessor had such a title as could pass the right of action to the assignee. *Seymour* v. *Franco*, 7 L. J. (O.S.) K. B. 18; 31 R. R. 347.

Expiration of Lessor's Title—Expiration or Surrender of Term.]—In ejectment by landlord against tenant, whose lease is expired, the latter is not barred from shewing that his landlord's title is expired. *England* d. *Syburn* v. *Slade*, 4 Term Rep. 682; 2 R. R. 498. S. P., *Doe* d. *Jackson* v. *Ramsbottom*, 3 M. & S. 516.

Payment of rent by a tenant to his landlord after the title of the latter has expired, and after the tenant has received notice of an adverse claim, does not amount to an acknowledgment of title in the landlord or to a virtual attornment; unless, at the time of such payment, the

tenant heard the precise nature of the adverse claim, or how the landlord's title had expired. *Fenner* v. *Duplock*, 9 Moore, 32; 2 Bing. 10; 2 L. J. (O.S.) C. P. 102.

T. held premises under a lease from B., and paid rent to B., and to his personal representative after his death. On the expiration of the lease, T. surrendered the premises to the defendant:—Held, that the defendant could not dispute the title under which T. came in. *Doe d. Manton* v. *Austin*, 2 M. & Scott, 107; 1 L. J., C. P. 152.

A tenant may shew that his landlord's title is at an end, in an ejectment against him by the latter; but where such action was brought by the reversioner whose interest was the same as that of the tenant for life, and the tenant had paid rent to the reversioner:—Held, that he could not shew that the reversionary interest was at an end; but that he might shew some prior title in the person under whom he claimed to hold. *Doe* d. *Colemere* v. *Whitroe*, D. & R., N. P. C. 1; 25 R. R. 769.

A defendant in ejectment, who has paid rent to the lessor of the plaintiff, may shew that his landlord pending the term, sold his interest in the premises. *Doe* d. *Lowden* v. *Watson*, 2 Stark. 230.

The defendant, after being let into possession of premises by P., and paying rent to him, paid one quarter's rent to the plaintiff, to whom P. had agreed to demise the premises for a long term. In an action by the plaintiff for the succeeding quarter's rent:—Held, that the defendant might shew that the agreement between P. and the plaintiff was put an end to, and that the rent had been paid to P. *Brook* v. *Briggs*, 2 Bing. (N.C.) 572; 2 Scott, 803; 5 L. J., C. P. 143.

In an action for rent, the tenant may shew that the title of his landland has expired during the tenancy, though he continues to occupy the premises, and has not been evicted. *Mountney* v. *Collier*, 1 El. & Bl. 630; 22 L. J., Q. B. 124; 17 Jur. 503; 1 W. R. 179.

Where, in an action by a landlord against his tenant for use and occupation, the tenant offers in evidence a document shewing that the landlord's title has ceased, the document is admissible, because the property has passed to another who has a right to sue him for the same use and occupation; but when it appears that, under the document in question, the property would have passed from the plaintiff before the time of the use and occupation for which he sued, the document is not admissible, on the usual legal maxim that a tenant cannot deny his landlord's title. *Agar* v. *Young*, Car & M. 78.

A. let land to B. on a tenancy from year to year, which he continued to hold for several years after A.'s title had determined, paying rent to A., and he at length gave up possession on a notice to quit from A. Subsequently to the determination of A.'s title, but before B. had given up possession, B. underlet to C. C. paid rent to B. as long as B. continued to hold, but paid no rent to anyone subsequently. In ejectment by A. against C., after B. had given up possession:—Held, that it might be presumed, as a matter of fact, that a new tenancy from year to year had been commenced by B. after A.'s title had ceased, and that C. therefore could not dispute A.'s title. *L. & N. W. Ry.* v. *West*, 36 L. J., C. P. 245; L. R. 2 C. P. 553.

The defendant held, as tenant from year to year to the plaintiff, two distinct holdings—one at a rent of 63*l.* and the other of 21*l.*—the gale days of both being the same: the plaintiff granted his estate by way of mortgage, but continued in possession and receipt of the rents, and, afterwards, in his rentbooks consolidated the two holdings into one, at an increased bulk rent of 103*l.*, which was paid by the defendant. The plaintiff served notice to quit in his own name alone, and brought an ejectment in his own name without joining the mortgagee:—Held, that these facts afforded no evidence of the creation, after the mortgage, of a new tenancy, so as to estop the defendant from shewing that the plaintiff's title had passed from him to the mortgagee. *Delmege* v. *Mullins*, Ir. R. 9 C. L. 209—Ex. Ch.

Tenant may file interpleader against his landlord, where it arises on act of landlord subsequent to lease. *Cowtan* v. *Williams*, 9 Ves. 107.

—— **Lessee must renounce Title.**]—In an action for use and occupation, where the defendant has come in under the plaintiff he cannot shew that the plaintiff's title has expired, unless he solemnly renounced the plaintiff's title at the time, and commenced a fresh holding under another person. *Balls* v. *Westwood*, 2 Camp. 11.

What amounts to a Denial of Lessor's Title—Setting up Long Term.]—A., being tenant for life, under a power of leasing, created in 1763, demised to the defendant in 1826. The lease was not a good execution of the power, and in 1844, after the death of A., the reversioner brought an ejectment against the defendant, the demise being laid by B. only. It appeared at the trial that in 1708 a term of a thousand years was created in the property in question for certain purposes, and to attend the inheritance, and that in an indenture of the 1st of March, 1757, the indenture creating the term was recited, and the executor of the surviving trustee of the term was required to assign it to attend the inheritance:—Held, that the defendant was not estopped from setting up the term, as he did not thereby deny the general title of B. but protected his own lease, which was consistent with such title. *Doe* d. *Egremont (Earl)* v. *Langdon*, 12 Q. B. 711; 18 L. J., Q. B. 17; 13 Jur. 96.

2. Tenant's Right to Compensation for Improvements or Outlay.

a. Under Agricultural Holdings Acts.

Statutes.]—53 & 54 Vict. c. 57 *amends the law with respect to compensation due to tenants on land under mortgage.*

58 & 59 Vict. c. 27 *extends the provisions of the Agricultural Holdings (England) Act*, 1883, *to market gardens.*

"Allotment," what is—Garden—Land Cultivated for Purpose of Business.]—A parcel of land of not more than two acres, in which bulbs had been planted by a seedsman for the purpose of his business, is not an allotment within s. 4 of the Allotments and Cottage Gardens Compensation for Crops Act, 1887, inasmuch as it was not land cultivated as a "garden" in the ordinary sense of the term. *Cooper* v. *Pearse*, 65 L. J., M. C. 95; [1896] 1 Q. B. 562; 74 L. T. 495; 44 W. R. 494; 60 J. P. 282.

"Contract of Tenancy," what is—Letting from Year to Year—Agreement for Determination by Three Months' Notice at any Time.]—The parties to an agreement for a letting from year to year may by the agreement stipulate that the tenancy may be determined by a three months' notice at any time. A tenant of a market garden under such an agreement current at the commencement of the Market Gardeners' Compensation Act, 1895, holds the land under a "contract of tenancy," within the meaning of s. 4 of the act, as interpreted by s. 61 of the Agricultural Holdings Act, 1883, so as to be entitled to compensation for improvements executed before the act. *Threlfall, In re* (50 L. J., Ch. 318; 16 Ch. D. 274), followed. *Kemp* v. *Derrett* (3 Camp. 510) and *Doe* d. *King* v. *Grafton* (21 L. J., Q. B. 276; 18 Q. B. 496) considered. *King* v. *Eversfield*, 66 L. J., Q. B. 809; [1897] 2 Q. B. 475; 77 L. T. 195; 46 W. R. 51; 61 J. P. 740—C. A.

Time for giving Notice of Claim—Determination of Tenancy.]—By s. 7 of the Agricultural Holdings Act, 1883, "a tenant claiming compensation under this act shall, two months at least before the determination of the tenancy, give notice in writing to the landlord of his intention to make such claim." Where the tenant of a farm was entitled, under the custom of the country, to hold over a portion of the land for four months after the expiration of his notice to quit the farm:—Held, that the "determination of the tenancy" took place when the tenant's holding under the custom of the country ended; and therefore that a notice of his claim for compensation, given two months before that time, was good. *Portarlington (Earl), Ex parte, Paul, In re*, 59 L. J., Q. B. 30; 24 Q. B. D. 247; 61 L. T. 835; 54 J. P. 644.

Where a lease is to run for a definite period from the entry of the tenant, which entry took place, as to the houses, grass, and fallow land, on May 26th, 1860; as to arable land in corn crop at the separation of the corn crop in the same year; and as to barns and cothouses at Whitsuntide, 1861; a notice for compensation for unexhausted improvements, in order to comply with the requirements of s. 7 of the Agricultural Holdings (Scotland) Act, 1883, that "four months at least before the determination of the tenancy" the tenant must give notice to his landlord "in writing of his intention to make a claim," must be given four months prior to the separation of the crop in the year in which the lease terminates. Semble, that when the termination as to arable land is to be the "separation of the crop," that is to be regarded as synonymous with the Martinmas term, so that a notice will be in time if given four months before Martinmas:—Quære, whether, when there is more than one period for the termination to a lease, the notice prescribed by s. 28 must not be given prior to the first period. *Wight* v. *Hopetoun (Earl)* (4 Macq. H. L. 729) commented on. *Black* v. *Clay*, [1894] A. C. 368; 6 R. 362; 71 L. T. 446—H. L. (Sc.)

The words "determination of the tenancy" in s. 7 of the Agricultural Holdings (England) Act, 1883, mean the determination of the holding in so far as it is an agricultural holding, so that under a tenancy of agricultural land terminating by a custom recognised in the lease on an earlier date than the tenancy of the buildings, the tenancy for the purposes of compensation under the act of 1883 is determined at the earlier date. *Morley* v. *Carter*, 66 L. J., Q. B. 843; [1898] 1 Q. B. 8; 77 L. T. 337; 46 W. R. 77.

Compensation under Earlier Act — Notice under Later Act.]—A notice by a tenant in occupation of a tenancy current at the commencement of the Agricultural Holdings Act, 1883, of a claim for compensation for improvements executed after the commencement of the act, is good if given under the Agricultural Holdings Act, 1883, though the compensation is to be based upon the principles of the Agricultural Holdings Act, 1875. The compensation for such improvements is to be calculated on the basis of the Agricultural Holdings Act, 1875, and not of the Agricultural Holdings Act, 1883. *Smith* v. *Acock*, 53 L. T. 230.

Appointment of Referee—Consent of Parties—Power of Umpire to award Costs.]—Where it appears upon the face of an award made under the Agricultural Holdings Act, 1883, that one of the referees was appointed by the county court registrar, but it is not stated that such appointment was made by consent of the parties, the award will be set aside where it is shown that no consent in fact was given. Per Wills, J.: Ord. XL. r. 7, of the County Court Rules, 1889, which purports to give a larger jurisdiction to the county court registrar, is ultra vires. Per Wills, J.: Costs as between solicitor and client cannot be given be given by an award under the Agricultural Holdings Act, 1883. *Griffiths and Morris, In re*, 64 L. J., Q. B. 386; [1895] 1 Q. B. 866; 15 R. 301; 72 L. T. 290; 43 W. R. 652; 59 J. P. 134.

Award — Giving Compensation generally — No Items—Validity.]—A tenant gave notice of claim for compensation under the Agricultural Holdings (England) Act, 1883, and the landlord gave notice to the tenant of a counterclaim for dilapidations and breaches of covenant. The parties not agreeing as to the amounts payable under their respective claims, the landlord gave the tenant notice, under the Agricultural Holdings Act, 1883, appointing D. to act on his behalf. The tenant acted in the matter as his own referee. The referees did not appoint an umpire before entering upon the reference, but, differences having arisen, they appointed W. to act as umpire. This appointment of the umpire was in a letter signed by both referees as follows:—"We, the undersigned, hereby appoint you our umpire to settle all differences that have arisen between us in this valuation, which relates to compensation for unexhausted lime, manures, and feeding stuff, and counterclaims for dilapidations and breaches of covenant on both sides, under a lease, dated the 20th July, 1880, and under the Agricultural Holdings Act, 1875 and 1883, and we agree to abide by your decision in writing as final and binding on all parties." The umpire made his award in writing as follows: "I do award that the sum of 96*l.* 11*s.* is payable by the said Charles Shrubb to the said William Lee, balance in full satisfaction of all claims made by either party." The landlord appealed against the award upon the grounds (1) that it was obligatory that the award should have been made under the provisions of the Agricultural Holdings (England) Act, 1883; (2) that the award was invalid, because it awarded a sum generally in respect of claims under the Agricultural Holdings Acts, 1875 and 1883, and of claims

arising outside those acts, without distinguishing between the two sets of claims; (3) that the award was bad, as it awarded a sum generally for compensation and did not, as required by s. 19 of the act of 1883, specify (1) the several improvements in respect of which compensation was awarded; (2) the time at which each improvement was executed; (3) the sum awarded in respect of each improvement:—Held, that there was abundant evidence to warrant the conclusion that this was an award outside the Agricultural Holdings Act altogether, and that it was none the less so because it may have included some matters which were within the act; that the reference was in fact a common law reference; and that the award was final and binding upon the parties. *Shrubb* v. *Lee*, 59 L. T. 376; 53 J. P. 54.

—— **Without Consent of Parties — Setting aside.**]—See *Griffiths and Morris, In re*, supra.

—— **Enforcement in County Court—Balance found due to Landlord.**]—The procedure provided by the Agricultural Holdings Act, 1883, for enforcing in a county court an award made under that statute, is not applicable when the dispute arises out of a claim by a tenant and a counterclaim by a landlord, and the award finds a balance due to the landlord. *Holmes and Formby, In re*, 64 L. J., Q. B. 391; [1895] 1 Q. B. 174; 15 R. 114; 71 L. T. 842; 43 W. R. 205.

Action by Landlord—Counterclaim for Compensation.]—A claim for compensation by a tenant under the Agricultural Holdings Act, 1883, if disputed, must be referred to arbitration only, and cannot form the subject-matter of a counterclaim in an action for rent brought by the landlord in the high court. *Gaslight and Coke Co.* v. *Holloway*, 52 L. T. 434; 49 J. P. 344.

A tenant of a farm, restrained by agreement from selling the hay and straw grown on the farm, became bankrupt. The trustee in bankruptcy removed and sold a quantity of the hay in breach of the agreement and then disclaimed the lease. The landlord sued the trustee for the removal of the hay, and the trustee counterclaimed for unexhausted improvements:—Held, that the counter-claim could not be sustained, as, by the Agricultural Holdings Act, 1883, s. 8, arbitration is rendered compulsory in case of disputes between landlord and tenant. *Schofield* v. *Hincks*, 58 L. J., Q. B. 147; 60 L. T. 573; 37 W. R. 157.

Payment of Compensation to Tenant by Executors of Landlord—Right of Executors to Charge on Holding.]—Although the definition of "landlord" in the s. 61 of the Agricultural Holdings (England) Act, 1883, does not include the executors of a landlord, yet the clause at the end of the section, by which the designations of landlord and tenant are to continue to apply to the parties until the conclusion of any proceedings taken under the act, entitles the executors of a landlord, who have paid to the tenant an amount due to him in respect of compensation under the act, to obtain from a county court, under the 29th section of the act, a charge on the holding to the amount of the sum so paid. *Gough* v. *Gough*, 60 L. J., Q. B. 726; [1891] 2 Q. B. 665; 65 L. T. 110; 39 W. R. 593; 55 J. P. 807—C. A.

b. Before the Acts.

Effect of new Lease.]—A lease provided that on its termination the tenant should receive compensation for unexhausted improvements. At its termination a new lease of the farm was granted to the tenant, nothing being said about the compensation:—Held, that the tenant was entitled to compensation under the first lease. *Lane* v. *Moeder*, 1 Cab. & E. 548.

Lien for.]—The bankrupt agreed in writing to take a lease of a manufactory for a term of years, and the landlord agreed to erect, at his own expense, certain buildings upon the bankrupt's paying, as an additional rent, 7*l.* 10*s.* per cent. upon the amount so expended. The buildings, however, were subsequently erected by the bankrupt, on the verbal assurance of the landlord that the bankrupt might deduct the amount expended from the rent. The assignees elected not to adopt the agreement for the lease, but refused to deliver up possession to the landlord, unless he allowed them the sum which the bankrupt had expended on the buildings:—Held, that as both the written and verbal agreement between the landlord and the bankrupt contemplated a continuancy of the tenancy which the assignees had themselves repudiated they had no lien on the premises for the money expended by the bankrupt. *Ladd. Ex parte, Ryland, In re*, 3 Deac. & C. 647.

A father, an equitable owner of land, erected a granary thereon; he afterwards allowed his two sons to use and occupy them, and they erected other buildings thereon at a great expense:—Held, that the sons had a lien on the premises for their outlay. *Unity Joint Stock Mutual Banking Association* v. *King*, 25 Beav. 72; 27 L. J., Ch. 585; 4 Jur. (N.S.) 470; 6 W. R. 264.

The plaintiff, at the suggestion of the defendant, his father-in-law, removed from a shop which he had hired into a house belonging to the defendant, and which the defendant promised to let him occupy rent-free. No rent was paid for nineteen years, and the plaintiff expended about 300*l.* upon the premises, almost wholly for repairs. The plaintiff alleged that there was an absolute gift of the house to him:—Held, that the plaintiff was not entitled to any lien in respect of the 300*l.* *Millard* v. *Harvey*, 10 Jur. (N.S.) 1167; 13 W. R. 125.

Account.]—Under the 145th General Order, the Master has not jurisdiction to give allowance or compensation to a tenant for improvements. A tenant for a term, pending the cause, will not be allowed for improvements made without the sanction of the court, on notice to all parties, although he may have been misled as to its tenure by the receiver. *Wildridge* v. *M'Kane*, 8 Ir. Eq. R. 231.

Account between tenant and landlord under a husbandry lease. *Kennington* v. *Houghton*, 2 Y. & Coll. C. C. 620.

A lessee of charity property obtained a further reversionary term, and afterwards made considerable lasting improvements on the property; the reversionary lease being set aside, the court considered the lessee entitled to compensation for money laid out by him in reference to the extended enjoyment. *Att.-Gen.* v. *Kerr*, 2 Beav. 420; 9 L. J., Ch. 190; 4 Jur. 406. *And see* 5 Jur. 863.

Reference under the circumstances directed, to ascertain whether any and what compensation

ought to be paid to an outgoing tenant from year to year, for his outlay of capital on charity lands. *Att.-Gen.* v. *Gains*, 11 Beav. 63; 12 Jur. 275.

Where a suit has been compromised before the expiration of a lease for five years pending the cause, the tenant is entitled to be compensated for such moneys as he has bonâ fide laid out for the benefit of the lands demised. *Garstin* v. *Nangle*, Hay. & J. 542. And see *Holmes* v. *Bowden*, ib. 544, n.

Under Void Lease.]—Lessee under a lease void for his own fraud, not entitled to allowances for lasting improvements. *Pierce* v. *Webb*, 3 Bro. C. C. 16, n.

Where title fraudulent, equity in giving relief will reimburse the party in possession for permanent improvements. *Shine* v. *Gough*, 1 Ball & B. 444.

Where lease or grant is good in law, equity will not set it aside without allowing for lasting improvements on estate. *Att.-Gen.* v. *Balliol College*, 9 Mod. 411.

In 1699 a lease of charity land was granted for 999 years, at a rent very little more than had for some time been received for it. The lessee covenanted to build upon the land. That lease was in 1849 set aside as to a part of the land comprised in it, on an information filed against the assignee of that part only; and he was:—Held, not to be entitled to any allowance in respect of the building which had been erected upon the land. *Att.-Gen.* v. *Pilgrim*, 2 Hall & Tw. 186. Affirming 12 Beav. 507.

If, on parol agreement for a lease, any consideration had been paid, equity would restore the consideration, though it did not execute the agreement in specie. *Hollis* v. *Edwards*, 1 Vern. 159.

There is a difference between money laid out in necessary repairs and lasting improvements, and money laid out for fancy and humour; the former shall be allowed, though not the latter. *Ib.*

3. LANDLORD'S RIGHT TO TAKE POSSESSION.

Abandonment of Premises.]—If a tenant quits without any intention of returning, the landlord may enter without bringing ejectment. *Lacey* v. *Lear*, Peake's Add. Cas. 210; 4 R. R. 904. And see *Wildbore* v. *Rainsforth*, 8 B. & C. 6; 2 M. & Ry. 185.

Where a tenant of a house, after a regular notice to quit had been given him, abandoned the premises, locked up the door, and left only a few articles of furniture therein; and the landlord afterwards, in his absence, and when no person was in the house, broke open the door and took possession:—Held, that he was justified in so doing, as he had a legal right of entry. *Turner* v. *Meymott*, 79 Moore, 574; 1 Bing. 158; 1 L. J. (O.S.) C. P. 13; 25 R. R. 612. And see *Taunton* v. *Costar*, 7 Term Rep. 431; 4 R. R. 481.

If the tenancy is determined, and the tenant and his family are gone away, and the house locked up, no one being in possession, the landlord will be justified in breaking into the house and obtaining possession. *Hillary* v. *Gay*, 6 Car. & P. 284.

Lessor putting Bill in Window—Effect of.]—If a landlord is lawfully on his tenant's premises for the purpose of making a distress, he may put up a bill in the window for the purpose of letting them, without thereby making himself liable as a trespasser. *Skidmore* v. *Booth*, 6 Car. & P. 777.

Lessee refusing to Quit.]—Where a tenant remains in apartments after the expiration of his term, the landlord is not justified in forcibly asserting his right to the possession by expelling him. *Newton* v. *Harland*, 1 Scott (N.R.) 473; 1 Man. & G. 644; 2 Jur. 350.

If a tenancy of a house is determined, and the tenant has promised to leave on a particular day, but afterwards refuses to do so, the landlord is not justified in putting the tenant's wife by force out of the house, and putting the tenant's furniture into the street. *Hillary* v. *Gay*, 6 Car. & P. 284.

—— **Rights as against Third Persons.**]—C. rented a farm under the plaintiff, his term in which expired on the 1st February, 1838. On the 2nd February the plaintiff's agent demanded possession of the land; but C. refused to quit unless paid for certain improvements. The plaintiff thereupon brought an ejectment, and obtained actual possession on the 16th July:—Held, that the demand of possession on the 2nd February gave the plaintiff such a constructive possession as to enable him to maintain trespass against a third person for coming on the land and carrying off the crops. *Hey* v. *Moorehouse*, 8 Scott, 156; 6 Bing. (N.C.) 52; 9 L. J., C. P. 113.

Lessee of Part of Property—Action for Recovery of Land.]—Where the owner of the reversion of a theatre having by an order in a winding-up of a company obtained the lease and property of the theatre, the lessee of property, boxes, and stalls, brought an action asking for an injunction to restrain the reversioner from preventing the plaintiff having access to his boxes and stalls:—Held, that the order in the winding-up did not affect the right of third parties; the defendant could only exclude the plaintiff by an action for the recovery of land where third parties would have notice and an opportunity of appearing. *Leader* v. *Hayes*, 54 L. T. 204.

Disclaimer by Trustee—Rights of Sub-lessee and Landlord.]—When a lessee sub-lets, and afterwards became bankrupt, and his trustee, under s. 23 of the Bankruptcy Act, 1869, and under an order of the Court of Bankruptcy, disclaims the lessee's interest in the premises, the lessor is not entitled to eject the sub-tenant. A. lessee for a term of years by deed demised part of the premises for a shorter term, and the sub-lessee entered into possession. The lessee afterwards liquidated by arrangement, under the Bankruptcy Act, 1869, and his trustee, under an order of the Court of Bankruptcy, disclaimed the lessee's interest in the premises. Notice of the application to the court for leave to disclaim was given to the sub-lessee, within a reasonable time before the order was made. The lessor having brought an action to recover possession of the part of the premises demised to the sub-lessee as from the date of the appointment of the trustee:—Held, that the lessor was not entitled to recover possession. *Taylor* v. *Gillott* (L. R. 20 Eq. 682) commented upon. *Smalley* v. *Hardinge*, 50 L. J., Q. B. 367; 7 Q. B. D. 524; 44 L. T. 503; 29 W. R. 554—C. A.

A lessee of a house agreed to sub-let two rooms

for a part of his term, taking a fine; he afterwards became bankrupt, and his trustee disclaimed the lease. The landlord commenced an action of ejectment against the sub-lessee. The sub-lessee filed his bill to restrain the action, and to compel the landlord to grant him a lease according to the terms of his agreement with the first lessee. The provisions of the agreement differed from those of the lease:—Held, that the sub-lessee had no equity to enforce the provisions of the agreement against the landlord. *Taylor* v. *Gillott*, 44 L. J., Ch. 740; L. R. 20 Eq. 682; 32 L. T. 795; 24 W. R. 65.

Licence by Tenant to Landlord to eject—Effect of.]—A licence by a tenant to his landlord to eject him on a specified day without any process of law is void, as authorising the commission of an act which is made illegal by the act 5 Ric. 2, stat. 1, c. 8. *Eldridge* v. *Hawker*, 50 L. J., Ch. 577; 18 Ch. D. 199; 45 L. T. 168; 29 W. R. 914.

After Agreement to purchase Lessee's Interest.]—A landlord having power to determine a lease enters into an agreement with the lessee, under which he becomes purchaser of his interest, and then gives notice to determine the lease; the court held, that the relation of vendor and purchaser was established, and would not allow the tenant to be evicted until the question as to the amount of compensation or purchase-money was settled between the parties. *Doe* v. *London & Croydon Ry.*, 8 L. J., Ch. 200.

Under Proviso in Lease.]—See *Johnson* v. *Edgware, Highgate, and London Ry.*, ante, col. 811, and *Kennedy* v. *Liddy*, ante, col. 980.

Under 4 Geo. 2, c. 28.]—A landlord having dispossessed his tenant, under the 4 Geo. 2, c. 28, is not bound to shew that he complied with the injunctions of that act. *Doe* v. *Lewis*, 2 Ken. 320; 1 Burr. 614.

4. Proceedings to gain Possession.

a. Summary.

When Premises Vacant.]—When a tenant ceased to reside on the premises for several months, and left them without any furniture, or sufficient other property to answer the year's rent:—Held, that the landlord might properly proceed under 11 Geo. 2, c. 19, s. 16, to recover the possession, although he knew where the tenant then was, and although the justices found a servant of the tenant on the premises when they first went to view the same. *Pilton, Ex parte*, 1 B. & Ald. 369; 19 R. R. 342.

It is not necessary to state, in the record of the magistrates' proceedings, that the landlord has a right of re-entry; although such a right must exist in order to entitle the party to proceed under this statute. *Ib.*

—— **Before Magistrates.**]—Where magistrates had given possession of a dwelling-house, as deserted and unoccupied, and the judges of assize had, on appeal, made an order for restitution with costs, and the tenant brought an action for the eviction against the magistrates, the constable, and the landlord:—Held, that the record of the proceedings before the magistrates was an answer to the action on behalf of all the defendants. *Ashcroft* v. *Bowne*, 3 B. & Ad. 684; 1 L. J., K. B. 209.

The judges of assize, on appeal, under 11 Geo. 2, c. 19, s. 17, against an order of two magistrates giving possession to a landlord, made an order for restitution of the premises to the tenant. The order of the judges was not directed to any person:—Held, that a mandamus could not issue commanding the two justices to make restitution. *Reg.* v. *Traill*, 12 A. & E. 761; 4 P. & D. 325; 10 L. J., M. C. 57.

Proceedings of magistrates for restitution of premises under 11 Geo. 2, c. 19, are, by s. 17, to be reviewed (in England) by the judges on the circuits, acting as individual justices. An allegation in an indictment, that an order was made by A. and B., the justices of assize for Surrey, is not supported by a certificate of such an order, being signed by the deputy clerk of assize in the same way as an order of court. *Reg.* v. *Sewell*, 8 Q. B. 161; 15 L. J., Q. B. 49; 10 Jur. 48.

An order for restitution though not directed to any person, will justify the sheriff in acting under it. *Ib.*

Where magistrates, from a doubt of their jurisdiction, decline giving possession of premises to a landlord, the court will not compel them by mandamus to do so. *Fulder, Ex parte*, 8 D. P. C. 535; 4 Jur. 507.

On an appeal to the judges of assize against the decision of justices giving possession of premises under the 11 Geo. 2, c. 19, ss. 16 and 17, requiring that the notice, after the first view by justices, should state what day, at the distance of fourteen clear days at the least, they should return to take a second view:—Held, that fourteen clear days must elapse between the first and second views, and that that period had not elapsed, and the proceedings were set aside as irregular, and restitution ordered. *Creak* v. *Brighton JJ.*, 1 F. & F. 110.

The power to view and give possession to a landlord of deserted premises, created by 11 Geo. 2, c. 19, s. 16, extended by 57 Geo. 3, c. 52, and varied as to its mode of execution by 3 & 4 Vict. c. 84, s. 13, is not, by any of the provisions of the 3 & 4 Vict. c. 84, or by 11 & 12 Vict. c. 43, s. 34, vested in the lord mayor or one alderman sitting in the justice-room at the Mansion-house or Guildhall, so as to enable them to exercise the power in the same manner as a police magistrate sitting in one of the metropolitan police-courts may, under 3 & 4 Vict. c. 84, s. 13, exercise it. *Edwards* v. *Hodges*, 15 C. B. 477; 3 C. L. R. 472; 24 L. J., M. C. 81; 1 Jur. (N.S.) 91; 3 W. R. 167.

In an action for breaking and entering the plaintiff's dwelling-house, F. and M. justified the trespasses; the former, as owner in fee, the latter, as his servant. Plea, also, by the latter, not guilty. Replication, nolle prosequi as to F., but alleging an estoppel as to M., for that M. demised the premises to the plaintiff, as a yearly tenant, at 16*l.* a year, which demise was in force and undetermined. Rejoinder by M., denying that the tenancy of the plaintiff was in full force and undetermined. At the trial, the demise from M. to the plaintiff was proved, and it was shewn that a notice to quit, signed in the names of both F. and M., was given to the plaintiff; and that subsequently a complaint was made to the magistrates under the above statute, which was signed by F., "as for himself and M., either or both of them." Upon that complaint, a warrant was issued, which contained the name of only one complainant, under which the trespass was committed and the plaintiff ejected; the key of the house was taken to M. by the officer;

the jury having found for the plaintiff:—Held, that the authority of M., as servant of F., was sufficiently denied by the replication of estoppel, and that trespass was the proper remedy. *Darlington* v. *Pritchard*, 2 D. (N.S.) 664; 5 Scott (N.R.) 610; 4 Man. & G. 783; 12 L. J., C. P. 34; 7 Jur. 677. See also *Edmunds* v. *Pinniger*, 7 Q. B. 558; 14 L. J., Q. B. 273.

Under 1 & 2 Vict. c. 74.]—In an action against a landlord for irregularity in the mode of proceeding to obtain possession of premises under 1 & 2 Vict. c. 74, where the landlord, at the time of applying for the justices' warrant, was entitled to the possession of the premises, there must be special damage arising from the irregularity complained of. *Delaney* v. *Fox*, 1 C. B. (N.S.) 166; 26 L. J., C. P. 5; 2 Jur. (N.S.) 1233; 5 W. R. 148.

A declaration, setting out an informal notice of the landlord's intention to apply to the justices for a warrant to obtain possession under the act, and alleging the issuing and execution of such warrant, and that under the authority of such proceedings the plaintiff was forcibly expelled from the dwelling-house of which he was tenant, does not sufficiently shew special damage arising from the informality of the notice. *Ib.*

A landlord is not liable in trespass for ejecting a tenant where the tenancy has expired, although he may have taken proceedings against him under 1 & 2 Vict. c. 74. *Ib.*

Upon an application under 1 & 2 Vict. c. 74, by a landlord to justices of petty sessions, to recover possession of premises held over by his tenant after the expiration of the term, the tenancy having been proved to the satisfaction of the justices, and its legal determination, and the tenant's refusal to quit, the jurisdiction of the justices to give the landlord possession is not ousted by the tenant's setting up the title of a third person. *Rees* v. *Davies*, 4 C. B. (N.S.) 56.

Tenant holding over—Effect of Order—Forcible Entry—Damage to Furniture—Trespass.]—The plaintiff occupied a cottage belonging to the defendant F. under a tenancy determinable upon three months' notice. On the 24th of March, 1890, notice to quit the premises at Midsummer was given by F., but the plaintiff refused to give up possession on the termination of the tenancy, though informed that the owner had entered into a contract with B. (a co-defendant) to pull down and rebuild the plaintiff's cottage, and also one adjoining. On the 3rd of September, F., being still unable to get possession of the cottage occupied by the plaintiff, applied for and obtained from justices an order requiring possession to be given up within twenty-one days under the provisions of 1 & 2 Vict. c. 74. The same day that the order was obtained some tiles were removed by one of the defendants from the roof of the plaintiff's cottage and fell into a bedroom, thereby injuring some of his furniture; and before the twenty-one days had expired the foundations of the new cottages were dug in the garden, and some garden produce destroyed. There was also, within the time specified by the justices' order, some further interference with the roof and consequent damage to the furniture:—Held, that an action for trespass and damage to the plaintiff's goods was not maintainable, inasmuch as there was no evidence of a forcible entry or of any cause of action, and that the defendants were justified in acting as they did, notwithstanding the justices' order obtained pursuant to the provisions contained in 1 & 2 Vict. c. 74. *Jones* v. *Foley*, 60 L. J., Q. B. 464; [1891] 1 Q. B. 730; 64 L.T. 538; 39 W.R. 510; 55 J. P. 521.

b. In County Court.

Jurisdiction — Determination of Tenancy — "Legal Notice to quit."]—By s. 50 of the County Courts Act, 1856, jurisdiction in ejectment is given to the county courts in cases where neither the rent nor the value of the premises exceeds 50*l.* a year, and the tenant's term and interest "shall have expired, or shall have been determined either by the landlord or the tenant by a legal notice to quit."—The plaintiff let to the defendant a house for three years at a rent of 3*l.* 6*s.* 8*d.* a month, payable monthly; the agreement of tenancy contained a power of re-entry on nonpayment of any part of the rent for twenty-one days after the day of payment, or in case of the breach or non-performance of any of the conditions of the agreement. A month's rent having been in arrear for more than twenty-one days, the plaintiff gave the defendant notice to quit at the end of the next month of the term, alleging as breaches nonpayment of rent and a breach of a condition in the agreement:—Held, that a "legal notice to quit" must be taken to mean the notice to quit required by law and not one depending on the express stipulation of the parties; that the tenancy had not, therefore, been determined within the meaning of the section, and that an action to recover possession of the premises could not be brought in the county court. *Friend* v. *Shaw*, 57 L. J., Q. B. 225; 20 Q. B. D. 374; 58 L. T. 89; 36 W. R. 236; 52 J. P. 438.

5. Wrongful Acts and Nuisances.

a. Liability of Landlord.

i. *To Tenant.*

Negligence of Workmen doing Repairs.]—A well was let from year to year, neither landlord nor tenant being bound to repair the steining. The well being out of repair, the tenant complained to the landlord, who sent in men to repair it. The well was destroyed by the negligence of the workmen employed. An action having been brought by the tenant against the landlord to recover damages for the injury sustained by him:—Held, that the landlord was not necessarily responsible, but that it was a question of fact for the jury what was the nature of the obligation incurred by him by reason of his interference. *Mills* v. *Holton*, 2 H. & N. 14.

Cattle poisoned by Yew Trees on Adjoining Land.]—A tenant for life of an estate, in 1868 leased a farm adjoining plantations in which yew trees were growing, and which the lessor reserved to himself. In March and September, 1869, sheep belonging to the lessee died from having eaten of the yew that protruded through the fence surrounding the plantations, and clippings of yew that had been thrown over the fence by the lessor's gardener. The lessor died in February, 1870; the tenant continued to hold the farm as the tenant of the trustees of the will by which the estate was settled. In September and October, 1870, four steers belonging to him

got over a ditch, which happened to be nearly dried up, on to land in the hands of the trustees, and died from eating yew there. A bill for the administration of the lessor's estate was filed in February, 1871, and the lessee brought in under the decree a claim against his executors for damages on account of the loss of his sheep and cattle so poisoned :—Held, that the claim for the losses which occurred in the lessor's life, if ever sustainable, was one in respect of an injury to property coming within 3 & 4 Will. 4, c. 42, s. 2, and was made too late. *Erskine* v. *Adeane, Bennett's Claim*, 42 L. J., Ch. 835 ; L. R. 8 Ch. 756 ; 29 L. T. 234 ; 21 W. R. 802.

Vibration on Adjoining Land — Unstable Building—Estoppel—Derogating from Grant—Measure of Damages.] — Where a lessor, by working engines on land adjoining premises demised by him to a tenant, has caused such vibration as to destroy a house standing on and demised with those premises, it is no defence to an action by the lessee for a nuisance to shew that the house was at the time of its destruction, and also at the date of the demise, in a weak and unstable condition. The lessor is estopped from setting up such a defence, because to give effect to it would be to allow him to derogate from his own grant. *Grosvenor Hotel Co.* v. *Hamilton*, 63 L. J., Q. B. 661 ; [1894] 2 Q. B. 836 ; 9. R 819 ; 71 L. T. 362 ; 42 W. R. 626—C. A.

The measure of damages in such an action is not only the value of the tenant's lease, but (as in other cases of tort) includes also all loss suffered by him which is fairly attributable to the wrongful act of the lessor. *Ib.*

Duty of Landlord to protect Premises.]—Where premises are let as a jeweller's shop to be occupied during hours of business only, the landlord, in the absence of express stipulation, is under no liability for a loss occasioned by a robbery during the night, even though the premises were insufficiently protected. *Espir* v. *Todd*, 1 Cab. & E. 155.

ii. *To Third Parties.*

For wrongful Acts of Lessee.]—If the lessee of property, proceeding by the licence of the lessor, performs acts which amount to a nuisance, and for which he would have no defence in an action, the lessor will be liable, for he is bound to see that his property is so managed that other persons are not injured. *White* v. *Jameson*, L. R. 18 Eq. 303 ; 22 W. R. 761.

For Nuisances, &c.]—The lessor of demised premises adjoining the highway is not liable for a nuisance to the highway existing on such premises at the time of the demise, if the lessee occupies under an obligation to repair. *Gwinnell* v. *Eamer*, L. R. 10 C. P. 658 ; 32 L. T. 835.

A landlord who lets premises for a fixed and definite purpose is liable for any nuisance that arises naturally and of necessity from the use of such premises as contemplated by the demise. *Harris* v. *James*, 45 L. J., Q. B. 545 ; 35 L. T. 240.

A. let to B. a field for the purpose of its being worked as a lime quarry. The ordinary way of getting the limestone was by blasting, and A. authorised the quarrying of the stone and the erection of lime-kilns in the field. A nuisance was caused to the adjoining occupier by the blasting and by the smoke from the kilns, and he brought an action against both A. and B. :—Held, that he, the landlord, was liable, although the nuisance was actually created by the act of his tenant, because the terms of his demise were an authority from him to B. to create the nuisance, which was therefore the necessary consequence of the mode of occupation contemplated in the demise. *Ib.*

The owner of real property is not responsible for a nuisance committed and continued thereon by the tenant in possession. *Rich* v. *Basterfield*, 2 Car. & K. 257 ; 4 C. B. 783 ; 16 L. J., C. P. 273 ; 11 Jur. 696.

If the owner of land demises it with an existing nuisance thereon, he is responsible for the continuance of that nuisance during the term ; so, if he is a party to the creation of a nuisance after the demise ; but he is not responsible for a nuisance so created, though such nuisance is a probable consequence of the use of the land as demised. *Ib.*

An omission on the part of the owner of land to determine the tenancy after the creation by the tenant of a continuing nuisance thereon is not equivalent to a fresh demise of the premises, so as to make him responsible for such nuisance. *Ib.*

An action lies against the landlord of a house demised by lease, who, under his contract with his tenant, employs workmen to repair the house, for a nuisance in the house occasioned by the negligence of his workmen. *Leslie* v. *Pounds*, 4 Taunt. 649.

Overflow of Water from Dock.]—The Victoria Dock Company, a company incorporated by act of parliament, in pursuance of their powers, in 1858 demised a portion of the dock wall or bank to the Thames Graving Dock Company, the lessees covenanting to construct a graving dock on land of their own, and make and at all times maintain a channel through the demised part of the wall into such graving dock. The Graving Dock Company constructed their dock and the channel in accordance with the covenant in the lease. The undertaking of the Thames Graving Dock Company was afterwards acquired by the Victoria Graving Dock Company. The Victoria Docks Company was afterwards amalgamated with the London and St. Katharine Dock Company. On the 18th January, 1881, there was an unusually high tide and a strong gale, which was at its height at the highest point of the tide. The high tide and gale combined forced the water in the graving dock, which had entered it through the channel demised by the said lease, over the banks and flooded the plaintiff's land. The plaintiff sued both companies for damages. The court came to the conclusion, upon the evidence, that the banks of the graving dock had not been properly maintained at the height required by the Dagenham Commissioners, who are the commissioners of sewers for the district :—Held, that neither the height of the tide nor the force of the wind, nor the coincidence of their happening together, could be considered as the act of God, in the sense which would discharge the Graving Dock Company from liability. That the St. Katharine Dock Company, being under a liability to maintain their own wall, and having leased it with a covenant which bound the lessees to make an opening in it, were in the same position as if it had been cut by a contractor employed by

them, and were liable for any damage resulting from their lessee's neglect in taking proper precautions against the natural results of such opening. *Burt* v. *Victoria Graving Dock Co.*, 47 L. T. 378.

Premises in Dangerous or Defective Condition.]—An action lies against an owner of premises who lets them to a tenant in a ruinous and dangerous condition, and who causes or permits them so to remain, until by reason of the want of reparation they fall upon and injure the house of an adjoining owner. *Todd* v. *Flight*, 9 C. B. (N.S.) 377; 30 L. J., C. P. 21; 7 Jur. (N.S.) 291; 3 L. T. 325; 9 W. R. 145.

An owner of a messuage and premises, attached to which was an area, let the same to a tenant from year to year, and died, having devised the property, with an iron grating over the area improperly constructed and out of repair so as to amount to a nuisance, to the defendant. The defendant having no notice of the nuisance, suffered the tenant to remain in the occupation of the premises upon the same terms as before, receiving rent. The wife of A. having sustained damage by reason of the dangerous condition of the grating:—Held, that the defendant, as reversioner, was liable to an action for the damage thereby occasioned. *Gandy* v. *Jubber*, 5 B. & S. 78; 33 L. J., Q. B. 151; 10 Jur. (N.S.) 652; 9 L. T. 800; 12 W. R. 526. But on appeal the decision was questioned without the point being determined. *S. C.*, 5 B. & S. 485; 9 B. & S. 15; 13 W. R. 1022—Ex. Ch.

A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening in consequence during the term. *Robbins* v. *Jones*, 15 C. B. (N.S.) 221; 33 L. J., C. P. 1; 10 Jur. (N.S.) 239; 9 L. T. 523; 12 W. R. 248.

A landlord, in 1873, demised a house abutting upon a public street to W., the lease containing a covenant whereby he bound himself to "repair and keep in repair" the demised premises. At the time of the demise there was upon the premises a grating opening into the street, which grating was, unknown to the landlord, in a defective state of repair and dangerous. In 1874 the grating gave way, causing damage to the plaintiff while lawfully using the highway. The jury found that the landlord could not have known of the defective condition of the grating by the exercise of ordinary care:—Held, that he was not liable. *Gwinnell* v. *Eamer*, supra.

A landlord is liable for an injury to a stranger by the defective repair of demised premises only when he has contracted with the tenant to repair, or when he has been guilty of misfeasance, as, for instance, in letting the premises in a ruinous condition: in all other cases he is exempt from responsibility for accidents happening to strangers during the tenancy. *Nelson* v. *Liverpool Brewery Co.*, 46 L. J., C. P. 675; 2 C. P. D. 311; 25 W. R. 877.

The defendants let to F. a house by an agreement in writing, by which F. agreed "to do all necessary repairs to the premises except main walls, roof, and main timbers." There was no agreement by the defendants to repair, and the house was in good condition at the time of letting it. Owing to the defendants' negligence in not repairing a part of the main walls, a chimney-pot during the tenancy of F. fell upon the plaintiff, who was a servant of F., and injured him:—Held, that the plaintiff was not entitled to recover compensation from the defendants for the injury sustained by him. *Ib.*

A landlord let premises to a tenant under a lease by which the latter covenanted to keep them in repair. Attached to the house was a coal-cellar under the footway, with an aperture covered by an iron plate, which was at the time of the demise out of repair. A passer-by fell in and was injured:—Held, that the landlord was not liable for this accident. *Pretty* v. *Bickmore*, L. R. 8 C. P. 401; 28 L. T. 704; 21 W. R. 733.

Held, also, that the provision in the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), s. 102, makes no difference in this respect. *Ib.*

The plaintiff was injured through a defect in the condition of a coal-plate in the pavement in front of a house let by the defendant on a weekly tenancy, and such defect, though not shewn to have been in existence at the commencement of the tenancy, had existed for nearly two years before the accident:—Held, that having regard to the nature of the tenancy, there had been a reletting of the premises after the nuisance was created, and that the defendant, as reversioner, was liable. *Gandy* v. *Jubber* (5 B. & S. 78; 9 *Ib.* 15) discussed. *Sandford* v. *Clarke*, 57 L. J., Q. B. 507; 21 Q. B. D. 398; 59 L. T. 226; 37 W. R. 28; 52 J. P. 773.

The owner of premises let by him in flats as offices, who retains the staircase in his occupation and control, owes a duty towards the tenants and towards those persons who come to the premises on business with them, to keep the stairs in a reasonably safe state of repair, although the leases to the tenants contain no covenant by the landlord to that effect, and therefore the owner is liable for personal injury caused by the want of repair. *Miller* v. *Hancock*, [1893] 2 Q. B. 177; 4 R. 478; 69 L. T. 214; 41 W. R. 578; 57 J. P. 758—C. A.

In an action for damages against the landlord of premises let on a weekly tenancy by a person who has sustained injuries through an accident which took place on the premises, it is a question for the jury whether the accident was caused by a structural defect existing at the time of the original letting, or whether it was caused by the negligence of the tenant. *Bowen* v. *Anderson*, [1894] 1 Q. B. 164; 10 R. 47; 42 W. R. 236; 58 J. P. 213.

b. Liability of Tenant.

i. *To Landlord.*

Waste, what is.]—Semble that an injury to or the destruction of demised premises, resulting from the use of them by the tenant in a reasonable and proper manner having regard to the class of tenement to which they belong, is not waste. *Saner* v. *Bilton*, 47 L. J., Ch. 267; 7 Ch. D. 815; 38 L. T. 281; 26 W. R. 394.

Cutting Turf.]—A tenant cannot cut turf under a demise of "improvable bog," unless he can shew that it was necessary to cut away the turf for the purpose of improving it. *Pollard* v. *Smith*, 1 Hog, 391.

Tenant restrained from cutting turf for sale (his lease giving a right of estovers only), notwithstanding an uninterrupted practice for eighty years. *Courtown* (*Lord*) v. *Ward*, 1 Sch. & Lef. 8.

Injunction refused to restrain tenant from cutting turf as fire-bote. *De Salis* (*Count*) v. ——, 2 Moll. 516.

Where a landlord filed a bill against his immediate tenant, to restrain him from cutting turf for sale on a valuable bog appurtenant to the lands demised, and the tenant put in his answer stating, that he had never by himself been in the actual occupation of any portion of the lands, that he never by himself or any of his agents had committed the waste charged by the bill, and that if his sub-tenants had cut turf for sale or otherwise, he was unable to restrain them from so doing, the practice having existed previously to the lands coming into his possession :—Held that although it did not appear whether these tenants were merely tenants from year to year, or had any greater interest, the injunction could not issue as they were not before the court. *Norbury* (*Lord*) v. *Alleyne*, 1 Dr. & Wal. 337.

A lessee for lives renewable for ever will be restrained from committing waste on the demised premises by cutting turf, although it appeared that the bog cut out was converted into pasture land, and that the ground was improved by the waste. *White* v. *Walsh*, 1 Jones, 626, n. S.P., *Anon.*, 1 Jones, 627, n.

A lessee for years renewable for ever will be restrained from similar waste, although it appears that the tenants had immemorially cut turf. *Waterpark* (*Lord*) v. *Austen*, 1 Jones, 627, n.

A mere demise of bog, as such, will not give the lessee a right to cut turf for sale, particularly where the demise is of the bog together with other property. But if nothing but bog be demised, and it is not convertible to any other use save being cut for sale, or if it were, at the time of the demise used by cutting it for sale, the lessee may cut turf for sale. *Coppinger* v. *Gubbins*, 3 Jo. & Lat. 397 ; 9 Ir. Eq. R. 304.

Tenant in fee, in possession of lands, conveyed the same and all bogs thereon to a purchaser, who, by deed of equal date, demised the lands to the vendor and his heirs for lives, renewable for ever, to hold "in the same manner as he now holds and enjoys the same," reserving a rent equal to 6*l.* per cent. on the purchase-money. The lease contained the ordinary powers and covenants. The vendor had, in some few instances, before the conveyance, cut turf for sale :—Held, nevertheless, the court being of opinion that there was no such general dedication of the bog to cutting, for mere purpose of sale, as to convert it into the nature of an open mine, that the lessee was not entitled to cut turf for sale. *Ib.*

Cutting Timber and Trees.]—*See* supra, M. 12, ante, col. 1237.

Sowing Pernicious Crops.]—Injunction granted to stay waste and from sowing land with pernicious crops. *Pratt* v. *Brett*, 2 Madd. 62 ; 17 R.R. 187.

Breaking up Meadow or Pasture.]—A tenant will not be allowed to break up ancient meadow or pasture, though the land is mossy and requires tillage. *Martin* v. *Coggan*, 1 Hog, 120.

Quære, whether injunction would be granted on ground of waste to restrain tenant from ploughing up meadow to build on. *De Wilton* (*Lord*) v. *Saxon*, 6 Ves. 106.

Where a tenant turned up the ground, the court interfered by injunction to stay waste. *Carden* v. *Butler*, Hay. & J. 112.

—— **Penalties—Increase of Rent.**]—*See* ante, cols. 950 et seq. and cols. 1184, 1185.

Cultivating Waste Land.]—An action for an injury to the inheritance lies by the reversioner against the tenant pending the term for inclosing and cultivating waste land included in the demise, and for continuing the grievance. *Queen's College, Oxford* v. *Hallett*, 14 East, 489.

Carrying out Allotment System—Licence by Lessor—Duration of Permission.]—A tenant for life, dispunishable for waste, had power to lease for twenty-one years ancient pasture land, which he afterwards, and before any lease, had converted into garden allotments in a manner amounting to waste. The leasing power provided against "any fine, premium or forfeit being taken for the making thereof," and that "none of the lessees should be, by any clause or words therein contained, authorised to commit waste, or exempted from punishment for waste." In a lease reciting this power, the tenant for life demised the premises for twenty-one years, reserving a rent payable half-yearly. The lease contained a covenant by the lessee not to break up any of the pasture land demised, "except for the purpose of carrying out the allotment system," introduced by the tenant for life :—Held, that the exception in the covenant did not amount to a licence or an authority to the lessee to commit waste by carrying out the allotment system, and that if any implication could be made so as to construe that exception as justifying a permission to the lessee to do anything, it could not be inferred that it permitted him to do more than to carry out the allotment system during the life of the tenant for life, so far as the tenant for life had power to permit it, and not otherwise. *Doe* d. *Hopkinson* v. *Ferrand*, 20 L. J., C. P. 202 ; 15 Jur. 1061.

Converting into Cemetery.]—Semble, the conversion of meadow and pasture lands into a public cemetery amounts to waste at common law. *Hunt* v. *Browne*, Sau. & Sc. 179.

Erecting Buildings on Holding—Dwelling-houses.]—Erecting on an agricultural holding dwelling-houses to be used in furtherance of an illegal conspiracy held to amount to waste. *Brooke* v. *Mernagh*, 23 L. R., Ir. 86. S. P., *Brooke* v. *Kavanagh*, 23 L. R., Ir. 97.

——**Glass-house.**]—See *Meux* v. *Cobley*, 61 L. J., Ch. 449 ; [1892] 2 Ch. 253 ; 66 L. T. 86.

Altering Buildings.]—At law the tenant is guilty of waste if he pull down doors, windows, wainscots, or in any way alters the material form and features of the demised buildings. *North* v. *Guinan*, Beat. 343. And see *Edge* v. *Pemberton*, 12 M. & W. 187 ; 1 D. & L. 467 ; 13 L. J., Ex. 48.

Where, in an action by the reversioner against the tenant of a house, for opening a door in a wall without his consent, and thereby damaging the house, and prejudicing his reversionary interest, the opening of the door is proved, and all actual damage is disproved, the jury should be directed to inquire whether the reversionary interest has or has not been injured. *Young* v. *Spencer*, 5 M. & Ry. 47 ; 10 B. & C. 145 ; 8 L. J. (o.s.) K. B. 106.

The reversionary interest of the plaintiff might be injured, although the house itself was not. *Ib.*

Injunction against proceeding with alterations in a house under an agreement for a lease upon circumstances that would probably prevent a specific performance, viz. surprise, the effect of

fraudulent misrepresentation and concealment, and the particular nature of the alterations for the conversion of a private house to the purpose of a coachmaker's business, wholly changing the nature of the subject. *Bonnett* v. *Sadler*, 14 Ves. 526.

—— **Pulling down and rebuilding.**]—Two leases were granted of pieces of land with some buildings on them, one granted in 1798 for 999 years, the other granted in 1824 for 988 years. There was no reservation of a power of re-entry for breach of covenant, nor was there any negative covenant obliging the lessee not to change the use of the premises. There was a power of re-entry for rent in arrear, and no sufficient distress on the premises. In each lease there was a covenant by the lessee that he, his executors, &c., "will during the term granted preserve, uphold, support, maintain, and keep the demised premises, and all improvements made and to be made thereon, in good and sufficient order, repair, and condition; and at the end or sooner determination of this demise, shall and will so leave and deliver up the same unto" the lessor, his heirs, &c. The premises had been used as corn stores for some years; and afterwards as artillery barracks, and dwellings for married soldiers. They had fallen into disrepair: it became necessary to repair them: the lessee thought it would be beneficial to convert the store buildings into dwelling-houses, which would much increase their value, and was proceeding to convert them accordingly, when the lessor filed a bill to restrain him, alleging waste:—Held, that this was not the case of enforcing a negative covenant where the words of contract were clear and indisputable; that the waste alleged was meliorating waste, and that, under the circumstances, the court had, in the due exercise of its discretion in such matters, properly refused to interfere by injunction. *Doherty* v. *Allman*, 3 App. Cas. 709; 39 L. T. 129; 26 W. R. 513—H. L. (Ir.)

The court will not restrain a tenant from pulling down a house and building another which the landlord objects to. *Smyth* v. *Carter*, 18 Beav. 78.

Where Premises burnt.]—A tenant for years is subject to waste where the premises have been burnt, though there be no covenant to repair or rebuild. *Rook* v. *Worth*, 1 Ves. 462.

Removing Barrier between Mines.]—An action in the nature of waste will lie against a lessee of a mine for an injury to the reversion by the removal of a barrier or a boundary between it and an adjoining mine. *Marker* v. *Kenrick*, 13 C. B. 188; 22 L. J., C. P. 129; 17 Jur. 44.

Threat to commit Waste.]—A breach, in an action by landlord against tenant, that the tenant threatened to commit waste unless paid a certain sum by the incoming tenant, and that the latter was thereby compelled to and did pay him that sum, in order to prevent his committing such waste, is bad. *Leach* v. *Thomas*, 2 M. & W. 427; 5 D. P. C. 612; 6 L. J., Ex. 126.

Action of Waste—When it Lies.]—An action in the nature of waste will lie against a lessee, although the act complained of might also be the subject of an action for the breach of an express covenant. *Marker* v. *Kenrick*, 13 C. B. 188; 22 L. J., C. P. 129; 17 Jur. 44.

An action in the nature of voluntary waste will lie against a tenant for years after the expiration of his term as well as an action for the breach of covenants contained in his lease. *Kinlyside* v. *Thornton*, 2 W. Bl. 1111.

An action for waste lies at the suit of a landlord against his tenant, for acts done by the latter, while holding over after the expiration of a notice to quit. *Burchell* v. *Hornsby*, 1 Camp. 360.

Damages—Nominal.]—In an action of waste, on the 6 Edw. 1, c. 5, against a tenant for years, for converting three closes of meadow into garden ground, if the jury gives only one farthing damages for each close, the court will give him leave to enter up judgment for himself. *Harrow School* v. *Alderton*, 2 Bos. & P. 86. And see *Pindar* v. *Wadsworth*, 2 East, 155.

Where the action of the tenant amounts to technical waste, if the court is satisfied it is waste which does not injure the inheritance, it is no answer for the landlord to say that it benefits the tenant and puts money into his pocket—Per Kay, J. *Tucker* v. *Linger*, 51 L. J., Ch. 713; 21 Ch. D. 18; 46 L. T. 894; 30 W. R. 578. Affirmed, 52 L. J., Ch. 941; 8 App. Cas. 508; 49 L. T. 273; 32 W. R. 40; 48 J. P. 4—H. L. (E.)

—— **On Lessor's Death.**]—Lessee's damages in waste moderated by death of lessor. *Anon.*, Cary, 2.

Injunction against Waste.]—Where a tenant defending an ejectment brought by his landlord, makes default at the trial, and makes use of the interval to do all the mischief he can by breaches of covenant and wilful waste, an injunction will be granted on motion, or in the vacation or petition; but it was refused where no ejectment had been brought. *Lathropp* v. *Marsh*, 5 Ves. 259.

And see *Bonnett* v. *Sadler* and *Smyth* v. *Carter*, supra.

ii. *To Third Parties.*

Of Occupier of Premises.]—The duty of him who occupies a house abutting on the highway is to repair all known defects of the house and its appurtenances, the non-repair of which may result in danger to the passers-by; and that duty is not discharged by the employment of a contractor to repair such defects. If damage results from the negligence of a contractor so employed, the householder is liable. *Tarry* v. *Ashton*, 45 L. J., Q. B. 260; 1 Q. B. D. 314; 34 L. T. 97; 24 W. R. 581.

A. occupied a house abutting on a street. Projecting from the front wall, about fifteen feet over the pavement, was a lamp which he had employed a contractor to repair, along with his other lamps. The contractor did his work badly. Another contractor being afterwards employed by A. to examine the lamp, placed the ladder against the bracket which joined it to the wall. The weight of the ladder and the rotten state of the bracket caused the lamp to fall and injure a passer-by in the street:—Held, that A. was responsible to him for the injury so caused. *Ib.*

The defendant was tenant and occupier of a newly-erected stable, adjoining and all but touching the flank wall of a house in the suburbs of London, and which stable was erected on a mound of made earth at a higher level than the basement of the plaintiff's house, and the

result was that water, mixed with stable drainage and sewage leaking from a broken soil-pipe in the stable yard, oozed through the wall of the plaintiff's house, so as to be a nuisance. On a bill by the owners of the house, for an injunction to restrain the nuisance occasioned by the damp, and also by the noise of the horses kept in the stable:—Held, that the occupier of the house should be a party to the suit, inasmuch as the alleged nuisances were of a temporary nature. *Broder* v. *Saillard*, 45 L. J., Ch. 414; 2 Ch. D. 692; 24 W. R. 1011.

The bill having been amended by the addition of the occupier as a co-plaintiff, it appeared that the damp was due to the circumstance of the stable being erected on made earth, placed there unknown to the defendant by some predecessor in title:—Held, nevertheless, that an injunction should be granted, for the reason that the possessor of land is responsible for nuisances arising on it, by whatever means occasioned. *Ib.*

Held, also, with regard to the noise, that the stable was so situated that the ordinary use of it occasioned an annoyance amounting to a nuisance. *Ib.*

The plaintiff and the defendant were respectively occupiers of adjoining houses. An old drain which commenced on the defendant's premises, and thence passed under and received the drainage of several other houses, turned back under the defendant's house, and thence under the cellar of the plaintiff's house, and ultimately into a public sewer. The part of the return drain which passed through the defendant's premises being decayed, the sewage escaped and flowing into the plaintiff's cellar did damage. The defendant was unaware of the existence of this return drain, and consequently of its want of repair:—Held, that the defendant was liable for the damage done to the plaintiff: for that defendant's duty was to keep the sewage which he himself was bound to receive from passing from his own premises to the plaintiff's premises otherwise than along the old accustomed channel, and that this duty was independent of negligence on his part, and independent of his knowledge or ignorance of the existence of the drain. *Humphreys* v. *Cousins*, 46 L. J., C. P. 438; 2 C. P. D. 239; 36 L. T. 180; 25 W. R. 371.

A. granted a lease of two rooms to B., and then let to C. a room above B.'s rooms for dancing and other entertainments. B. commenced an action against A. and C. for an injunction, alleging that the dancing overhead and the behaviour of the visitors on the stairs was a nuisance:—Held, that the annoyance from dancing was a nuisance, but that the annoyance from visitors on the stairs was not a nuisance for which A. or C. was liable. *Jenkins* v. *Jackson*, 58 L. J., Ch. 124; 40 Ch. D. 71; 60 L. T. 105; 37 W. R. 253.

A person carrying on a delicate and sensitive trade has no right to complain, on the ground of nuisance, because a person occupying premises below, above, or adjoining his, in carrying on another trade in a proper and reasonable manner, does something which, although not in itself noxious to another trade, may be detrimental to his delicate and sensitive trade. *Cooke* v. *Forbes* (L. R. 5 Eq. 166) distinguished. *Robinson* v. *Kilvert*, 58 L. J., Ch. 392; 41 Ch. D. 88; 61 L. T. 60; 37 W. R. 545—C. A.

Lessee of Sporting Rights—Overstocking of Land with Game—Injury to Crops.]—The plaintiff was the tenant of a farm over which the shooting rights were reserved to the landlord. The defendants were lessees of the shooting rights over the estate of which the plaintiff's farm formed part. The plaintiff brought his action in the county court against the defendants for compensation for injury done to his crops by pheasants brought into a coppice adjoining his farm. It was proved at the trial that the defendants had brought from another part of the estate 450 pheasants, and turned them down in the coppice adjoining the plaintiff's farm, and that the pheasants came out of the wood and did damage by feeding on the crops in his field, which was contiguous to the coppice. The amount of the damage done was not disputed. The county court judge held that the plaintiff was entitled to recover the amount claimed. The defendants appealed:—Held, on appeal, that the county court judge was right, and the plaintiff was entitled to recover, as the damage complained of had been done by reason of an undue quantity of game having been brought near to his farm, and that the sporting rights of the defendants had been exercised in an unreasonable manner. *Farrer* v. *Nelson*, 54 L. J., Q. B. 385; 15 Q. B. D. 258; 52 L. T. 766; 33 W. R. 800; 49 J. P. 725.

Abatement of Nuisances.]—A nuisance arose from a privy in the upper part of a house, of which, with the shop belonging thereto, H. was the lessee, at a rack-rent, for twenty-one years. H. occupied the shop only, and sub-let the upper part, where the nuisance arose, to K., a weekly tenant, and to this part of the premises H. had no access. C., as agent for H.'s lessor, collected the rent. The parish authorities, for the purpose of abating the nuisance, under the powers given them by 29 & 30 Vict. c. 90, s. 21, and 18 & 19 Vict. c. 121, s. 12, summoned C., as the owner of the premises within the interpretation clause (s. 2) of the latter statute, before the justices, who made an order upon him to abate the nuisance:—Held, that C. was not the owner within the true construction of s. 2, as K., the weekly tenant, was the occupier of the premises where the nuisance arose, and that therefore H. was not the occupier, but the person receiving rent from the occupier, of the property within the meaning of the statutes. *Cook* v. *Montague*, 41 L. J., M. C. 149; L. R. 7 Q. B. 418; 26 L. T. 471; 20 W. R. 624.

—— **Payment by Tenant—Recovery from Landlord.**]—The plaintiff was tenant from year to year to the defendants, of a house in London, in which a nuisance arose by reason of water and sewage collecting in the cellar owing to a stoppage in the drains. The sanitary authority under s. 4, sub-s. 1, of the Public Health (London) Act, 1891, served a notice at the premises, directed to the owner or occupier, and requiring the nuisance to be abated; they did not serve a notice on the owner under s. 4, sub-s. 3, which provides for service on owner in case of structural defect. The plaintiff, who under the act was liable to a penalty if he did not comply with the notice, did the necessary work, in the course of which it was discovered that the nuisance arose from a structural defect:—Held, that plaintiff was entitled under s. 11, sub-s. 1, to recover from the defendants the costs and expenses incurred in abating the nuisance as money paid by him for the use and at the request of the defendants;

although no notice under s. 4, sub-s. 3, had been served upon the defendants as owners. Per Charles, J., he was also entitled to recover at common law. *Gebhardt* v. *Saunders*, [1893] 2 Q. B. 452; 67 L. T. 684; 40 W. R. 571; 56 J. P. 741.

See further, NUISANCE.

c. Action by Lessor against Third Party.

For Injury to Reversion—Proof of Tenancy.]—In an action, an averment that the plaintiff's close, at the time of the injury, was in the occupation of J. V. and H. V., is sufficiently proved, if at the time of the injury it was in their occupation, though the tenancy was since changed, before action. *Vowles* v. *Miller*, 3 Taunt. 137.

In an action for an injury done to the plaintiffs' reversion, they proved that they were tenants in common under a demise; and a witness stated that he occupied part of the premises under both the plaintiffs, and that he had at first an agreement in writing, which he signed; and another witness said, that he occupied under one of the plaintiffs only, and that he did not know the other;—Held, that there was sufficient evidence of a tenancy by both the occupiers under both the plaintiffs. *Strother* v. *Barr*, 2 M. & P. 207; 5 Bing. 136; 6 L. J. (O.S.) C. P. 245. See *Webb* v. *Clarke*, 4 W. R. 125.

A first count was for injuring the plaintiff's reversion in lands, by cutting and carrying away branches from trees growing on it. Second count, in trover, for the branches. Proof that the plaintiff demised the lands to a tenant, by a written agreement not produced, and that the defendant carried away some branches, the value of which was not shewn:—Held, that the plaintiff could not support the first count without producing the written agreement; but that, on the second count, he was entitled to nominal damages. *Cotterill* v. *Hobby*, 6 D. & R. 551; 4 B. & C. 465; 3 L. J. (O.S.) K. B. 276.

In an action for an alleged injury to the plaintiff's reversionary interest in a house, he averred in his declaration that the premises were in the occupation of P., as tenant thereof to the plaintiff. It was proved that the house had been let to P. by a cestui que trust, to whom she had paid rent, the plaintiff being his trustee:—Held, to be no variance, as the legal estate was in the plaintiff, and the cestui que trust was to be considered as his agent or bailiff. *Vallance* v. *Savage*, 5 M. & P. 576; 7 Bing. 595; 9 L. J. (O.S.) C. P. 181.

—— **Defence.**]—To an action by a reversioner against the defendant, for pulling down a wall, and building and incumbering a close in the occupation of his tenant, and putting other buildings thereon, a plea that he was the occupier of a dwelling-house adjoining the close and wall, and, in repairing his dwelling-house, accidentally threw down the wall, and afterwards, and in a reasonable time, and before action, rebuilt the wall, and committed the grievance in such rebuilding, &c.:—Held, ill. *Taylor* v. *Stendall*, 3 D. & L. 161; 7 Q. B. 634; 14 L. J., Q. B. 301; 9 Jur. 1096.

For Detinue of Specific Articles removed during Tenancy.]—A lessor can maintain an action in detinue or trover for the recovery of specific articles wrongfully removed, with the privity of the lessee, from the demised premises during the tenancy. *Petre* v. *Ferrers*, 61 L. J., Ch. 426; 65 L. T. 568.

F. was the tenant of a mansion and premises under a demise for years granted by trustees of a settlement under a power, P. being entitled under the settlement to the reversion expectant upon the termination of the lease. During the term certain articles, consisting of an altar-stone and sacred relics, which from a time anterior to the demise had been used and kept in a chapel constituting part of the demised premises, were removed under the authority of F.:—Held, that P. was entitled to a judgment for restoration of the specific articles. *Ib.*

6. Tenant's Duty to Preserve Boundaries.

Generally.]—A tenant is bound to preserve the boundaries, and if he permits them to be destroyed so that the landlord's land cannot be distinguished from his, he is bound to restore them specifically, or to substitute land of equal value. *Att.-Gen.* v. *Fullerton*, 2 Ves. & B. 263; 13 R. R. 76.

Where a tenant of land for life, or for years or at will, has lands of his own adjoining to that which he so holds as tenant, it is his duty to keep the boundaries between them clear and distinct, so that at the expiration of the tenancy the reversioner or remainderman may be able without difficulty to resume possession of what belongs to him; and if the person having such partial interest neglects this duty, and suffers the boundaries to be confused, so that the reversioner or remainderman cannot tell to what lands he is entitled, a court of equity will give relief by compelling the persons who have occasioned the difficulty to make good, out of what may be considered to lie in the nature of a common fund, that portion of it which belongs to another; but in order to obtain this relief it must be shewn that the tenant is in possession of the specific land originally demised. *Att.-Gen.* v. *Stephens*, 6 De G. M. & G. 111; 25 L. J., Ch. 888; 2 Jur. (N.S.) 51; 4 W. R. 191.

Jurisdiction of Court.]—The duty of the tenant of land, immediately adjoining other land of his own, is, not merely to leave the boundary between his own land and his landlord's distinct at the expiration of his term, but to keep it distinct during the term. The court has, therefore, jurisdiction during the term to ascertain the boundary if the tenant has confused it. A reference to chambers to ascertain boundaries directed in lieu of the issue of a commission, further consideration being adjourned and costs reserved. *Spike* v. *Harding*, 47 L. J., Ch. 323; 7 Ch. D. 871; 38 L. T. 285; 26 W. R. 420.

Lessor allowing Building beyond Boundary.]—On a demise of a piece of ground on which a tenant has built, if it corresponds with the abuttals, though not with the measured distance as stated in the lease, and the lessor sees the building going on without objecting to it, he will not afterwards be allowed to claim the overplus above the measured distance on the footing of an encroachment. *Neale* d. *Leroux* v. *Parkin*, 1 Esp. 229.

Encroachments by Tenants—Statute of Limitations.]—Where a tenant takes in and incloses adjoining land during his tenancy, the presumption of law that he does it for his landlord, so

that the land gained by such encroachment will have to be given up at the end of the tenancy as part of the original demised premises, is not rebutted by the fact that the landlord expressly assented to the inclosure being made; and where such presumption exists, the Statute of Limitations (3 & 4 Will. 4, c. 27), s. 7, does not apply till the original tenancy has ended. *Whitmore* v. *Humphries*, 41 L. J., C. P. 43; L. R. 7 C. P. 1; 25 L. T. 496; 20 W. R. 79.

Landlord allowing Tenant to exercise Acts of Ownership.]—Where a landlord suffers his tenant to exercise acts of ownership, and makes no objection to it, it is evidence to be left to the jury, whether he did not mean to be bound by those acts of his tenant. *Doe* d. *Winckley* v. *Pye*, 1 Esp. 366.

O. FURNISHED HOUSES.

1. AGENTS TO LET.

Liability of.]—The plaintiff employed the defendant, as a house agent, to let a house for her on commission. In an action for introducing an insolvent tenant:—Held, that it was properly left to the jury upon the evidence to say whether it was part of the defendant's retainer to make reasonable inquiries as to the eligibility of the tenant. *Heys* v. *Tindall*, 1 B. & S. 296; 30 L. J., Q. B. 362; 4 L. T. 403; 9 W. R. 664.

Authority of.]—It is doubtful whether an agent to let a house has an implied general authority to let persons into possession, but slight evidence will be sufficient to shew an express authority. *Slack* v. *Crewe*, 2 F. & F. 59.

2. CONTRACT.

Habitable.]—It is not enough that a landlord in letting a furnished house honestly believes that the house is in a fit state for habitation; the house itself must be reasonably habitable. *Charsley* v. *Jones*, 53 J. P. 280.

In an agreement to let a furnished house there is an implied condition that the house shall be fit for occupation at the time at which the tenancy is to begin, and if the condition is not fulfilled, the lessee is entitled thereupon to rescind the contract. *Wilson* v. *Finch Hatton*, 46 L. J., Ex. 489; 2 Ex. D. 336; 36 L. T. 473; 25 W. R. 537.

In a contract for the letting of a furnished house or rooms there is no implied condition that the house shall continue fit for habitation during the term. *Wilson* v. *Finch Hatton* (2 Ex. D. 336) explained. *Sarson* v. *Roberts*, 65 L. J., Q. B. 37; [1895] 2 Q. B. 395; 14 R. 616; 73 L. T. 174; 43 W. R. 690; 59 J. P. 643—C. A.

—— **Bugs.**]—It is an implied condition in the letting of a furnished house that it shall be reasonably fit for habitation; if it is not (e.g. where it is greatly infested with bugs), the tenant may quit it without notice. *Smith* v. *Marrable*, 11 M. & W. 5; 2 D. (N.S.) 810; Car. & M. 479; 12 L. J., Ex. 223; 7 Jur. 70.

Upon the letting of a furnished house for immediate occupation, with an express condition that it is fit for occupation, if it is not so, and is at once given up on that account, the landlord cannot recover either the rent or for use and occupation. On such a contract, whether express or implied, it is a breach of the condition if the house is so infested and overrun with bugs, as to render it unfit for occupation; and as the condition applies to the whole house, it is a breach if any of the rooms are in that state. But it must appear that the nuisance existed to a serious and substantial extent, and was such as the tenant could not reasonably be expected either to endure or to extirpate. *Campbell* v. *Wenlock* (*Lord*), 4 F. & F. 716.

—— **Defective Drainage.**]—The defendant agreed to rent the plaintiff's furnished house for three months from the 7th of May, but having at the beginning of the intended tenancy discovered that the house was unfit for habitation owing to defective drainage, he refused to occupy it. The plaintiff repaired the drains, and on the 26th of May tendered the house in a wholesome condition to the defendant, who refused to occupy or to pay any rent. The plaintiff having sued for the rent and for use and occupation:—Held, that the state of the house at the beginning of the intended tenancy entitled the defendant to rescind the contract, and that he was not liable for the rent or for use and occupation. *Wilson* v. *Finch Hatton*, supra.

—— **Insufficiency of Water Supply.**]—An agreement was entered into between C. and P. for the lease of a partly furnished house, together with a garden and a few acres of ground, for a term of five years. P. alleged that a false representation had been made by C. as to the sufficiency of the water supply, and, on the water supply failing, P. alleged that the house was uninhabitable, and refused to be bound by the agreement. There was evidence that the pipes had become stopped up when the house was in the occupation of P.:—Held, upon the evidence, that there had been no misrepresentation by C.; and that, in a letting of this description, the doctrine laid down in *Smith* v. *Marrable* (11 M. & W. 5), that there was an implied condition in the letting of a house that it should be reasonably fit for habitation, was inapplicable. *Chester* v. *Powell*, 52 L. T. 722.

—— **Infectious Disease.**]—One who has agreed to take a furnished house is not bound to fulfil his contract if the house be infected with measles at the date fixed for the commencement of the tenancy. If in such a case the lessor sue for rent, he must show, to entitle him to succeed, that the house was in fact in a state fit for human occupation at the date fixed for the commencement of the term, notwithstanding a previous intimation by the tenant of his intention to repudiate the contract. *Bird* v. *Greville* (*Lord*), 1 Cab. & E. 317.

There is no duty in the case of a man who has let part of his house as furnished lodgings to give information to the lodgers upon a member of his family living in the house becoming ill with an infectious disease. *Sarson* v. *Roberts*, supra.

—— **Right to Determine Lease—Implied Agreement only exists at Commencement.**]—A tenant is not justified in determining a tenancy of a furnished house, because during the term a portion of the plastering of the ceilings (which were cracked and fractured at the commencement of the tenancy) fell in one room, and the plastering of the ceilings in other rooms was unsound, and

liable to fall. On a letting of a furnished house, the implied term that it shall be fit for human habitation only applies to the condition of the premises at the commencement of the tenancy. *Maclean* v. *Currie*, 1 Cab. & E. 361.

—— **Housing of the Working Classes—Damages for Breach.**]—By s. 12 of the Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), "in any contract for letting for habitation by persons of the working classes a house or part of a house, there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation":—Held, that a tenant under that section has a right to sue his landlord for damages for injuries caused by the premises not being reasonably fit for human habitation owing to any defective state of repair. *Walker* v. *Hobbs*, 59 L. J., Q. B. 93; 23 Q. B. D. 458; 61 L. T. 688; 38 W. R. 63; 54 J. P. 199.

Agreement to Furnish—Condition precedent.]—A. let to B. a furnished house, at a certain rent payable in advance from a certain future day, and agreed that it should be furnished suitably for a school:—The suitable furnishing of the house is a condition precedent to the right to demand the rent. *Mechelan* v. *Wallace*, 6 N. & M. 316; 7 A. & E. 54, n.

Agreement to Deliver up in Good Condition.]—A defendant agreed to hire of the plaintiff a house and household furniture, and, at the expiration of the tenancy, to leave the furniture cleaned:—Held, that this contract was supported by proof that the furniture was clean at the time the defendant took possession of it, and that he agreed to leave it as he found it. *Stanley* v. *Agnew*, 12 M. & W. 827; 13 L. J., Ex. 197.

—— **Agreement to refer to Arbitration.**]—Where by a written agreement a tenant of a furnished house agrees at the expiration of the tenancy to deliver up possession of the house and the furniture in good condition, and in the event of loss or damage to make good or pay for the same, the amount of such payment, if disputed, to be settled by two valuers, the settlement of the amount of the payment by the valuers is a condition precedent to the right of the landlord to bring an action in respect of the dilapidations. *Babbage* v. *Coulburn*, 52 L. J., Q. B. 50; 9 Q. B. D. 237, n.; 46 L. T. 794; 30 W. R. 950, n.—C. A.

To use as Private Residence.]—An agreement to let a furnished house was drawn up by the plaintiff and sent to the defendant, who returned it unsigned, and sent a letter, in which he wrote, "I approve of the agreement and will sign it"; but, before it was signed, refused to carry it out, on the ground that she found the plaintiff—while assuring her that he meant to use the house as a private residence—was actually advertising it as a boarding-house:—Held, first, that the agreement required a 2*s.* 6*d.* stamp, but might be admitted on payment of the penalty. *Caralciro* v. *Puget*, 4 F. & F. 537.

Held, secondly, that if the letter amounted to an adoption of it as a final agreement, it would be sufficient within the Statute of Frauds. *Ib.*

Held, thirdly, that if the defendant was deceived into adopting it, by a wilful misstatement as to the plaintiff's object, that would support a plea of fraud. *Ib.*

Claim and Proof—What a Variance.]—A declaration for rent stated a demise of a messuage, land, and premises, with the appurtenances. The proof was a demise of a messuage and land, together with the furniture, utensils, and implements:—Held, that as the rent issued out of the real property, and not out of the furniture, it was sufficient to allege and prove a demise of the real property, and therefore there was no variance. *Farewell* v. *Dickenson*, 6 B. & C. 251; 9 D. & R. 345; 5 L. J. (O.S.) K. B. 154. S. P., *Salmon* v. *Mathews*, 8 M. & W. 827; 11 L. J., Ex. 59.

Premises Destroyed by Fire.]—When furnished apartments have been let by a verbal contract at a sum payable quarterly, and the premises are destroyed by fire in the middle of a quarter, an action lies for the use and occupation during the current quarter, until the fire, at a rate proportioned to the time of actual occupation, if it appears that both parties have agreed that the occupier's liability does not continue after the occurrence of the fire; for such agreement negatives the supposition of a demise for a certain time, and shews a contract in respect of the occupation de die in diem. *Parker* v. *Gibbins*, 1 Q. B. 421; 1 G. & D. 10; 5 Jur. 1036. *See also* ante, col. 928.

P. LODGINGS.

1. LETTING.

Statute of Frauds.]—An agreement to occupy lodgings at a yearly rent, payable in quarterly proportions (the occupation to commence on a future day), is an agreement relating to an interest in land within 29 Car. 2, c. 3 (Statute of Frauds), s. 4. *Inman* v. *Stamp*, 1 Stark. 12; 18 R. R. 740.

And a verbal agreement to take ready-furnished lodgings "for two or three years" is a contract for an interest in land, and valid as a lease for not exceeding three years. *Edge* v. *Strafford*, 1 Tyr. 293; 1 C. & J. 391; 9 L. J. (O.S.) Ex. 101.

By a parol agreement between the plaintiff, a boarding-house keeper, and the defendant, the defendant agreed to pay, for the board and lodging of himself and man, and accommodation for his horse, at the boarding-house, 200*l.* a year from a fixed day; the agreement to be terminable by a quarter's notice on either side. The plaintiff having sued the defendant for a breach by him of this agreement, in refusing to become an inmate of the boarding-house:—Held, that though the agreement was unwritten, the action was maintainable; for that the contract was not one for any interest in or concerning land. *Wright* v. *Stavert*, 2 El. & El. 721; 29 L. J., Q. B. 161; 6 Jur. (N.S.) 867; 2 L. T. 175; 8 W. R. 413.

Use and Occupation.]—A person who agrees to take furnished lodgings, but does not enter, is not liable to an action for use and occupation. *Edge* v. *Stafford*, supra.

Covenant not to Underlet.]—Letting lodgings is not a breach of a covenant not to underlet. *Doe* d. *Pitt* v. *Laming*, 4 Camp. 77; 15 R. R. 728.

Tenant not Liable for Double Value on Holding over.]—A weekly tenant continuing in possession several weeks after the expiration of a notice to quit, and a demand made, is not liable to an

action for double value under 4 Geo. 2, c. 28, s. 1. *Lloyd* v. *Rosbee*, 2 Camp. 453 ; 11 R. R. 764.

Special Contract.]—A defendant entered into an agreement in writing with the plaintiff, by which he was to board and lodge with the plaintiff at a certain weekly sum, and the plaintiff agreed to take in payment for the board and lodging certain furniture of the defendant in the plaintiff's house. The furniture having afterwards, and before the plaintiff had appropriated it, been taken in execution for a debt of the defendant to another party :—Held, that the plaintiff was entitled to recover for board and lodging generally, as if the special contract had never existed. *Keys* v. *Harwood*, 2 C. B. 905 ; 15 L. J., Car. P. 207.

When no Contract entered into.]—A. and his wife boarded and lodged in the house of B., the brother of A., and both A. and his wife assisted B. in carrying on his business. A. brought an action for the services, to which B. pleaded a set-off for board and lodging :—Held, that neither the services on the one hand, nor the board and lodging on the other, could be charged for, unless the jury was satisfied that the parties came together on the terms that they were to pay and to be paid ; but that, if that were not so, no ex post facto charge could be made on either side. *Davies* v. *Davies*, 9 Car. & P. 87.

Rent—Landlord's Misconduct causing Tenant's leaving.]—If a landlord of furnished lodgings, by his misconduct, justifies a tenant in an abrupt departure, during a tenancy limited to a specific period, he cannot recover rent for the whole time agreed on, but is entitled to rent for the time during which there has been an actual occupation. *Kirkman* v. *Jervis*, 7 D. P. C. 678.

Defence—Plaintiff intending to use Premises for Immoral Purpose.]—In an action for breach of a contract to let rooms, the defendant may justify such breach by the fact that the plaintiff intended to use the rooms for illegal purposes, whether at the time of refusing to perform the contract he assigned or really acted upon such intended use as a reason for such refusal or not. *Cowan* v. *Milbourn*, 36 L. J., Ex. 124 ; L. R. 2 Ex. 230 ; 16 L. T. 290 ; 15 W. R. 750. *And see* ante, col. 924.

2. Rights of Lodgers.

Who is a Lodger.]—By an agreement in writing the plaintiff hired from F. rooms in a house held by her under an unexpired lease from the defendant, for which the plaintiff was to pay F. 27*l.* 10*s.* per quarter, she paying rates and taxes and keeping the premises in repair. The rooms so hired by the plaintiff substantially constituted the whole house, F. only retaining possession of the housekeeper's room on the basement and of two or three empty attics and a stable. Rent being due from F. to the defendant, the latter distrained and sold household furniture belonging to the plaintiff, who, relying upon the provisions of the Lodgers' Goods Protection Act, 1871 (34 & 35 Vict. c. 79), sued him for an illegal distress :—Held, that, although the agreement under which he held might make him an under-tenant, the plaintiff was not the less a lodger entitled to the protection of the statute. *Philips* v. *Henson*, 47 L. J., C. P. 273 ; 3 C. P. D. 26 ; 37 L. T. 432 ; 26 W. R. 214.

If the landlord, reserving a room in a house, lets the rest of it to a person, but retains such control and dominion over it as is usually retained by masters of houses let in lodgings, the relation of landlord and "lodger" may exist between the parties within the meaning of the Lodgers' Goods Protection Act, 1871 (34 & 35 Vict. c. 79), although the lodger has the right of exclusively occupying the greater part of the premises, and has separate and uncontrolled power of ingress and egress, and neither the landlord nor his agent sleeps or resides in the house, and the lodger acts as caretaker of the part reserved. The existence of the relationship of landlord and lodger is a question of fact. *Ness* v. *Stephenson*, 9 Q. B. D. 245 ; 47 J. P. 134.

An occupier of part of a house is not a "lodger" within the meaning of the Lodgers' Goods Protection Act, 1871, unless the person under whom he holds retains some control and dominion over the house. *Morton* v. *Palmer*, 51 L. J., Q. B. 7 ; 45 L. T. 426 ; 30 W. R. 115—C. A.

—— **How far a Question for Jury.**]—The plaintiff rented three floors of a house from B., the lessee, who received the plaintiff's rent and paid the rates and taxes. B.'s name was painted over the shop, and he occupied the ground-floor and basement. Afterwards B. let the ground-floor and basement to J., whose name was then painted up with B.'s. The plaintiff continued to occupy and pay rent to B. B.'s lessor seized the plaintiff's goods for distress for rent due from B. In an action against the lessor's bailiff for wrongful distress, the judge left it to the jury to say whether the plaintiff was a lodger, and a verdict was found for the plaintiff :—Held, that there had been a misdirection, as the question left to the jury had the effect of leaving it to them to decide as to the construction of the Lodgers' Goods Protection Act. *Ib.*

Held, by Brett and Lindley, L.JJ., that there ought to be a new trial ; Cotton, L.J., being of opinion that judgment ought to be entered for defendant. *Ib.*

Distraining on Lodger's Goods.]—*See* Distress.

To Use of Premises.]—If a person takes lodgings on the first and second floors of a house, he has a right to the use of the door-bell, the knocker, and the skylight of the staircase, and the water-closet, unless it is otherwise stipulated at the time of the taking of the lodgings ; therefore, if the landlord deprives the lodger of the use of either, an action lies. *Underwood* v. *Burrows*, 7 Car. & P. 26.

Right of Voting at Parliamentary Elections.]—*See* Election Law.

3. Liability of Lodging-house Keeper.

Common Lodging-house—Registration.]—A lodging-house, where hawkers and persons of a similar class are received, staying for various periods, having their meals in one room, and paying sixpence a night, is a common lodging-house within the meaning of the Public Health Act, 1875, and therefore requires registration. *Langdon* v. *Broadbent*, 37 L. T. 434.

Penalty for Keeping—Charitable Institutions—Non-registration.]—Sect. 3 of the Common

Lodging Houses Act, 1853, provides that "a person shall not keep a common lodging-house or receive a lodger therein until the house has been inspected and approved for that purpose by some officer appointed in that behalf by the local authority, and has been registered." The appellant opened and kept a lodging-house for the reception of male lodgers, who slept in one common room capable of accommodating 100 persons. The lodgers were charged, at the discretion of the manager, a sum not exceeding 4*d.* per night for bed, supper and breakfast; but the house was maintained not for the purpose of gain, but for the accommodation of the poorest class of persons only, partly with a charitable and partly with a religious object. The house had not been inspected or approved by the officer of the local authority, nor was it registered. The appellant having been summoned and convicted for keeping a common lodging-house in contravention of the provisions of the above section:—Held, that the house, being maintained as a charitable institution, and not for purposes of gain, was not a common lodging-house within the meaning of the act, and that the conviction could not be supported. *Booth* v. *Ferrett*, 59 L. J., M. C. 136; 25 Q. B. D. 87; 63 L. T. 346; 38 W. R. 718; 55 J. P. 7.

"Keeper of"—Non-residence of Landlord.]—The landlord of a house in the city of Dublin, all the rooms of which are let out in tenements by the week, at rents less than three shillings per week, although he does not reside upon the premises, is the keeper of a common lodging-house within the meaning of the Dublin Improvement Acts Amendment Act, 1864, s. 24. *Halligan* v. *Ganly*, 19 L. T. 268.

By-laws and Registration.] — *See* LOCAL GOVERNMENT.

For Loss of Lodgers' Goods.]—There is no duty of the keeper of a lodging-house arising out of the relation of lodging-house keeper and lodger, to take care of his lodger's goods as in the case of an innkeeper. *Holder* v. *Soulby*, 8 C. B (N.S.) 254; 29 L. J., C. P. 246; 6 Jur. (N.S.) 1031; 2 L. T. 219; 8 W. R. 438.

Nor, assuming it to be a usage in lodging-houses that the keeper, when the lodger is about to quit his apartments, has licence to enter and show them to strangers who are inquiring for lodgings, is there, arising out of that usage, any liability on the keeper, if the goods are then stolen, for not using due and proper care to prevent such persons from carrying away the lodgers' goods then in the apartments. *Ib.*

Lodgers are bound to take care of their own goods. *Ib.*

—— **Dishonesty of Servant.**]—To render a lodging-house keeper liable for the wrongful acts of a servant, the lodging-house keeper must have been guilty of such a misfeasance, or such gross misconduct, as an ordinary and reasonable person would not have been guilty of. *Clench* v. *D'Arenberg*, 1 Cab. & E. 42.

A declaration alleged that the plaintiff became a guest in a boarding-house of the defendant, on the terms that she would take due and reasonable care of the plaintiff's goods while they were in her house, for hire and reward to her in that behalf payable, and that it became her duty, by herself and her servant, to take such due and reasonable care of the plaintiff's goods whilst she remained as a guest, with the goods in the defendant's house. It appeared that the plaintiff was a guest in the defendant's boarding-house, paying between 2*l.* and 3*l.* per week, and having the use of sitting, drawing and dining-rooms, in common with others, her own bedroom, her board, and the attendance of the servants. In the evening the plaintiff, being about to leave, while her luggage was in the hall, near the front door, sent one of the servants out to a shop near for biscuits; he left the front door ajar, and a thief entered and stole a box of the plaintiff's. The judge directed the jury that the defendant was not bound to take more care of her house and the things in it than a prudent owner would take; and one of the questions which he left to the jury was whether, supposing the loss to have been occasioned by the negligence of the servant in leaving the door ajar, there was any negligence on the part of the defendant in hiring or keeping the servant:—Held, that it was at least the duty of a boarding-house keeper to take such care of her house and the goods of her guests in it as a prudent householder would take. *Dansey* v. *Richardson*, 3 El. & Bl. 144; 2 C. L. R. 1442; 23 L. J., Q. B. 217; 18 Jur. 721.

By Lord Campbell, C.J., and Coleridge, J., that it was a breach of the defendant's duty, as keeper of a boarding-house, if, through the gross negligence of herself or her servant, the plaintiff's box was stolen; and that the distinction between the negligence of the servant in leaving the door open, and the negligence of the defendant in hiring or keeping the servant, could not be supported, and therefore that the direction was wrong. But by Wightman and Erle, JJ., a boarding-house keeper is not bound to take more care about the goods of his guest than he as a prudent owner would take with respect to his own; and that if the defendant had taken care to employ and keep none but trustworthy servants, she was not liable for the act of negligence of the servant in leaving the door open, and therefore that the direction was right. *Ib.*

J. R.

LAND REGISTRY.

1. LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888.
2. TRANSFER OF LAND ACT, 1862.
3. REGISTRATION OF DEEDS—*See* DEED AND BOND.
4. REGISTRATION OF JUDGMENTS—*See* JUDGMENTS.

1. LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888.

Charges within—Charges under Public Health Act.]—By s. 257 of the Public Health Act, 1875, certain expenses incurred by local authorities, for the payment of which the owner of the premises in respect of which they were incurred is liable, may be recovered from the owner, and until recovery are a charge upon such premises:—Held, that such expenses are not "land charges" within the meaning of the Land Charges Registration and Searches Act, 1888, so

as to require registration under that act. *Reg.* v. *Holt*, 59 L. J., Q. B. 113; 24 Q. B. D. 178; 62 L. T. 117; 38 W. R. 236; 54 J. P. 120.

Vacating Registration.]—A husband being in default for non-payment of alimony and costs, writs of sequestration were issued to enforce payment, and were duly registered under the Lands Charges Act, 1888. Before the sequestrators could sell the property in respect of which the writs had been issued, the husband assigned his interest therein, and the assignee having satisfied the claims by paying an agreed sum into court, the petitioner, with the concurrence of all parties, applied to discharge the sequestrators and to vacate the registration of the writs:—Held, that there was no power under the act to order the registration of the writs to be vacated. *Cook* v. *Cook*, 59 L. J., P. 69; 15 P. D. 116; 62 L. T. 667; 38 W. R. 656.

2. TRANSFER OF LAND ACT, 1862.

Indefeasible Title—Trustees for Sale—Consent.]—Trustees having the legal estate in, and being empowered to sell real estate, with the consent of the beneficial tenant for life, for the time being, entitled in possession, are not "trustees for sale of the fee simple," within the fourth clause of the 4th section of 25 & 26 Vict. c. 53. *Bradish* v. *Ellames*, 3 N. R. 632; 10 Jur. (N.S.) 251; 10 L. T. 89.

—— **Purchaser for Mortgagee.**]—A mortgagor registered with an indefeasible title made three successive mortgages, all of which were entered on the register of incumbrances; the first mortgagee sold under his power of sale, and conveyed the estate to a purchaser:—Held, that the purchaser was entitled to be registered with an indefeasible title. *Richardson's Purchase, In re*, 40 L. J., Ch. 616; L. R. 12 Eq. 398; 25 L. T. 12; 19 W. R. 1048; as varied on a subsequent application, 41 L. J., Ch. 221; L. R. 13 Eq. 142; 20 W. R. 163.

When the owner of an equity of redemption of real estate is entered on the register of estates with an indefeasible title, under the Transfer of Land Act, 25 & 26 Vict. c. 53, subject to a mortgage, and the mortgagee afterwards exercises his power of sale, and conveys part of the registered property to a purchaser, such purchaser is entitled, after his conveyance has been entered on the register, to have the property bought by him, and all entries relating thereto removed from the register without the consent of the mortgagor. *Winter, In re*, 42 L. J., Ch. 318; L. R. 15 Eq. 156; 27 L. T. 842; 21 W. R. 320.

—— **Expenses of making Roads—Charge.**]—A. the owner of seven lots of land, sold two of them to B., and he retained five. They entered into mutual covenants for bearing, in proportion, the expenses of a road common to all the lots, and there was a proviso that the expenses should be a charge upon the owners of the seven lots in proportion:—Held, that the land was not charged, and that A. was entitled to have an indefeasible title to his five lots registered under 25 & 26 Vict. c. 53, without noticing the proviso or the claims of B. *Mason, Ex parte, Drew's Estate, In re*, 35 Beav. 443; 35 L. J., Ch. 845; L. R. 2 Eq. 206; 12 Jur. (N.S.) 425; 14 L. T. 278.

—— **"Valid Marketable Title."**]—In 1857, in suits in chancery, it had been certified that a good title could be made to certain estates, and the estates were afterwards sold under orders of the court, subject to a condition that the title should not be required prior to a private act of parliament which had vested the estates in trustees for sale, and which recited the previous certificate of good title made by the court of chancery:—Held, that the title up to the period for which it had been certified might be accepted without further examination as indefeasible for registration. *Watney, In re*, 38 L. J., Ch. 57.

Jurisdiction of Court.]—Semble, the jurisdiction of the court of chancery was not extended by 25 & 26 Vict. c. 53, which act was only intended to give the court power to make a sale with an indefeasible title, when it had jurisdiction aliunde to order the sale. *Bradish* v. *Ellames*, 3 N. R. 632; 10 Jur. (N.S.) 251; 10 L. T. 89.

Practice.]—Mode of obtaining the opinion of the court under the 17th and 134th sections of the 25 & 26 Vict. c. 53. *Anon.*, 5 N. R. 230.

The preliminary order or orders under the s. 43 of the 25 & 26 Vict. c. 53, must be made on petition in court, and not upon application in chambers; and it is proper before obtaining certificate, that an order or orders should be made embracing all the matters referred to in that section. *Bradish* v. *Ellames*, 10 Jur. (N.S.) 1231; 11 L. T. 532; 13 W. R. 170.

—— **Materials in support of Application.**]—In ex parte applications, under 25 & 26 Vict. c. 53, s. 4, for the opinion and directions of a judge, a statement, in writing, of the facts should be prepared, certified by the registrar, and submitted to the judge. *Kennard, In re*, 11 Jur. (N.S.) 27; 11 L. T. 585; 13 W. R. 302.

When an ex parte application for an order to the registrar of titles is accompanied by a written statement of the circumstances of the case, certified by the registrar of the court, the judge must hear it. *Drew's Estate, In re*, 35 Beav. 446; 35 L. J., Ch. 845; L. R. 1 Ch. 126; 11 Jur. (N.S.) 1030.

The practice with regard to appeals from the land registry office is for the court to proceed on a certified statement of the registrar. *Ib.*

—— **Advertisements.**]—Upon an application for the sale by the court of lands with an indefeasible title, the court will fix a day upon which parties who have sent in claims in answer to the advertisements directed by the act must bring in evidence of such claims. *Bradish* v. *Ellames*, 15 L. T. 350; 15 W. R. 380.

A. E. R.

LAND SOCIETY.

Rules—Construction.]—A land society was formed for the purchase of an estate to be sold in lots to the members, each of whom covenanted to abide by the rules of the society. The estate was purchased by trustees for the society, and the purchase-money was secured by mortgages on which the trustees were liable. The estate was divided into numbered allotments, and a price set opposite each number to be paid by monthly instalments, and such allotments were

to be allotted at that price unless previously sold by auction. By r. 35 members were required in addition to the price of their allotments, to pay a proportionate part of the price, expenses, and interest payable in respect of allotments held from time to time by the trustees. The rules further provided for the forfeiture of allotments in case of default, and declared that the rights of the defaulting member in respect of such allotments should absolutely cease; they empowered the trustees to sell such forfeited allotments, and required them in the event of a sale, after deducting all moneys payable under the rules by the defaulting member, to pay him the surplus of the proceeds:—Held, that unallotted and forfeited allotments were allotments held from time to time by the trustees within r. 35, and that members were liable for contributions in respect thereof. *Hill* v. *Crank*, 62 L. J., Q. B. 145; 68 L. T. 551—C. A.

—— **Building Society.**]—A society whose rules are certified as a building society is not justified in acting as a freehold land society. *Grimes* v. *Harrison*, 26 Beav. 435; 28 L. J., Ch. 823; 5 Jur. (N.S.) 528; 23 J. P. 421. And see *Kent Building Society, In re*, 1 Dr. & Sm. 417; 30 L. J., Ch. 785; 7 Jur. (N.S.) 1045; 4 L. T. 610; 9 W. R. 686.

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LANDS CLAUSES ACT.

[BY JOHN MEWS.]

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I. CONSTRUCTION OF COMPULSORY POWERS.

General Rules.]—Equity, in exercising its jurisdiction to prevent companies, intrusted with large powers by the legislature, acting in a manner prejudicial to the rights of individuals on the one hand, will, on the other, be careful not to assist persons in availing themselves of any omission in such powers, for the purpose of giving effect to exorbitant claims against the companies. *Bell* v. *Hull and Selby Ry.*, 1 Railw. Cas. 616.

It is on the ground of ageneral public good, that the legislature grants to railway companies the compulsory powers of taking the property of individuals. *Gray* v. *Liverpool and Bury Ry.*, 9 Beav. 391; 4 Railw. Cas. 235; 10 Jur. 364.

In questions between companies and individuals whose property the former seek to take under compulsory clauses in their acts, the court does not strain the construction of the act in favour of the former. *Ib.*

When the power of fully completing a railway, according to the intention of the legislature, depends on the voluntary consent of individuals having property on the proposed line, such consent ought to be obtained by the company before they proceed in the undertaking. Whether, where it is evident that the line of a railway cannot be fully completed, the company have a right, compulsorily, to take any part of the property in the proposed line, quære. *Ib.*

The court will not take into consideration the possibility of a public company hereafter obtaining extended parliamentary powers. *G. W. Ry.* v. *Metropolitan Ry.*, 1 N. R. 551.

Injuring Persons without Compensation.]—It is a proper rule of construction not to construe

an act of parliament as interfering with or injuring persons' rights without compensation, unless one is obliged to so construe it. *Att.-Gen.* v. *Horner*, 54 L. J., Q. B. 232; 14 Q. B. D. 257; 33 W. R. 93; 49 J. P. 326.

Strict Construction.]—The court will not construe the compulsory powers of a railway company so as to extend them beyond the express words or absolutely necessary implication of the act, it being the duty of the company to take care that the public understand, before the act is passed, the extent of the compulsory powers that they require. *Lamb* v. *North London Ry.*, L. R. 4 Ch. 522; 21 L. T. 98; 17 W. R. 746.

Acts of parliament authorising the construction of public undertakings are to be construed strictly with reference to the rights of those who are empowered to make them. *Eversfield* v. *Mid-Sussex Ry.*, 5 Jur. (N.S.) 776.

Doubtful Construction.]—Where the construction of an act of parliament under which property is to be compulsorily taken is doubtful, it should be construed most favourably to those who seek to defend the property from innovation. *Sparrow* v. *Oxford, Worcester and Wolverhampton Ry.*, 9 Hare, 441.

Observations as to the construction of doubtful passages of acts of parliament, as between a company and the public. *Eton College, Ex parte*, 20 L. J., Ch. 1; 15 Jur. 45.

It is incumbent on a company claiming a statutory compulsory power of taking land to prove clearly and distinctly from the act of parliament the existence of the power; and if there is any doubt with regard to its extent, the landowner should have the benefit of that doubt. *Simpson* v. *South Staffordshire Water Works Co.*, 4 De G. J. & S. 679; 34 L. J., Ch. 380; 11 Jur. (N.S.) 453; 12 L. T. 360; 13 W. R. 729, 908. S. P., *Barker* v. *North Staffordshire Ry.*, 2 De G. & Sm. 55; 5 Railw. Cas. 401; 12 Jur. 324, 575, 589.

Powers conferred on Public Bodies.]—In the construction of powers conferred by act of parliament upon public bodies acting for the public benefit alone, the intention of the legislature is not to be measured by the more guarded powers given to public companies established for trading purposes. *North London Ry.* v. *Metropolitan Board of Works*, 1 Johns. 405; 28 L. J., Ch. 909; 5 Jur. (N.S.) 1121; 7 W. R. 640.

An act empowering a company to contract for purposes of public advantage ought not to receive a narrow construction. *Dover Gas Light Co.* v. *Dover Corporation*, 7 De G. M. & G. 545.

Where the legislature confers powers on any body, whether one which is seeking to make a profit for shareholders, or one acting solely for the public good, to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good, and a contract purporting to bind such a body and their successors not to use those powers is void. *Ayr Harbour Trustees* v. *Oswald*, 8 App. Cas. 623—H. L. (Sc.)

Deviation from Powers given.]—Acts of parliament for making canals, railroads, etc., are powers given by parliament over the land of the different proprietors through whose estates the works are to proceed. Each proprietor, therefore, has a right to have the power strictly and literally carried into effect, as regards his own lands, and also has a right to require that no variation shall be made to his prejudice. But where the act of parliament is faithfully carried into execution, as regards his lands, he cannot on the mere ground of a variation which is not injurious to himself, and which was made with the consent of others, obtain from a court of equity, an injunction to stay the proceedings. *Lee* v. *Milner*, 2 Y. & Coll. 611.

Persons obtaining from the legislature power to interfere with the rights of property are bound strictly to adhere to the powers so conceded to them, to do no more than the legislature has sanctioned, and to proceed only in the mode which the legislature has pointed out; but (except in a proceeding at the instance of the attorney-general) any one seeking the assistance of a court of equity, to restrain the violation of such a contract with the legislature, is bound to show that he has a private interest in the matter. *Liverpool Corporation* v. *Chorley Water Works Co.*, 2 De G. M. & G. 852.

Land must be bonâ fide required.]—Principles upon which the court will exercise its jurisdiction over bodies to whom parliament has given powers of making compulsory purchases of land. *Webb* v. *Manchester and Leeds Ry.*, 4 Myl. & C. 116; 1 Railw. Cas. 576.

Semble, that the court will not allow such bodies to avail themselves of their parliamentary powers, by taking land which they do not require for a bonâ fide purpose sanctioned by their act of parliament. *Ib.*

Semble, also, that although an attempt to obtain possession of land has been, in the first instance, made under colour of the powers of the act of parliament, when not really required for the bonâ fide purposes of the act, yet if the land afterwards becomes really necessary or desirable for such bonâ fide purposes, the court will not interfere to prevent its being taken. *Ib.*

Taking not Authorised.]—Where a railway company takes land in excess of its powers, semble, the court will not grant relief by injunction if the quantity and value of the land are extremely small. *Dowling* v. *Pontypool, Caerleon and Newport Ry.*, 43 L. J., Ch. 761; L. R. 18 Eq. 714.

Object attainable in Another Way.]—When a railway company has given notice to take land for some object which is clearly within their compulsory powers, a court of equity will not interfere to restrain them merely on the ground that they might obtain the same object in some other way without taking the land. *Lamb* v. *North London Ry.*, L. R. 4 Ch. 522; 21 L. T. 98; 17 W. R. 746.

Public Act.]—An act of parliament for the formation of a railway, containing a declaration that it is to be judicially taken notice of as a public act, cannot be treated or construed as a private assurance. *Hargreaves* v. *Lancaster and Preston Ry.*, 1 Railw. Cas. 416.

Enabling not Compulsory.]—Acts of parliament, authorising companies to make railways, are regarded as but enabling statutes which give powers, but do not render compulsory or obligatory the exercise of those powers. *Scottish*

North Eastern Ry. v. *Stewart*, 3 Macq. H. L. 382 ; 5 Jur. (N.S.) 607 ; 7 W. R. 458. S. P., *Edinburgh, Perth and Dundee Ry.* v. *Philip*, 2 Macq. H. L. 514 ; 3 Jur. (N.S.) 249 ; 5 W. R. 377. *Astley* v. *M. S. & L. Ry.*, 2 De G. & J. 453 ; 27 L. J., Ch. 478 ; 4 Jur. (N.S.) 567 ; 6 W. R. 561.

Incorporation of Lands Clauses Act.]—Where an act of parliament with compulsory powers incorporates the whole of the Lands Clauses Act, a right to compensation is without any other enactment conferred upon the persons interested in lands injuriously affected by the exercise of such powers. *Reg.* v. *St. Luke's, Chelsea*, 41 L. J., Q. B. 81 ; L. R. 7 Q. B. 148 ; 25 L. T. 914 ; 20 W. R. 209—Ex. Ch.

The effect of the incorporation of a general act by the special act of a company with compulsory powers is, that the general act must be looked at with reference to the powers conferred upon the company of dealing with the land when required ; but it is to the special act that regard must be had for the purpose of ascertaining the contract between the landowner and the company, and the power which the company has of acquiring the land. *Simpson* v. *South Staffordshire Waterworks, In re*, 4 De G. J. & S. 679 ; 34 L. J., Ch. 380 ; 11 Jur. (N.S.) 453 ; 12 L. T. 360 ; 13 W. R. 729. See also *Westminster Estate (Parish of St. Sepulchre), In re*, 4 De G., J. & S. 232 ; 33 L. J., Ch. 372 ; 10 Jur. (N.S.) 298 ; 9 L. T. 819 ; 12 W. R. 499 ; 3 N. R. 594.

The Lands Clauses Act is not to be considered as incorporated in a subsequent private act of parliament, the object of which is merely to give a certain benefit to a company in respect of a lease which has been conditionally granted to them, and which it confirms ; the former act being applicable only where land is sought to be acquired for undertakings of a public nature. *Wale* v. *Westminster Palace Hotel Co.*, 8 C. B. (N.S.) 276 ; 7 Jur. (N.S.) 26 ; 9 W. R. 14.

A railway act passed in 1844, under which lands were taken afterwards. In 1845, the Lands Clauses Act passed ; and in 1847 a second railway act was passed extending the first :—Held, that the Lands Clauses Act applied to the whole undertaking, and became consolidated both with the acts of 1844 and 1847, and that the owner of lands taken under the first act of 1844 became entitled to the benefit of its provisions. *Lancashire and Yorkshire Ry.* v. *Evans*, 15 Beav. 322. S. P., *Evans* v. *Lancashire and Yorkshire Ry.*, 1 El. & Bl. 754 ; 22 L. J., Q. B. 254 ; 17 Jur. 878.

Exclusion of.]—The City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii.), incorporates the provisions of the Lands Clauses Act, 1845, except so far as they are inconsistent therewith, or are therein declared not to extend thereto ; and by s. 3, the provisions of the Lands Clauses Act relating to the "purchase and taking of lands otherwise than by agreement," are declared not to extend to the City of London Sewers Act :—Held, that s. 68 of the Lands Clauses Act, which is included under the heading "Purchase and taking of lands otherwise than by agreement," preceding s. 16, was excepted by the form of words used in s. 3 of the City of London Sewers Act ; and that a person whose premises had been injuriously affected by works done under the latter act was not entitled to compensation. *Ferrar* v. *Sewers Commissioners*, 38 L. J., Ex. 102 ; L. R. 4 Ex. 227 ; 21 L. T. 295 ; 17 W. R. 709—Ex. Ch.

By two acts of Geo. 3, the defendants were empowered to alter the levels of streets without compensating those injured by such alteration. The 18 & 19 Vict. c. 120, enables a vestry to purchase any right or easement over any land necessary for their works ; it also incorporates the Lands Clauses Act, 1845, but excludes the operation of ss. 16 to 68, being those sections which relate to the taking of lands otherwise than by agreement ; and by s. 247 it repeals all acts which are inconsistent with it. The defendants obstructed the plaintiff's light in raising a street, and refused to enter into any agreement or pay compensation :—Held, that in the absence of any agreement, the defendant was not entitled to compensation, as s. 68 was not incorporated. *Baker* v. *St. Marylebone Vestry*, 24 W. R. 848 ; 35 L. T. 129.

The London (City) Improvement Act, 1847, provided, by s. 1, that the Lands Clauses Act, 1845, "so far as the provisions thereof were not expressly varied or accepted," should be incorporated ; and by s. 19, that "so much of the Lands Clauses Act, 1845, as relates to the purchase of lands otherwise than by agreement" should not be incorporated. The Holborn Valley Improvement Act, 1864, by s. 5, incorporated the act of 1847, except s. 19, and also the provisions of the Lands Clauses Act, 1845, "except the part of the last-mentioned act with respect to the purchase and taking of lands otherwise than by agreement." An act for further improvements of the Holborn Valley, passed in 1867, by s. 1, incorporated the previous Improvement Act, except certain sections, and the Lands Clauses Act, 1845, "except the provisions of the last-mentioned act with respect to the purchase and taking of lands otherwise than by agreement." Under the Holborn Valley Improvement Act, 1864, the corporation of London constructed certain works, and thereby blocked up a street near the plaintiff's premises, and diminished the access to and value of the premises, and the plaintiff sent in a claim under the Lands Clauses Act, 1845, s. 68 :—Held, that s. 68 of the Lands Clauses Act was excepted from the local acts, and that (even assuming s. 68, if incorporated, would give a right to compensation) this being so, and no other sections giving such a right, the plaintiff was not entitled to compensation either by statutory process or right of action at common law. *Dungey* v. *London Corporation*, 38 L. J., C. P. 298 ; 20 L. T. 921 ; 17 W. R. 1106.

By a special act the Lands Clauses Act, "except so much as related exclusively to the purchase and taking of land by compulsion," was incorporated with it :—Held, that s. 68 of the Lands Clauses Act was not excepted, although that section was within the division of the Lands Clauses Act relating to "the purchase and taking of lands otherwise than by agreement." *Broadbent* v. *Imperial Gas Light Co.*, 7 De G. M. & G. 436 ; 26 L. J., Ch. 276 ; 3 Jur. (N.S.) 221 ; 5 W. R. 272.

Varying.]—The Lands Clauses Act, 1845, contained special provisions with regard to claims for compensation for lands affected by the works of a railway, and directed that (except in certain specified cases) compensation should be awarded with costs. A special act (38 & 39 Vict. c. ccviii.) declared that the provisions of the general act were, "except where expressly varied by the special act," incorporated with it. The general act provided the forms of proceedings

in arbitrations—such as the appointment of arbitrators by the contending parties, and the appointment of an umpire by the arbitrators—and declared that compensation might be recovered with costs. The special act directed that arbitrations conducted under its provisions should be conducted by an arbitrator appointed by the Board of Trade, but contained no specific directions as to the award of costs. An arbitration of this sort took place under the special act. The arbitrator awarded compensation, but said nothing as to costs:—Held, that the claimant was entitled to costs, for that the substitution of one form of proceeding in the arbitration different from that in the general statute, expressly varied the provisions of the general statute as to that matter, but did not repeal the provisions as to costs in the general statute, nor affect the general rule that the party succeeding in such an arbitration should recover costs. *Metropolitan District Ry.* v. *Sharpe*, 50 L. J., Q. B. 14; 5 App. Cas. 425; 43 L. T. 130; 28 W. R. 617; 44 J. P. 716—H. L. (E.)

II. PURCHASE OF LANDS.

A. BY AGREEMENT.

1. *Generally*, 1299.
2. *Capacity to Sell and Convey*, 1302.
3. *In Consideration of a Rent-charge*, 1305.
4. *Agreements between Landowners and Promoters*, 1307.
5. *Specific Performance*, 1311.

1. GENERALLY.

To procure Supply of Water.]—A clause in an agreement by a railway company to purchase land, binding the company to procure a supply of water as good as the supply of water cut off by the construction of the line from the severed lands of the vendor, only binds the company to do once for all that which may reasonably be expected to insure a sufficient supply of water, and does not bind them to do whatever may be necessary from time to time to secure that result. *Gray and Metropolitan Ry., In re*, 44 L. T. 567.

"Necessary and convenient for Traffic"—Land used for Garden—Coal-shed let to Tenant.]—Land was conveyed to a railway company for the construction of "a station-house and other works and conveniences necessary and convenient for passenger and goods traffic," with a covenant by the company that if any part should not within five years be used for the purposes of the station-house, works and conveniences, and so used at the expiration of that time, the company would reconvey or purchase as therein mentioned. About fifty-two perches were used as garden ground in part by the station-master and in part by some of the porters, and about four perches were occupied by a coal-shed, let by the company to a coal dealer to store his coal brought by the railway, ready for distribution:—Held, that the company were not bound to reconvey or purchase. *Harris* v. *L. & S. W. Ry.*, 60 L. T. 392.

Time for Purchase of Land.]—A landowner agreed with a railway company to sell them ten acres of land and one acre for a station, at a certain price, and that if the company should require more land for the station, or for any purpose, they should pay for the same at the rate of 100*l.* per acre, and the agreement was to be supplemental to the Lands Clauses Act. The ten acres were paid for and conveyed. Before the compulsory powers of the company had expired they gave (apparently by mistake) notice to treat for three acres more, and before the time for completion expired they took possession of these three acres, alleging that they required the land. They also took possession of some small pieces of land which were covered by earth slipped from the railway:—Held, that, under the agreement the company had power, until the expiration of the time limited for the completion of the railway, to take such land as they required for the purpose of a station, or for slips of earth at 100*l.* an acre. *Kemp* v. *S. E. Ry.*, 41 L. J., Ch. 404; L. R. 7 Ch. 364; 26 L. T. 110; 20 W. R. 306.

An agreement between a railway company and landowner provided that in case the company should require additional land for the purposes of their railway and works, they should pay for it at the rate of 200*l.* per acre, without further payment in respect of severance or other damages:—Held, that the company were thereby authorised to take land for the purpose of diverting a footway, within the time for completing their works, which had not expired, although the time for compulsory taking of land had expired. *Rangeley* v. *Midland Ry.*, 37 L. J., Ch. 313; L. R. 3 Ch. 306; 18 L. T. 69; 16 W. R. 547.

Public companies having power to purchase land cannot contract for its purchase, and insist upon a custom to defer its completion to the extreme period of time allowed them for the taking of land and the completion of their works. No such custom exists, but they are bound to complete their contract within a reasonable time. *Baker* v. *Metropolitan Ry.*, 31 Beav. 504; 32 L. J., Ch. 7; 9 Jur. (N.S.) 61; 7 L. T. 494; 11 W. R. 18.

Price and Damages.]—Action for obstructing a private right of way. Plea, that the defendants were authorised to make a railway near to the plaintiff's messuage, for which purpose they agreed in writing to purchase his land near the messuage; and as the making of the railway was likely to injure him, it was agreed that the defendants should pay to the plaintiff, for the purchase of the land, such a sum of money as should compensate not only for the price, but also for all injury which should necessarily arise from making the railway near to the messuage. That in pursuance of this agreement by a deed, the plaintiff, in consideration of 575*l.* paid to her by the defendants, conveyed the land to them for the purpose of making the railway. That it was agreed that that sum should be accepted, and the plaintiff accepted the same, for the purchase of the land, and by way of compensation for all damage which she might sustain by reason of the exercise of the powers of the act upon the land purchased, 575*l.* being the sum so agreed to be paid, to compensate the plaintiff, not only for the price of the land, but also for all injury which should necessarily arise from making the railway. That the grievances complained of were part of the injury necessarily arising from making the railway, and were part of the damage sustained by the plaintiff by reason of the exercise of the powers of the act, and intended to be compensated. The deed recited, "whereas the plaintiff

has agreed to accept, and the defendants to pay, 575*l.* for the land, and by way of compensation for all damage which may be sustained by the plaintiff, by reason of the exercise of any of the powers of the act upon the land so agreed to be purchased" :—Held, that the plea was bad, for that the legal effect of the agreement, as stated in the plea, was, that the sum was paid to compensate the plaintiff for all such injury as should necessarily arise from making the railway near to the messuage of the plaintiff ; whereas, by the deed, it appeared that it was paid to compensate for specific injury only, not complained of in the declaration. *Pilgrim* v. *Southampton and Dorchester Ry.*, 7 C. B. 205 ; 18 L. J., C. P. 139 ; 13 Jur. 515.

Effect of Notice to Treat.]—After the passing of the act, the company, before claiming the benefit of the agreement, served the defendant with a common notice to treat, and did not formally insist on the agreement until the defendant had appointed an arbitrator. The company subsequently entered under s. 85 of the Lands Clauses Act :—Held, that this clause applied exclusively to compulsory purchases; that the proceedings of the company assumed the non-existence of any agreement; and on these grounds a bill by the company and two promoters for specific performance of the agreement was dismissed. *Bedford and Cambridge Ry.* v. *Stanley*, 2 J. & H. 746 ; 1 N. R. 162 ; 32 L. J., Ch. 60 ; 9 Jur. (N.S.) 152 ; 7 L. T. 477 ; 11 W. R. 139. See *Kemp* v. *S. E. Ry.*, 25 L. T. 622.

Abandonment—Compulsory Powers.]—If a company exercises its compulsory powers, and takes proceedings under the Lands Clauses Act, relating to the purchase of lands otherwise than by agreement, it cannot afterwards enforce a prior agreement. *Ib.*

Agreement purporting to diminish Powers over Land taken.]—Harbour trustees, constituted for the management and improvement of a public harbour by a special act, which incorporated the Land Clauses (Scotland) Act, 1845, were empowered to take lands scheduled (which included that part of O.'s land having an unrestricted frontage to the harbour) for the undertaking. While the question of compensation to O. for his land was before the arbiter the trustees lodged a minute agreeing that the conveyance should restrict their use of the ground taken so as not to interfere with the access from the remaining property of O. to the harbour. To this minute O. did not assent. The arbiter found 4,900*l.* payable by the trustees as compensation for an unrestricted use, or 2,786*l.* if it were competent for the trustees to bind themselves and their successors by the above-mentioned minute. O. raised an action for declarator of an absolute purchase and unrestricted right in the subject, and for payment of the larger sum :—Held, that the trustees had power under their special act, now or at any future time, to make erections on the piece of ground taken, which would effectually destroy the frontage of O.'s remaining property to the harbour ; secondly, it was not competent to the trustees to dispense with future exercise of their powers by themselves and their successors. *Ayr Harbour Trustees* v. *Oswald*, 8 App. Cas. 623—H. L. (Sc.)

Effect of, on Legal Rights.]—A railway company having purchased of the proprietors of a canal all their estate and interest in it, subject to certain leases, as to portions thereof, being houses and wharves, determinable upon six months' notice ; and, previously to obtaining their act, having agreed with the lessees of the said houses and wharves to give them satisfaction, recompense and compensation for the value of their leasehold interests, or for damage sustained by them in respect of fixtures and improvements or otherwise, by the execution of the act ; and the railway company being then the reversioners, gave the lessees notice to determine their tenancies :—Held, that the court would not permit them so to exercise their legal rights on the face of the above agreement. *Doo* v. *Croydon Ry.*, 1 Railw. Cas. 257 ; 8 L. J., Ch. 200 ; 3 Jur. 258.

—— **Leaseholds.**]—Where a railway company arranges by agreement with a lessee to take land held under a lease containing a proviso against assignment without the licence of the lessor, the necessity for such licence is taken away by the operation of the act. *Slipper* v. *Tottenham and Hampstead Junction Ry.*, 36 L. J., Ch. 841 ; L. R. 4 Eq. 112 ; 16 L. T. 446 ; 15 W. R. 861.

Where a portion of the land comprised in a lease is taken by a railway company, the lessee is not bound, under s. 119, to procure the lessor's consent to the agreement with the company for the apportionment of the rent. *Ib.*

2. CAPACITY TO SELL AND CONVEY.

Act strictly Construed.]—The provisions of the Lands Clauses Act, s. 9, which relate to the purchase of lands from persons under disability, must be strictly complied with. *Wycombe Ry.* v. *Donnington Hospital*, L. R. 1 Ch. 268 ; 12 Jur. (N.S.) 347 ; 14 L. T. 179 ; 14 W. R. 359.

Unless the court is convinced that future interests have been substantially protected. *Adderley* (*Rector*), *Ex parte*, 10 L. T. 131 ; 12 W. R. 243.

Husband and Wife.]—Where a testator devised land to his widow, Mary, for life, remainder to his son, and Elizabeth his wife in fee, who, during the life of the tenant for life, conveyed the land by a deed not acknowledged to a railway company :—Held, that the wife's interest was within s. 7 of the Lands Clauses Act, and passed to the company. *Cooper* v. *Gostling*, 4 Giff. 449 ; 9 L. T. 77 ; 11 W. R. 931.

Equitable Tenant for Life.]—An equitable tenant for life cannot, under s. 7 of the Lands Clauses Act, make a conveyance which will pass the legal estate. *Lippincott* v. *Smyth*, 29 L. J., Ch., 520 ; 6 Jur. (N.S.) 311 ; 2 L. T. 79 ; 8 W. R. 336.

Tenant in Tail.]—Inalienable estates tail are within s. 7 of the Lands Clauses Act, and may, under that statute, be conveyed by the tenant in tail in possession ; but that statute does not extend to the crown, for the king not being specially named therein, the rights of the crown are unaffected thereby. *Cuckfield Burial Board, In re*, 19 Beav. 153 ; 24 L. J., Ch. 585 ; 3 W. R. 142.

Death of Vendor—Infant a Trustee.]—A vendor contracted to sell land to a railway company, and died, having demised the land to an infant. The company had entered into possession under its statutory powers, but had not accepted the title. On a petition under the Trustee Act, the court made an order declaring the infant a trustee for, and directing that on payment of the purchase-money he or some proper person should convey to, the company. *Lowry's Will, In re*, 42 L. J., Ch. 509; L. R. 15 Eq. 78; 21 W. R. 428.

Trustee absent.]—Where one of two trustees for sale was absent in America:—Held, that the other, under the description of an "incapacitated" person, was entitled by the London Bridge Acts to make a conveyance for the purpose of such acts. *Tatham, Ex parte, London Bridge Acts, In re*, 3 Y. & Coll. 67; 7 L. J., Ex. Eq. 64; 2 Jur. 440.

Person of Unsound Mind.]—Sect. 7 of the Lands Clauses Act, 1845, does not authorise a person of unsound mind to sell land to a company or public body who have statutory power to take it: the section only authorises the committee of a lunatic to sell. *Tugwell, In re*, 53 L. J., Ch. 1006; 27 Ch. D. 309; 51 L. T. 83; 33 W. R. 132.

Applies to s. 92.]—Persons under disability, who can sell and convey under ss. 6 and 7 of the Lands Clauses Act, are able to sell and convey within the meaning of s. 92. *St. Thomas's Hospital* v. *Charing Cross Ry.*, 1 J. & H. 400; 30 L. J., Ch. 395; 7 Jur. (N.S.) 256; 4 L. T. 13; 9 W. R. 411.

Lunatic Asylum.]—A contract for the sale of land to the committee of visitors of a lunatic asylum may be approved of by the court of quarter sessions before being actually signed by the parties, if it can be identified as the contract which was afterwards entered into. *Derenish* v. *Brown*, 26 L. J., Ch. 23; 2 Jur. (N.S.) 1043; 4 W. R. 783.

Sect. 36 of the 16 & 17 Vict. c. 97, incorporating the Lands Clauses Act, 1845, with respect to the purchase-money or compensation coming to parties having limited interests enables parties having limited interests to contract with the committee of visitors for the sale of land, although the committee of visitors has no compulsory powers of purchasing. *Ib.*

Trustees—Powers of Sale.]—A testator devised and bequeathed his residuary estate (which comprised freehold lands, in respect of which a notice to treat was given by a railway company before the death of the testator) to the use of trustees and their heirs in trust for his wife for life, and after her death to pay and assure the same unto his two married daughters, in equal shares, for their separate use as tenants in common, with a gift over in favour of their respective issue in events which did not happen; "and for the purpose of division" he empowered his trustees to sell his residuary estate; and he declared that his trustees should be entitled to be paid for all business done by them in relation to his estate. The testator's wife, his two daughters and their husbands, all survived him; and after the death of the widow the trustees sold and conveyed the lands to a railway company for a price which had been determined by the valuation of two surveyors, as provided by s. 9 of the Lands Clauses Act, 1845; the trustees having first, for the purpose of making such valuation, appointed one of themselves as the surveyor on their behalf. One of the testator's daughters disputed the validity of the sale, and brought an action to restrain the company from taking or using the lands:—Held, first, that whether the power of sale under the will was still in existence or not, the trustees did not exercise it, but professed to convey the land under the provisions of the Lands Clauses Act, and therefore the validity of the sale must be determined without reference to the power. *Peters* v. *Lewes and East Grinstead Ry.*, 50 L. J., Ch. 839; 18 Ch. D. 429; 45 L. T. 234; 29 W. R. 875—C. A.

Secondly, that the trustees, being trustees of the land for femes covertes who were absolutely entitled for their separate use, were not persons competent to contract with a railway company for the sale of the land under s. 7 of the Lands Clauses Act, 1845, and that the sale was for that reason invalid. *Ib.*

Appointment of Surveyor—Certificate.]—A sale by trustees is invalid by reason of the appointment by the trustees of one of themselves as surveyor to value the land under s. 9 of the Lands Clauses Act, 1845. *Ib.*

The mere fact of trustees having the price fixed by two surveyors, and then agreeing to sell for that price, instead of first agreeing to sell for a certain price and then testing the price by the valuation of two surveyors, would not in itself invalidate a sale under s. 9 of the Lands Clauses Act—Per Jessel, M.R. But held by Hall, V.-C.:—That trustees cannot sell under the act at a price to be determined by valuation, but must first fix the price by agreement, and then ascertain its sufficiency by valuation. *Ib.*

The fact that the provisions of s. 9 of the Land Clauses Act have not been complied with, which require, in the case of a purchase from a person having a limited interest, that the value should be ascertained as therein provided, is no bar to the court decreeing performance of the contract, as it will itself, if necessary, ascertain that the price to be paid is sufficient. *Baker* v. *Metropolitan Ry.*, 31 Beav. 504; 32 L. J., Ch. 7; 9 Jur. (N.S.) 61; 7 L. T. 494; 11 W. R. 18.

Where a railway company agreed for the purchase of lands from persons under disability, and the certificate of two surveyors, as to the adequacy of price, had not been obtained, the court refused to decree specific performance at the instance of the company. *Wycombe Ry.* v. *Donnington Hospital*, L. R. 1 Ch. 268; 12 Jur. (N.S.) 347; 14 L. T. 179; 14 W. R. 359.

A municipal corporation was, under a local waterworks act, which incorporated the Lands Clauses Act, 1845, and the Waterworks Clauses Act, 1847, empowered to take, use, divert and appropriate certain streams and sources of water, and also a stream which flowed to, and was essential to the working of, a mill, of which the plaintiff was tenant for life. The corporation accordingly gave him notice of their intention to divert the whole of the stream, and did take and divert a great portion of it. Subsequently, by an agreement, made under the powers of the special act, he and the corporation agreed to refer to two surveyors "the amount of compensation-money to be now paid by the corporation for the damage which the owner or owners for the time being of the premises may sustain by the abstraction of the whole of the streams," &c., which the corporation was empowered to take

and divert. The surveyors were unable to agree, and a third surveyor was nominated under s. 9, who made his award, assessing a sum as compensation for the permanent damage and injury which the owner or owners for the time being of the mill, &c., may have sustained, or shall or may sustain by the abstraction of the whole of the streams," &c. The plaintiff sued the corporation to recover the sum so assessed, and filed his statement of claim setting out the facts, and claiming the amount, and a mandamus directing the corporation to pay it into the bank, under the provisions of the Lands Clauses Act, 1845 :—Held, that the reference to valuation was not ultra vires ; that there had been a good valuation under s. 9 ; and that the plaintiff was entitled to compensation in respect of the whole of the streams which the corporation had given him notice of their intention to take, and not merely in respect of so much of the streams as had been already taken. *Stone* v. *Yeovil Corporation*, 46 L. J., C. P. 137 ; 2 C. P. D. 99 ; 36 L. T. 279 ; 25 W. R. 240—C. A.

Declaration by Surveyors.]—On a sale by agreement to a company by an owner under disability :—Held, that the requirements of the Lands Clauses Act, 1845, s. 9, must be strictly complied with, and that the absence of a declaration in writing annexed to the valuation and subscribed by the surveyors was fatal to a claim by the company for the specific performance of the contract, although the valuation was made by surveyors without formal appointment. *Bridgend Gas and Water Co.* v. *Dunraven*, 55 L. J., Ch. 91 ; 31 Ch. D. 219 ; 53 L. T. 714 ; 34 W. R. 119.

Common Lands.]—Sects. 101 to 106, inclusive, of the Lands Clauses Act, 1845, with reference to the ascertaining of compensation for common lands, are not imperative so as to preclude the enforcement of specific performance of an agreement entered into otherwise than as mentioned in those sections. *Bee* v. *Stafford and Uttoxeter Ry.*, 23 W. R. 863.

3. IN CONSIDERATION OF A RENT-CHARGE.

Presumption of Agreement.]—A canal company having power to purchase lands for gross sums or for annual rent-charges, to be determined by commissioners in cases of disability, took possession of the lands of an infant, on an agreement with his tenant, and after an award by the commissioners of the gross sum or annual rent-charge which ought to be paid, but which award was invalid, no one being party to it who had power to bind the infant's interest, the awarded gross sum was paid by the company to the steward on an agreement for its return if the land were not conveyed to the company on the infant attaining his majority. No conveyance was executed, and the purchase-money was returned, but the company continued in the use of the land for their canal, paying to the landowner for forty years after he attained his majority a rent of nearly the amount awarded by the commissioners. The company also with his knowledge purchased the interests of leaseholds in the land :—Held, that an agreement could not be presumed to have been entered into or ratified by the landowner for a sale of the fee in consideration of a rent-charge. *Somersetshire Coal Canal Co.* v. *Harcourt*, 2 De G. & J. 596 ; 27 L. J., Ch. 625 ; 4 Jur. (N.S.) 671 ; 6 W. R. 670.

Leave to Distrain.]—When land had been conveyed to a railway company in consideration of a rent-charge, and the deed gave the person entitled to the rent-charge a power to distrain on the land for arrears of the rent-charge, the court gave the owner of the rent-charge leave to distrain on the land, notwithstanding the appointment of a receiver of the tolls, profits and income of the undertaking of the company in a suit instituted by the owner of a similar rent-charge on behalf of himself and all the other owners of similar rent-charges who should come in and contribute to the expenses of the suit. *Eyton* v. *Denbigh, Ruthin and Corwen Ry.*, 37 L. J., Ch. 669 ; L. R. 6 Eq. 14 ; 16 W. R. 1005.

Lands were conveyed to a railway company by various persons in consideration of rent-charges. The company became unable to pay the rents, and a suit was instituted by the owner of one of the rent-charges on behalf of himself and all the other owners of rent-charges who should come in and contribute to the expenses of the suit for the payment of the rent-charges ; and a decree was made, and a receiver of the tolls, profits and income of the undertaking appointed. The company conveyed and assigned their superfluous lands and chattels to trustees upon trust for the benefit of the creditors of the company, and a suit was instituted by a creditor on behalf of himself and all other creditors entitled to the benefit of the trust deed for the administration of the trusts thereof : a decree was made, and a receiver appointed in this suit also. Upon the application of the owner of a rent-charge for leave in both suits to distrain for arrears of rent on land conveyed by him to the company :—Held, that he was entitled to such leave in the first suit, but not in the second. *Eyton* v. *Denbigh, Ruthin and Corwen Ry.*, 38 L. J., Ch. 74 ; L. R. 6 Eq. 488 ; 16 W. R. 928.

Leave to Enter.]—When lands are sold to a railway company in consideration of a rent-charge, the parties may agree for its being secured by a power of entry ; and a conveyance made upon such an agreement, whereby the land was conveyed to uses that the grantor should take the rent-charge, and if it fell into arrear should enter until satisfaction, was held to entitle him to leave to enter against a receiver of the undertaking appointed by the court. *Forster* v. *Manchester and Milford Ry.*, 49 L. J., Ch. 454.

Vendor's Lien.]—By an agreement dated in 1851, a company under powers conferred by the Lands Clauses Act, 1845, contracted, in consideration of the payment of a yearly rent-charge, to purchase land for the construction of docks. The company had entered, and completed the construction of the docks, but had not made any payment in respect of the rent-charge :—Held, that the vendors were not entitled to a lien for the unpaid arrears of the rent-charge. *Jersey (Earl)* v. *Briton Ferry Floating Dock Co.*, L. R. 7 Eq. 409.

Priority—Debentures.]—The holders of rent-charges created by a railway company under the Lands Clauses Act, ss. 10 and 11, and charged on the undertaking of the company, have a first

charge on the lands of the company comprised in the deeds of charge, and are entitled to have their rent-charges paid out of the net earnings of the undertaking in priority to debenture holders. *Eyton* v. *Denbigh, Ruthin and Corwen Ry.*, L. R. 7 Eq. 439 ; 20 L. T. 388 ; 17 W. R. 546.

4. AGREEMENTS BETWEEN LANDOWNERS AND PROMOTERS.

Validity—To pay Purchase-money and buy off Opposition.]—A railway company, proposing to apply to parliament for an Extension Act, which a landowner, over whose estate the proposed railway was to pass threatened to oppose, made an unconditional agreement with him under the seal of the company, by which, after reciting that he agreed to withdraw his opposition, the company agreed to make the line and to pay 2,000*l.* for his land therein specified, required for the railway, and by clause 3, that they should pay him 2,000*l.* within three months from the passing of the act, as and for a personal compensation to him for the annoyance, inconvenience, damage, disturbance, loss and injury which he had sustained, or might or would sustain, in respect of the sporting and game upon his estate, by or in consequence of the construction of the intended works and of the parliamentary and other surveys and other works connected therewith or incidental thereto. The landowner agreed not to oppose the passing of the bill. The bill passed, and three months afterwards he brought an action to recover the money :—Held, that the contract was not ultra vires of the directors in the sense of being prohibited by the legislature, and was therefore a legal contract binding upon the company. *Taylor* v. *Chichester and Midhurst Ry.*, 39 L. J., Ex. 217 ; L. R. 4 H. L. 628 ; 23 L. T. 657.

The directors of an existing railway company applied to parliament for an act to make a branch line and a diverging line, one of which would touch the property of a landowner, and the other pass through his house and garden. He opposed their bill. They entered into an agreement with him to buy his land at a certain price, and on this consideration he withdrew his opposition to the bill, which then passed, but which did not give the power to make the diverging line, but only empowered them to make the branch line. The landowner executed his part of the agreement ; the directors did not execute theirs, but after some time determined not to make the branch line, and gave the landowner notice that they should not want his land. He filed a bill for specific performance :—Held, that as the contract was one in furtherance of the general objects of the company (although the company was not at the time of making it empowered to execute the works for which the land was wanted), it was not a contract ultra vires of the directors, and that the person who had contracted to sell the land was entitled to specific performance. *Eastern Counties Ry.* v. *Hawkes*, 5 H. L. Cas. 331 ; 7 Railw. Cas. 188 ; 24 L. J., Ch. 601 ; 3 W. R. 609.

Promoters of a company proposing to make a line of railway, or persons standing in a similar situation, as directors of an existing company, applying to parliament for authority to make a new line, may lawfully enter into a contract for land that will be necessary for the proposed line should the bill pass, and when it has passed, such contract will be valid, and may be enforced. *Ib.*

The mere want of legal power to make the contract at the moment of entering into it, will not affect its validity afterwards. Secus, where the act itself illegal, and parliament is to be asked to legalise it. *Ib.*

Semble, that where the directors of a railway company, wanting part of a property, purchase more of it than is required, though that may become a question between them and the shareholders, they cannot on that account avoid the contract with the seller. *Ib.*

In a contract for the sale of land for the purposes of a projected railway, the vendor was described as having, so far as regarded one part of the land, no more than a mere life estate, and the projectors of the railway undertook to obtain from parliament powers to enable him to make a good title :—Held, that where they did not fulfil this stipulation, or but for their own default, the title might have been perfected, they could not set up his deficiency of title as an answer to a bill for specific performance. *Ib.*

—— **Bona fides of Owner.**]—Where an act creating a railway company, or giving new powers to an existing company, authorises the purchase of lands for extraordinary purposes, a person who agrees to sell his land to the company, is not bound to see that it is strictly required for such purposes ; if he does not know of any intention to misapply the funds of the company, but acts bonâ fide in the matter, he may enforce payment of the contract. *Eastern Counties Ry.* v. *Hawkes*, 5 H. L. Cas. 331 ; 7 Railw. Cas. 188 ; 24 L. J., Ch. 601 ; 3 W. R. 609.

Conditional on making Railway.]—Two projectors of a railway company entered into a treaty with a landowner, whereby the latter agreed not to oppose their bill in parliament, and an agreement was executed by them (as the executive directors of the company), by which the company, upon its incorporation, was to pay to him 1,000*l.* for land of which he was the freeholder, and which was required for the purpose of making the railway, and 4,000*l.* for residential damage. A stipulation was also made that the company was to make a tunnel through part of his property, and a station was to be erected on another part. The company was incorporated, but, not being able to raise sufficient funds, no attempt was made to make the railway, and the money subscribed was returned to the shareholders :—Held, that the contract was conditional upon the making of the railway, and therefore that the landowner was not entitled to the moneys payable thereunder. *Preston* v. *Liverpool, Manchester and Newcastle-upon-Tyne Junction Ry.*, 5 H. L. Cas. 605 ; 25 L. J., Ch. 421 ; 2 Jur. (N.S.) 241 ; 4 W. R. 383.

By an agreement between the plaintiff and the promoters of a bill in parliament for making a railway, after reciting that the line of railway was proposed to be carried close to his park, and through some of his land, which bill he had opposed, he, in consideration of the covenants therein contained, acceded thereto. It was witnessed that, in consideration of the covenants on the promoters' part, the plaintiff covenanted that he would accede to the bill, provided it passed in the present or ensuing session of parliament ; and, in consideration of the assent given to the bill by the plaintiff, they covenanted that, in the event of the bill passing, the company should pay him, for so much land

intersected by the line as might be required, at the rate of 120*l.* per acre; and that they should pay him 3,000*l.* in full compensation for the general damage which the line should or might do to the mansion, park and estate, including therein the crossing of the road near the entrance to the park, the obstruction of views, the expense of temporary residence during the progress of the works, the depreciation in value as a residence, the additional expense in the cultivation of the farms by the alteration of the road, and all other damage to be done to the mansion and park. And the plaintiff agreed, on tender of 120*l.* per acre, and 3,000*l.*, that he would convey:—Held, per Parke, B., and Platt, B., that the promoters thereby bound themselves that the company should pay the 3,000*l.* on the passing of the act, although the railway should not be constructed, or any actual damage be done; but, per Pollock, C. B., that the taking of the land and damage done were conditions precedent to the payment of the 3,000*l.* *Bland* v. *Crowley*, 6 Railw. Cas. 756; 6 Ex. 522.

Conditional on Obtaining Act—Amalgamation.]—Two railways, called A. and B., were projected by different parties to run from M. towards N. The line of A. passed through the centre of the plaintiff's estate, and the line of B. through a corner of it. The projectors of A. agreed with the plaintiff for the purchase of that portion of his land which they required, and they were to have power to vacate the agreement in case the act for making their railway should not pass. Two bills were brought into parliament for forming the railways, and were referred to a committee, at whose suggestion the two projects were amalgamated; and an act was passed incorporating the projectors of both railways into one company, and for making a railway partly in the line of A. and partly in the line of B., the latter being the line selected with respect to the plaintiff's estate. Pending the act, the promoters of the two railways agreed with each other that where either company should have entered into contracts with landowners, whose property might be affected by either line, though in a somewhat different mode, the contracts entered into by the company proposing the rejected line should be adopted by the united company. A copy of this agreement was subsequently sent to the plaintiff by the united company. The projectors of line A. afterwards vacated their agreement with the plaintiff:—Held, that the plaintiff could not enforce that agreement against the united company. *Greenhalgh* v. *Manchester and Birmingham Ry.*, 3 Myl. & C. 784; 1 Railw. Cas. 68; 8 L. J., Ch. 75; 3 Jur. 693.

The Birkenhead and Chester Railway Company agreed with the plaintiff to give him for fourteen acres and a half of land 20,000*l.*, to be paid by instalments. The Birkenhead and Chester Company, and a rival company, called the Chester and Birkenhead Railway Company, both went to parliament, and in committee it was agreed that it should be referred to two members of the committee, to choose between the two lines, and that the selected company should take the engagements with the landholders entered into by the other, and this agreement was signed by the agent of the plaintiff. The Chester and Birkenhead Company were selected, and obtained their act, and for their proposed line sixteen acres of plaintiff's land, in another part of the estate, would be required. The plaintiff filed his bill against the Chester and Birkenhead Company, alleging the above facts, and praying that the contract of adoption might be declared binding on the defendants, and that they might be decreed to perform the same, and be restrained from entering on his lands till the first instalment, then due, was paid. To this a demurrer was put in, which was overruled. *Stanley* v. *Chester and Birkenhead Ry.*, 3 Myl. & C. 773; 1 Railw. Cas. 58.

—— **Validity.**]—It would not be ultra vires, a company wishing to alter one of the branches of its railroad, and about to apply to parliament for authority to do so, to enter into a contract for the purchase of lands required for the railway, if it should obtain an act. *Scottish North Eastern Ry.* v. *Stewart*, 3 Macq. H. L. 382; 5 Jur. (N.S.) 607; 7 W. R. 458.

Company not in Existence—Validity.]—An agreement by a landowner, with the promoters of a railway company, that in the event of their obtaining an act of parliament he will sell them such land as they require at a fixed rate, is binding, although the company has no existence at the time of the contract; and it is no objection on the ground of want of mutuality that the company is not bound to take the land. *Bedford and Cambridge Ry.* v. *Stanley*, 2 J. & H. 746; 32 L. J., Ch. 60; 9 Jur. (N.S.) 152; 7 L. T. 477; 11 W. R. 139; 1 N. R. 162. Contra *Williams* v. *St. George's Harbour Ry.*, 5 W. R. 725.

Conditional on beginning to execute Branch.]—A railway company obtained an act for making a branch within seven years. They gave the usual notices. While their bill was before parliament, they agreed to purchase the land of a certain owner. It was a term of this contract that it should not be enforced against the company within the seven years, and the purchase-money was to be paid when the company, on obtaining their act, should have "begun to execute the branch." The company obtained their act, but never executed or began to execute the branch. The seven years expired:—Held, that permissive words in the act of parliament were not obligatory; that the company was not bound to execute or begin to execute the branch; and that as the company had not executed or begun to execute the branch, their obligation to pay the purchase-money did not arise. *Edinburgh, Perth and Dundee Ry.* v. *Philip*, 2 Macq. H. L. 514; 3 Jur. (N.S.) 249; 5 W. R. 377.

Conditional on breaking Ground.]—A railway company, previously to applying to parliament for an act for the formation of a branch line, entered into an agreement with a landowner, by which he agreed to grant leases, and to give the company possession of a portion of his land, required for the formation of the railway, to enable the company to proceed with the works before obtaining their act, and, out of the sums thereinafter agreed to be paid, to settle with his tenants the agricultural and other damages to which they might be entitled. The company bound itself to apply for an act, and in case it was not obtained, to restore the ground taken possession of, and to pay such damages for the injury done as should be determined by an arbi-

trator. The company also agreed, before breaking ground, to pay him for personal inconvenience and annoyance, such a sum as should be declared by B.; and a deed of submission to arbitration was to be entered into for determining what should be paid to him, as the proprietor of an entailed estate, for land to be taken, and for injury done to the grounds and place in a residential point of view, and for injury sustained by the tenants. B. fixed the sum to be paid before breaking ground at 14,500*l.*, subject to deductions in a certain event. The company gave a debenture bond for the amount, and the landowner gave a discharge, and also executed a bond to the company, by which he bound himself, that if the bill should not pass he would repay the amount. The company obtained their act, but never exercised its powers, nor made the branch railway, and the time limited for its formation had expired:—Held, that the payment by way of price for the land was to be made if the land should be broken for the railway, and not otherwise, and specific performance could not, therefore, be compelled. *Scottish North-Eastern Ry.* v. *Stewart*, 3 Macq. H. L. 382; 5 Jur. (N.S.) 607; 7 W. R. 458.

Conditional on entering Land.]—A railway company, promoting in parliament a bill for the extension of their line, which extended line would pass through the lands of the plaintiff, covenanted with him as follows: "In the event of the bill being passed in the present session of parliament, the company shall, before they shall enter upon any part of the lands of Sir T. R. G., pay to him, his heirs or assigns, 4,900*l.* purchase-money, for any portion of his lands, not exceeding forty-three acres, which the company may, under the powers of their act, require and take for the purposes of this undertaking. In addition to purchase-money the company shall pay to him, his heirs or assigns, before they shall enter upon any part of the land, 7,100*l.*, as landlord's compensation for the damage arising to his estate by the severance thereof, in respect of the lands, not exceeding forty-three acres, to be taken by them":—Held, that the company was not bound to pay either of these sums unless they entered upon some part of the lands. *Gage* v. *Newmarket Ry.*, 7 Railw. Cas. 168; 18 Q. B. 457; 21 L. J., Q. B. 398; 16 Jur. 1136.

5. Specific Performance.

Parties.]—A railway company, having contracted with a party, who, under a contract made some years previously, was a purchaser of land which the company required for the railway, but who had not paid his purchase-money, and appeared for some time to have abandoned the possession of the land, filed their bill for specific performance against both the vendor and purchaser:—Held, that as the purchaser was not, after the lapse of time and under the circumstances, entitled in equity to a decree for specific performance of the contract against the vendor, the bill must be dismissed as against him, with costs; and as against the purchaser, without costs. *S. E. Ry.* v. *Knott*, 10 Hare, 122.

Claim for specific performance of agreement for a railway company to purchase land from trustees:—Held, that persons beneficially interested in the land were not necessary parties to the suit. *Potts* v. *Thames Haven Dock and Ry.*, 15 Jur. 1004.

Intention of Legislature.]—If the legislature prescribes formalities to be observed by parties contracting inter se, and one of them endeavours to avail himself of the want of such forms to postpone or avoid the completion of a contract entered into, the court will itself ascertain whether the intentions of the legislature have, in substance, been complied with; and if they have, it will carry the contract into effect. *Baker* v. *Metropolitan Ry.*, 31 Beav. 504; 32 L. J., Ch. 7; 9 Jur. (N.S.) 61; 7 L. T. 494; 11 W. R. 18.

Powers Expired—No Possession.]—The court of chancery will not, even in a suit for specific performance, compel a company who has not been in possession of the lands, and whose compulsory powers have expired, to pay the purchase-money, though the final award was made before their powers expired. The court, in such a case, will leave the seller to his remedy at law. *Harnett, Ex parte, Cork and Youghal Ry., In re*, 16 Ir. Ch. R. 268.

Construction of Agreement.]—A railway company contracted with the owner of lands to pay interest for the purchase-money, and compensation to be awarded, for so much of the lands as should be taken for the railway, and it was agreed that the money should be deposited in a certain bank until the completion of the purchase, and that the interest should be paid to the owner up to and inclusive of the day on which the purchase should be completed:—Held, that the reasonable construction of this agreement was, that it referred to the completion of the purchase by the purchaser, that, on the part of the purchaser, the purchase was completed by the payment of the purchase-money into court; and that it did not necessarily refer to the complete conveyance of the estate, and the final settlement of the purchase. *Lewis* v. *South Wales Ry.*, 10 Hare, 113; 22 L. J. Ch. 209; 16 Jur. 1149; 1 W. R. 45.

The promoters of a railway company, in consideration of a landowner's opposition to the bill being withdrawn, agreed to pay him 4,500*l.* as the purchase-money of land, not exceeding eight acres, to be taken by the company for the formation of this railway, and for consequential damage. The act was obtained, and the agreement adopted by the company in consideration of the landowner releasing the promoters from their covenant. The agreement was so framed, as to render it doubtful whether it was not to be contingent on the formation of the railway. The railway was abandoned, and, after the expiration of the time limited for the acquisition of land for the purposes of the undertaking by the company, the landowner filed a claim for specific performance of the agreement:—Held, to be a case in which a decree would produce more injustice than justice, and a specific performance was therefore refused. *Webb* v. *London and Portsmouth Ry.*, 3 De G. M. & G. 521; 21 L. J., Ch. 337; 16 Jur. 323.

A railway company contracted with A. to purchase not less than eight acres of his land, for which they were to pay at the rate of 1,000*l.* an acre over and above the compensation to be awarded to him for severing and otherwise injuring his estate. The company took more than the eight acres, for which they paid him the price agreed for, and also 2,660*l.*, being the amount awarded for injuring and severing his

property. Some years after the railway was made A. alleged that by the true construction of the agreement he was entitled to receive payment at the above rate of 1,000*l.* an acre, for portions of his roads, amounting to about three roods, over which the railway company had thrown bridges :—Held, that, assuming the construction of the agreement to be as A. contended, it was such a contract as the court would not decree specific performance of, but would leave A. to his legal remedy. *Ingram* v. *Midland Ry.*, 3 L. T. 553.

A company contracted to purchase the interest of a leaseholder in a piece of land for a given sum, and for the conveyance in fee of a piece of the land which they were to take under the compulsory powers of their act of parliament. The agreement contained a clause that the company was to be consulted on any buildings to be erected in the line of street, and that differences should be settled by two parties named, or their umpire. The company held the contract suspended, and after its compulsory powers expired, it refused to complete the contract. Upon a bill for specific performance :—Held, that the agreement respecting the buildings was vague, and that the court could not decree a specific performance of the contract. *Tillet* v. *Charing Cross Bridge Co.*, 28 L. J., Ch. 863 ; 5 Jur. (N.S.) 994 ; 7 W. R. 391.

Held, also, that as the agreement was uncertain no compensation could be awarded ; but as there was a concluded agreement, the court dismissed the bill, without costs. *Ib.*

An agreement for the sale of leaseholds contained a stipulation that there should be an apportionment of the rents according to the provisions of the Lands Clauses Act, 1845, if necessary. The necessity for an apportionment being clear, upon the lessor's refusal to agree to any apportionment, and the company's refusal to serve the lessor with notice to treat for the purchase of his interest (without which service no compulsory apportionment could be made), the lessee filed a bill for specific performance of the agreement, and prayed that the company might be ordered to serve his lessor with notice to treat :—Held, that, although the lessee was not entitled to a decree that the company should serve the lessor with a notice to treat for the purchase of his interest, the court would decree specific performance of the agreement, and direct that the lessee and the company should do and concur in all acts requisite to give effect to it. *Williams* v. *East London Ry.*, 21 L. T. 524 ; 18 W. R. 159.

Mandatory Injunction.]—The court will not interfere by way of mandatory injunction to compel the specific performance of a contract against a railway company, where the works have been already erected, and the public convenience would be sacrificed by interfering so as to compel the removal or the alteration of the works already executed, the court being satisfied that the works had been executed "so as to interfere as little as possible with the plaintiff's convenience," an expression which occurred in the agreement. *Raphael* v. *Thames Valley Ry.*, 35 L. J., Ch. 659 ; 12 Jur. (N.S.) 656 ; 14 L. T. 652 ; 14 W. R. 750.

Agent unauthorised—Possession.]—Objection taken to a bill for specific performance by a railway company, that the agent of the company not having been appointed under their corporate seal, there was no mutuality in the contract, overruled on the ground of possession taken, and acts done by them, which would have made them liable. *London and Birmingham Ry.* v. *Winter*, Cr. & Ph. 57.

Investigation of Title.]—The court will not, in a suit on the part of a landowner against a railway company for specific performance of an agreement to take lands, make a decree where there has been no investigation of title, but will refer it to chambers to see whether a good title can be made. *Gunston* v. *East Gloucestershire Ry.*, 18 L. T. 8.

Where there has been great delay on the part of the company, the court will reserve costs specially. *Ib.*

Possession pending Action.]—The plaintiff, a lessee of premises required for a street improvement, contracted to sell a lease of the premises for twenty-one years to the Metropolitan Board of Works. The purchasers required an abatement on the ground that the lease was found to be determinable at the end of seven or fourteen years by the lessor. The plaintiff claimed specific performance. Pending the action the board applied to be let into possession on payment into court of the whole purchase-money claimed :—Held, that though the board could, by taking the steps prescribed by the Lands Clauses Act, have obtained immediate possession of the property, yet as they had not done so, they were in the same position as any other purchaser who was defendant to an action for specific performance, and were not entitled to have possession given to them pending the action. *Bygrave* v. *Metropolitan Board of Works*, 55 L. J., Ch. 602 ; 32 Ch. D. 147 ; 54 L. T. 889 ; 50 J. P. 788—C. A.

Undertaking relinquished.]—Where a company after getting their act had determined to abstain from executing the line which it sanctioned :—Held, that they could not be compelled specifically to perform an agreement for the purchase of land which they had contracted to purchase for the purposes of the line, but which as they had relinquished the undertaking, they no longer required. *Scottish North-Eastern Ry.* v. *Stewart*, 3 Macq. H. L. 382 ; 5 Jur. (N.S.) 607 ; 7 W. R. 458.

Want of Money.]—In 1862 lands were taken by a railway company under agreements stipulating for a price to be fixed by arbitration, for a deposit, and for interest in the meantime, to be increased in case of delay by the company in completing the purchase. The deposit was paid and possession taken by the company, which constructed its railway on the land. The company also accepted the vendors' titles, and approved draft conveyances, but it refused to complete the purchase on the ground of want of money. Suits having been commenced by the vendors for specific performance of the agreement in 1867, a motion made in the suits for payment of the balance into court was refused. *Lewes* v. *Cambrian Ry.*, 36 L. J., Ch. 565 ; L. R. 2 Ch. 444 ; 15 W. R. 604.

Payment of Purchase-money into Court.]—In a suit by a vendor for specific performance against a railway company, they, by their answer, having admitted the contract, their acceptance of the title, and that they had taken possession of the land, the court, on an interlocutory motion,

ordered them to pay the purchase-money into court. *Chapple* v. *L. C. & D. Ry.*, 34 L. J., Ch. 597.

Where a company enters into a special contract to purchase, payment into court of purchase-money, under s. 69 of the Lands Clauses Act, is not proper. *Newton* v. *Metropolitan Ry.*, 8 Jur. (N.S.) 738. *See also* 1 Dr. & Sm. 583; 5 L. T. 542; 10 W. R. 102.

By an agreement, dated in June, 1847, a railway company contracted to purchase part of the estates in the cause, and it was stipulated that the purchase-money should be paid into a bank, in the names of the solicitors in the cause and the secretary of the company, there to remain till the approval of the contract by the master, when it was to be paid into court. The money was forthwith paid into a bank, and in 1848 the master made his report, approving of the contract. No application for the purpose having been made by the company, the plaintiffs, in March, 1850, moved for payment of the purchase-money into court, with interest at 5 per cent. from the date of the contract. Motion granted. *Chambers* v. *White*, 14 Jur. 1129.

A railway company, having entered into possession of land required for their undertaking under an agreement to pay the amount which should be fixed by arbitration for the purchase-money on the final settlement of the purchase, with interest thereon in the meantime, will, during the progress of a suit for specific performance of the contract, after the award, which remains unimpeached, has been made, and the title accepted, be ordered to pay the purchase-money, with interest thereon, into court, although they set up a case that the amount fixed by the arbitrator was fixed by him higher than it would otherwise have been in consequence of statements made by the other side, that the taking of their land would cause them the necessity of executing expensive works, which remain unexecuted at the date of the motion to bring in the purchase-money. *S. E. Ry.* v. *L., B. & S. C. Ry.*, 14 W. R. 666.

B. UNDER COMPULSORY POWERS.

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1. GENERALLY.

Easement—Right to cross Line of another Company—Subscription of Capital.]—By the act incorporating the S. Railway Company, the Lands Clauses Act, 1845, except where expressly varied thereby, was incorporated therewith, and it was enacted that the words to which meanings were assigned by the Lands Clauses Act should in the special act have the same meanings unless there was something in the subject or context repugnant thereto. The S. Company, "subject to the provisions of this act," were empowered to purchase any of the lands in their deposited plans. By s. 8, which was inserted for the protection of the G. W. Railway Company, it was provided (sub-s. 1), that the S. company should not enter upon or interfere with or execute any work over or under the line of the G. W. Railway until plans had been approved by the engineer of the G. W. Company or an engineer appointed by the Board of Trade. Sub-s. 2 provided that the railway of the S. Company should be carried in one place over and in another under the G. W. Railway by a bridge and tunnel. By sub-s. 4 the bridge and tunnel were to belong to the G. W. Company. By sub-s. 8 the S. Company were not to interfere with the land of the G. W. Company except for the purposes of the above crossings, and it was enacted that the S. Company should not purchase or take any land of the G. W. Company, but that the S. Company might purchase and the G. W. Company should grant an easement or right of using the crossings in perpetuity. By sub-s. 9 every dispute between the two companies respecting the above matters or any of them was to be referred to arbitration. The S. Company were proceeding to make the crossings, and the G. W. Company brought their action to restrain them from doing so, on the ground that the capital of the S. Company had not been subscribed, and that under the 16th section of the Lands Clauses Act they could not proceed to put in force any of their powers for the compulsory purchase of land until it had been subscribed:—Held (Lord Watson diss.), that the right given by the special act was a right of taking easements, not the exercise of running powers, nor the right of compulsory taking of "lands" within the Lands Clauses Act, 1845, s. 16, and that the notice to treat was good. *G. W. Ry.* v. *Swindon and Cheltenham Ry.*, 53 L. J., Ch. 1075; 9 App. Cas. 787; 51 L. T. 798; 32 W. R. 957; 48 J. P. 821—H. L. (E.)

—— Notice to Treat—Under what Section.]—The notice to treat was good, because it was given not under the Lands Clauses Act, s. 18, but under s. 8, sub-s. 8, of the special act. *Ib.*—Per Lord Fitzgerald.

The notice was good, because even if given under s. 35 of the Lands Clauses Act and not under the above section of the special act, nevertheless the respondent company were entitled to proceed before their capital was subscribed, because under the Lands Clauses Act, 1845, s. 85, the land is not "taken" but only entered upon. *Ib.*—Per Lord Bramwell.

Conditions Precedent — Meaning of Word "take."]—By an act of 1877, with which the Lands Clauses Act was incorporated, the Metropolitan Board of Works were authorised to effect certain street improvements, and by s. 5 were authorised to "enter upon, take, use, and hold" any of the lands in the deposited plans and books of reference, with the exception of certain specified lands. By s. 33, after reciting that it was expedient to make provision for the accommodation of such of the labouring classes as would be displaced by the improvements, the board were directed to acquire or appropriate lands, and sell them or let them on building lease for

the purpose of the erection of suitable houses for the labouring classes. And it was provided that before the board should, without the consent of one of the secretaries of state, "take for the purposes of this act" fifteen houses or more occupied at the passing of the act wholly or partially by persons of the labouring classes, they should prove to the satisfaction of such secretary of state that suitable accommodation had been provided elsewhere for the same number of persons as had been accommodated in the houses to be taken. The board served on the plaintiff notice to treat for the purchase of more than fifteen houses belonging to him, which were occupied at the passing of the act by the labouring classes. The plaintiff sent in his claim, without prejudice to any question as to the right of the board to exercise their powers before complying with the proviso of s. 33. The board then served notice of their intention to summon a jury. It was admitted that the conditions of the proviso had not yet been complied with. The plaintiff brought his action to restrain the board from proceeding on their notices till they had complied with the conditions:—Held, that as the conditions precedent to taking the plaintiff's land were conditions which the board were able and compellable to comply with, the land in question was land which the board were "authorised to purchase or take" within the meaning of the Lands Clauses Act, 1845, s. 18, and that they were entitled to serve a notice to treat and summon a jury. *Spencer* v. *Metropolitan Board of Works*, 52 L. J., Ch. 249; 22 Ch. D. 142; 47 L. T. 459; 31 W. R. 347—C. A.

Effect of Deviation.]—The undertakers of the Aire and Calder Navigation were empowered by act of parliament to make a canal, and tramroad leading therefrom, and fifteen years were given to them to complete the works. At the expiration of nearly four years from the passing of the act, having completed part of the canal, and having marked out the tramroad, they gave notice, pursuant to the act, to the owners of a certain spot of land, of their intention to purchase it for the purposes of the tramroad. The landowners resisted the purchase on the ground that the undertakers had deviated from the parliamentary line in the construction of their canal:—Held, that as the deviation worked no injury to the objectors, and as the undertakers did not admit any intention to abandon the original line, and there remained ten years in which they might complete their works, this objection was untenable. *Lee* v. *Milner*, 2 Y. & Coll. 611.

Operation upon restrictive Covenants.]—A landowner who has covenanted that neither he nor his assigns shall build upon his land, is discharged from his covenant after selling the premises to a railway company under its compulsory powers, as the company becomes an assignee of the land, not by the voluntary act of the former owner, but by compulsion of law. *Baily* v. *De Crespigny*, 38 L. J., Q. B. 98; L. R. 4 Q. B. 180; 19 L. T. 681; 17 W. R. 494.

2. Notice to Treat.

When Necessary.]—Where parties agree to refer the amount of compensation to arbitration, it is necessary to go through the form of giving notice to treat. *Collins* v. *South Staffordshire Ry.*, 7 Ex. 5; 21 L. J., Ex. 247; 16 Jur. 843. S. P., *South Yorkshire, Doncaster and Goole Ry., In re*, 7 D. & L. 36; 18 L. J., Q. B. 333; 14 Jur. 1093.

A railway company has no power to summon a jury to assess the value of lands, as to which they have given no previous notice to treat. *Doe* v. *London and Croydon Ry.*, 1 Railw. Cas. 257.

A railway company authorised to construct a line of railway under a public street is not bound to give notice to treat or to pay compensation to the owner of the land adjoining the street in respect of any part of the soil of such public street. A cul-de-sac dedicated to the public is for this purpose in the same position as a public street. *South* v. *East London Ry.*, 42 L. J., Ch. 477; L. R. 16 Eq. 108; 21 W. R. 590. See *S. C.*, 22 W. R. 566.

Form of.]—A notice to treat for part of a rope-walk in the line of railway, accompanied by a diagram, or a plan of the entire rope-walk, indicating by coloured lines the manner in which the railway would intersect it, and the portion required to be treated for, but having no scale or admeasurement appended to the diagram or plan, is sufficient. *Sims* v. *Commercial Ry.*, 1 Railw. Cas. 431.

Deposited plans and book of reference showed a small plot, No. 38, nearly surrounded by a large plot, No. 37. The schedule to the notice to treat mentioned 37 but not 38, and the accompanying plan omitted both the number and the boundary of 38. The painted area on the notice plan in fact covered the site of No. 38, and this fact was known to the plaintiff long before he pointed out the objection:—Held, that the notice was sufficient under the circumstances to entitle the company to take 38. *Dowling* v. *Pontypool, Caerleon, and Newport Ry.*, 43 L. J., Ch. 761; L. R. 18 Eq. 714.

The W. railway company, which was empowered to make a railway, with all proper stations, works and conveniences connected therewith, to terminate by a junction with the L. railway, at a point marked on the parliamentary plan, gave the plaintiff notice that the line of the railway would pass through a piece of his land which lay beyond the point of junction, but within the line of deviation marked on the plan, and that such land was required for the purposes of the railway, and took the necessary steps under the Lands Clauses Act to acquire a right of entry thereon. Being about to erect a station on the piece of land, the W. company agreed with the L. company that the station so to be erected should be used by both companies, and the terms of this agreement were afterwards embodied in and confirmed by an act of parliament. The station was accordingly built at the joint expense of the two companies, the W. company prolonging their line, with a double set of rails, from the point of junction into the station, one line of rails being for the joint use of both companies, and the other for the exclusive use of the W. company:—Held, that the notice given by the W. company to the plaintiff was a sufficient notice, although it did not in terms state that the land was required for the purpose of a station; that the prolonging their line beyond the point of junction into the station was no excess of their powers, and that the arrangement with the L. company (who were not in a position to take the land themselves) for the joint use of the station did not vitiate the title which the W. company had already acquired to the land. *Wood*

v. *Epsom and Leatherhead Ry.*, 8 C. B. (N.S.) 731 ; 30 L. J., C. P. 82 ; 2 L. T. 487.

A notice to treat given by a railway company for the purchase of the right or easement of making and for ever maintaining the railway by a bridge over a landowner's property, is a valid notice. *Pinchin* v. *London and Blackwall Ry.*, 1 Kay & J. 34 ; 2 Eq. R. 1172 ; 1 Jur. (N.S.) 241 ; 3 W. R. 52.

Validity—Easement.]—Semble, a notice to treat for the purpose of a right or easement of a stratum of air over land belonging to a manufactory is not a notice warranted by the Lands Clauses Act, the word "hereditaments" used in the interpretation clause as a meaning of the word "lands" signifying corporeal hereditaments, and therefore not including a right of way. *Pinchin* v. *London and Blackwall Ry.*, 5 De G. M. & G. 851 ; 3 Eq. R. 433 ; 24 L. J., Ch. 417 ; 1 Jur. (N.S.) 241 ; 3 W. R. 125. See *G. W. Ry.* v. *Swindon and Cheltenham Ry.*, supra.

Two Notices.]—A railway company, empowered to take lands, is not restricted to one notice, but may, after a notice for taking certain lands, give a further notice for taking other lands within the prescribed limits, such additional lands being necessary for the works. *Stamps* v. *Birmingham, Wolverhampton and Stour Valley Ry.*, 7 Hare. 251 ; 6 Railw. Cas. 123 ; 17 L. J., Ch. 431 ; 12 Jur. 720. Affirmed on appeal, 2 Ph. 673 ; 17 L. J., Ch. 431 ; 6 Railw. Cas. 132.

A railway company, being empowered by their act to take a close belonging to the plaintiff, gave him notice of their intention to take a part of it ; and, more than a year afterwards, the company gave him notice of their intention to take the remainder. The part first taken was intended for making the railway, and the remainder for making a station, both of which their act empowered them to make :—Held, that the power of the company with respect to the plaintiff's close was not exhausted by the first notice. *Simpson* v. *Lancaster and Carlisle Ry.*, 15 Sim. 580 ; 4 Railw. Cas. 625 ; 11 Jur. 879.

A railway company having given the plaintiff notice that they should require twenty perches of his land, subsequently gave a notice that they should only require one perch, and also gave a notice withdrawing the former notice :—Held, that the first notice was binding, and that, without the consent of the plaintiff, another valid notice could not have been given. *Tawney* v. *Lynn and Ely Ry.*, 4 Railw. Cas. 615 ; 16 L. J., Ch. 282.

Service on whom.]—By an act of parliament it was enacted, that a railway company should, within twelve months, give notice to an infant of the lands belonging to him which they might require to take ; and it was declared that by the Earl of Harrington should be meant, during his minority, his testamentary guardian. Other proceedings were pending in which the infant was represented by a next friend, and the notice was, within the limited time, served upon that next friend ; but it was not until after the expiration of twelve months that any notice was served upon the guardian :—Held, that no notice had been given under the act, and that the company must be restrained from taking the land. *Harrington (Earl)* v. *Metropolitan Ry.*, 13 L. T. 583, 658—L.JJ.

By a clause in the special act of a railway company it was enacted that before the company entered upon or took any tenement under the powers of the act, they should give six months' previous notice of their intention to take to the occupier of such tenement :—Held, that a six months' notice of the company's intention to take certain premises given to the occupier in pursuance of that clause, was a good notice binding on the company. *Morgan* v. *Metropolitan Ry.*, 38 L. J., C. P. 87 ; L. R. 4 C. P. 97 ; 19 L. T. 655 ; 17 W. R. 261—Ex. Ch.

Service on Tenant—Adoption by Owner.]—A corporation, three days before the expiration of their compulsory powers, without making any attempt to discover and serve the owner of the property, served a notice to treat on an occupier of part of the premises comprised in the notice to treat, who was the agent of the owner for the management of his property. The occupier took it the same day to the solicitor of the owner, and also wrote to the owner ; but it did not appear that, as a matter of fact, the notice came to the hands of the owner before the three days had expired. The owner, however, after the expiration of the three days gave a counter-notice under s. 92 requiring the corporation to take the whole of his property. This notice he subsequently withdrew, and required the corporation to proceed with the purchase of the land specified in their notice to treat, which they declined to do :—Held, that the service of the notice to treat was irregular and invalid, and that the owner could not, by his subsequent adoption of the notice, cure the irregularity and compel the corporation to proceed with it. *Shepherd* v. *Norwich Corporation*, 54 L. J., Ch. 1050 ; 30 Ch. D. 553 ; 53 L. T. 251 ; 33 W. R. 841.

The conditions necessary for service of a notice to treat discussed. *Ib.*

Under what Act.]—A railway company, after the compulsory powers of their original act expired, and the railway was opened for traffic, obtained another act enabling them to widen their line and enlarge their stations, and to take additional pieces of land :—Held, that, under these circumstances the company could not proceed to take a piece of land subject to the compulsory powers of both acts under a notice to treat given under their original act. *Richmond* v. *North London Ry.*, 37 L. J., Ch. 273 ; L. R. 5 Eq. 352 ; 18 L. T. 8 ; 16 W. R. 449. Affirmed on appeal, 37 L. J., Ch. 886 ; L. R. 3 Ch. 679.

Before Act obtained.]—A corporation served the usual notice on a landowner before applying to parliament for power to take his land. The act, when obtained, gave the corporation power to take more of his land than was described in the notice :—Held, that the corporation was not prevented from taking more land than was described in the notice. *Huddersfield Corporation and Jacomb, In re*, 44 L. J., Ch. 96 ; L. R. 10 Ch. 92 ; 31 L. T. 466 ; 23 W. R. 100.

Before Capital subscribed.]—It is no answer to an action against a railway company for not issuing their warrant for the assessment of compensation for land which they had given notice of their intention to purchase, that the undertaking was intended to be carried into effect by means of a certain capital, and that the whole amount has not been subscribed, as required by

s. 16,—the notice to treat not necessarily being an exercise of the powers of the act "in relation to the compulsory taking of land." *Guest* v. *Poole and Bournemouth Ry.*, 39 L. J., C. P. 329; L. R. 5 C. P. 553; 22 L. T. 589; 18 W. R. 836.

Not an Attachable Debt.]—When a mere notice to treat under the Lands Clauses Act, 1845, has been given, but the compensation has not been assessed, the compensation money is not a debt owing or accruing to the claimant within Ord. XLV. r. 2, which can be attached in the hands of the promoters of the undertaking to answer a judgment debt due from the claimant. *Richardson* v. *Elmit*, 2 C. P. D. 9; 36 L. T. 58.

Stamping Contract.]—In a suit for specific performance of a contract founded upon a notice to treat, the notice does not require to be stamped as an agreement. *Rawlings* v. *Metropolitan Ry.*, 37 L. J., Ch. 824; 18 L. T. 871.

Agreement superseded by.]—By an agreement entered into in September 1863, between the owners of lands and a railway company, under which the company purchased a certain portion of the lands, it was agreed that if the company should require any additional ground for any purpose they should pay for the same at a fixed rate. In May, 1865, the company served the owners of the lands in question with a notice to treat for the purchase of more land from them. Two years afterwards the company entered into possession of the lands:—Held, that the notice to treat had superseded the agreement, and that the value of the lands must be ascertained according to the Lands Clauses Act. *Kemp* v. *S. E. Ry.*, 25 L. T. 622. S. P., *Bedford and Cambridge Ry.* v. *Stanley*, 2 J. & H. 746; 1 N. R. 162; 32 L. J., Ch. 60; 9 Jur. (N.S.) 152; 7 L. T. 477; 11 W. R. 139.

Where Interest changed since Service.]—An interest in property created by an agreement entered into by the owner after a notice to treat has been served on him, is not a subject for compensation. *Edwards, Ex parte*, 40 L. J., Ch. 697; L. R. 12 Eq. 389; 25 L. T. 149; 19 W. R. 1047.

Where, therefore, an owner of property after a notice to treat had been served on him entered into an agreement with a person who had for several years occupied part of the property as a weekly tenant for a lease of the same to him for a term of three years:—Held, that the tenant was not entitled to compensation in respect of the interest created by such agreement. *Ib.* See *Carnochan* v. *Norwich and Spalding Ry.*, 26 Beav. 169.

After notice to treat for the purchase of houses, the owner granted leases for three years to his weekly tenants. The tenants sent in claims, which ultimately failed, but the promoters incurred considerable costs in adjudicating upon them. On a petition by the landowner for the payment out of his compensation, which had been paid into court under the Lands Clauses Act, s. 76:—Held, that the court could not authorise any deduction from the purchase-money to reimburse the promoters for their loss, or order the petitioner to pay costs; but that the court had jurisdiction to refuse him his costs, and would do so. *Topple, Ex parte*, 25 L. T. 407; 19 W. R. 1058.

A railway company served notices to treat for the purchase of land on a landowner, and on the tenant of a farm, but before the company took possession of the land the tenancy expired, and another tenant entered into possession of the farm, and without notice, as alleged, of the construction of the intended railway. The new tenant and his solicitor having requested the company to serve the former with notice to enable him to send in a claim for compensation, and the company having refused to do so, he filed a bill for an injunction; the court ordered the matter to stand over to the hearing of the cause, the company undertaking to pay 500*l.* into court, and to serve the plaintiff with notice to treat within four days. *Carter* v. *G. E. Ry.*, 9 Jur. (N.S.) 618; 8 L. T. 197.

Time runs from.]—Notice to treat for and take lands was served on the owner by the corporation of London under the City Improvement Act, which act incorporated the Lands Clauses Act. At the date of the notice the owner had, but at the expiration of six months he had not, a greater interest in the lands than an interest as tenant for a year or from year to year:—Held, in an action for a mandamus to the defendant to issue his precept for assessment of compensation, that the owner was entitled to judgment, because regard must be had to the date of notice in determining the interest. *Tyson* v. *London Corporation*, 41 L. J., C. P. 6; L. R. 7 C. P. 18; 25 L. T. 640; 20 W. R. 112.

Lapse of Time—Effect of.]—A railway company in 1856 took possession of a meadow, a large part of which belonged to one owner, and a small part to another who did not know the position or the exact extent of his land. The company, in 1859, took a conveyance of the large part, on which conveyance the extent of the small part was stated. The company did not pay for the small part, and the owner, in 1868, brought an ejectment against the company, obtained judgment, and was put into possession. His possession was disturbed by the company, and he filed a bill to restrain them. The company offered to pay the value of the land as in 1856, and interest thereon, which the landowner refused. The company then produced a notice to treat, given in 1856, and gave notice of their intention to proceed under that notice. The landowner filed a second bill to restrain them:—Held, that, under the circumstances, the company was not entitled to proceed under the notice to treat. *Stretton* v. *Great Western and Brentford Ry.*, 40 L. J., Ch. 50; L. R. 5 Ch. 751; 23 L. T. 379; 18 W. R. 1078.

Laches of a company in not following up a notice to treat does not preclude them from taking advantage of entering on lands under s. 85 of the Lands Clauses Act. *Willey* v. *S. E. Ry.*, 1 Mac. & G. 58; 1 H. & Tw. 56; 6 Railw. Cas. 108; 18 L. J., Ch. 201; 13 Jur. 241.

A railway company, incorporated by an act of parliament passed in July, 1864, limiting the time for the exercise of the compulsory powers to three years, and the time for the completion of the railway to five years, served a notice to treat for lands belonging to the plaintiff company on the 21st April, 1866. By an act of parliament passed in July, 1869 (against which the plaintiff company petitioned), the railway company was dissolved, and its undertaking was

amalgamated with that of the defendant company, and by the same act the time for completing the works was extended for three years; but the period within which the compulsory powers given by the first act were to be exercised was not extended. On the 18th August, 1871, the defendant company took possession of the lands, whereupon the landowners filed a bill to restrain them from continuing in possession:—Held, that the time for completion of the works having been extended by the act of 1869 (of which the plaintiff company had notice) to July, 1872, the notice to treat was not invalidated by lapse of time. *Ystalyfera Iron Co.* v. *Neath and Brecon Ry.*, 43 L. J., Ch. 476; L. R. 17 Eq. 142; 29 L. T. 662; 22 W. R. 149.

By a local act of 1863, a board of health was authorised to construct waterworks, and purchase and establish markets, and to exercise compulsory powers for the purchase of land for those purposes. These compulsory powers expired on the 13th of July, 1870, and on the 1st of August, 1870, a second act was passed to extend the time for the compulsory purchase of lands and completion of the waterworks, and to authorise the board to construct gasworks, and for other purposes not including the establishing of markets. On motion by the owner of property required for establishing a market to restrain the board from compulsorily taking the property under a notice to treat served on him in December, 1870, on the ground that the powers of the first act had ceased to exist and could not be extended, and that the second act must be read as creating new powers for the purposes of the second act only:—Held, that the powers were extended as well as the time for their exercise, and that the notice to treat was effectual. *Bentley* v. *Rotherham Local Board*, 46 L. J., Ch. 284; 4 Ch. D. 588.

Withdrawing, or Abandoning Notice.]—Commissioners having given notice to treat to an owner of lands proposed to be taken, cannot withdraw such notice. *Birch* v. *St. Marylebone Vestry*, 20 L. T. 697; 17 W. R. 1014.

The power to rescind a notice to treat for the sale of lands is not possessed by all trustees for public purposes, but is confined to commissioners acting on behalf of the executive government. *Steele* v. *Liverpool Corporation*, 14 W. R. 311.

Under an act incorporating a company for the erection of a market, and authorising them to purchase certain scheduled hereditaments, and to give a notice to parties interested to send in their claims, and directing that, in case of non-acceptance of the terms offered by the company, the value shall be assessed in a certain mode; the company cannot, after giving the notice, abandon the purchase. *Rex* v. *Hungerford Market Co.*, 1 N. & M. 112; 4 B. & Ad. 327.

—— **On Service of Counter-notice.**]—A notice by a railway company to treat for a part of a manufactory was met by a counter-notice by the owners, requiring them to take the whole. The company then gave the owners notice of their intention to apply to the Board of Trade for the appointment of a surveyor to determine the value of the premises comprised in the notice to treat, and of the further lands and hereditaments which the owners could lawfully require and had required the company to purchase and take. The owners then filed a bill, praying for a declaration that the company could not take a part of the manufactory without taking the whole; whereupon the company gave notice of its intention to withdraw from the notice to treat, offering to pay the plaintiffs' costs of suit up to that date; but they declined the offer, and insisted on an answer, which was filed. The bill was then amended, and, as amended, prayed for a declaration that the company was bound to take the whole manufactory:—Held, that notice of its intention to apply for the appointment of a surveyor did not amount to a binding contract by them to take the property; hence that they were at liberty to withdraw their notice to treat; and specific performance as prayed by the amended bill was refused. *Grierson* v. *Cheshire Lines Committee*, 44 L. J., Ch. 35; L. R. 19 Eq. 83; 31 L. T. 428; 23 W. R. 68.

A railway company having given notice to take a part of a property, and being required to take the whole, may abandon their notice, and refuse to take any part. *King* v. *Wycombe Ry.*, 28 Beav. 104; 29 L. J., Ch. 462; 6 Jur. (N.S.) 239; 2 L. T. 107. S. P., *Morrison* v. *G. E. Ry.*, 53 L. T. 384.

—— **As to Part.**]—A railway company having given the plaintiff notice that they should require twenty perches of his land, subsequently gave a notice that they should only require one perch, and also gave a notice withdrawing the former notice:—Held, that the first notice was binding; and that, without the consent of the plaintiff, another valid notice could not have been given. *Tawney* v. *Lynn and Ely Ry.*, 4 Railw. Cas. 615; 16 L. J., Ch. 282.

—— **Delay.**]—Notices by railway companies to take land cannot be treated higher than contracts, and after great delay in proceeding on such notices, they will be considered as abandoned. *Hedges* v. *Metropolitan Ry.*, 28 Beav. 109; 6 Jur. (N.S.) 1275; 3 L. T. 643.

—— **Expenses caused by.**] — On the 22nd October, a tenant from year to year, whose holding began on the 1st May, received notice from the promoters of an undertaking requiring him to give up possession at the expiration of six months. Before the expiration of six months he was informed by the promoters of the company that they did not intend to take possession at the end of the six months:—Held, that he was entitled to compensation for any expenses which he had been put to by the notice. *Reg.* v. *Rochdale Improvement Commissioners*, 2 Jur. (N.S.) 861; 4 W. R. 643.

As between Landlord and Tenant.]—On the 15th of June, 1859, a lessor granted a lease to the lessees for twenty-one years, determinable at the option of either party at the expiration of the first seven or fourteen years. In February, 1866 (the first seven years of the term having elapsed), the lessees received notice from a railway company to treat for the purchase of their interest in the premises, under the Lands Clauses Act, 1845; and the compensation payable to them by the company was assessed by an arbitrator on the 16th of April, 1867; on the 29th of July, 1870, judgment was signed for the amount, and an assignment was executed by the lessees, and the company took possession of the premises on the 21st of November, 1870. On the 19th of June, 1868, the company gave the lessor notice to treat in respect of his interest, and he sent in a claim on the 29th; but nothing further was done, the proposed line being abandoned. In

1871, the lessor brought an action against the lessees for breaches of their general covenant to repair, accruing as well before as since the assignment by the latter to the company. Upon a case stated by an arbitrator for the opinion of the court as to the principle upon which the damages were to be assessed:—Held, that there was nothing to prevent the lessor from recovering substantial damages in respect of breaches committed after the notice to treat, but before the assignment by the lessees to the railway company; and that the proper measure of damages was the amount by which the lessor's reversion had become deteriorated at the date when the company took possession under the assignment, viz. the 21st November, 1870. *Mills* v. *East London Union*, 42 L. J., C. P. 46; L. R. 8 C. P. 79; 27 L. T. 557; 21 W. R. 142.

The land of a lessee was required by a company under a lease, which provided that the lessor might resume such land for the purpose of building, planting, accommodation, or otherwise:—Held, that after the company had given notice to treat for the land, the lessor had no power to resume it by virtue of such proviso, and the company must pay compensation to the lessee. *Johnson* v. *Edgware, Highgate and London Ry.*, 14 L. T. 77; 14 W. R. 416.

A railway company serves a notice on a lessee to take land held under a lease and arranges the price of his interest, there being a covenant in his lease not to assign without the consent of his landlord:—Held, that the covenant was abrogated, so as to enable the tenant to assign to the railway without the consent of the lessor. *Slipper* v. *Tottenham and Hampstead Junction Ry.*, 36 L. J., Ch. 841; L. R. 4 Eq. 112; 16 L. T. 446; 15 W. R. 861.

Variance between Notice and Precept.]—A variance in the description of the lands in a notice to treat, and in the precept to the sheriff, is an irregularity only, and is waived by appearing before the jury summoned to assess compensation and by proceeding on the trial after the objection taken and overruled. *Bailey, Ex parte*, 1 B. C. C. 66.

When a company has given notice to an owner of land to treat for the purchase of part of it, but the owner and the company cannot agree upon the terms, and the company, therefore, issues a precept to the sheriff to summon a jury to assess the value; the part of the land which is described in the precept as being that of which the jury is to assess the value, must be neither less nor more than that for the purchase of which the owner has already been required by the notice to treat. *Stone* v. *Commercial Ry.*, 4 Mylne & C. 122; 1 Railw. Cas. 375.

Compelling Company to Complete Purchase.]—When a company has given a valid notice to take land, it is competent to the landowner to apply at once for a mandamus to compel the company to proceed to complete the purchase, and he cannot, therefore, at a subsequent time, urge delay on the part of the company as a ground for the interference of a court of equity with their taking proceedings to obtain the land. *Pinchin* v. *London and Blackwall Ry.*, 5 De G. M. & G. 851; 3 Eq. R. 433; 24 L. J., Ch. 417; 1 Jur. (N.S.) 241; 3 W. R. 125.

A company gave notice to landholders to treat for certain lands. After some discussion, the question of compensation was referred to arbitration, which, however, was never completed:—Held, that the remedy of the landholders was by mandamus to compel the summoning of a jury, and not by bill in chancery. *Lind* v. *Isle of Wight Ferry Co.*, 1 N. R. 13; 7 L. T. 416.

Where a notice to take land had been given by a company, had been followed by a claim for compensation on the part of the landowner, and a subsequent agreement between the parties, which claim and agreement were, however, ultimately abandoned and repudiated on both sides, the Court of Chancery refused to interfere to compel the company, who was in possession of the land, to summon a jury, holding that the notice per se did not give the court jurisdiction, and that the rights of the parties were to be regulated by ss. 68 and 85 of the Lands Clauses Act. *Adams* v. *London and Blackwall Ry.*, 2 Mac. & G. 118; 2 Hall & T. 285; 19 L. J., Ch. 557; 14 Jur. 679.

Mere Notice — Specific Performance.]—A notice to treat for the sale of lands, given under the Lands Clauses Act, does not enable the givers of the notice to maintain a suit for specific performance against the landowner, or effect a conversion of the land as between the devisee and the residuary legatee of the landowner. *Haynes* v. *Haynes*, 1 Dr. & Sm. 426; 30 L. J., Ch. 578; 7 Jur. (N.S.) 595; 4 L. T. 199; 9 W. R. 497.

A bill filed against a railway company by the grantee of an annuity, charged on land taken by the company stated, that before the grant of the annuity, the land was subject to a mortgage in fee, which had since been paid off, but that there had been no reconveyance; that the defendants, under the powers of their act, had given the plaintiff notice to treat for the land charged with the annuity, but without any further proceedings had taken possession of the land. The prayer was, that the company might be decreed to pay the arrears of the annuity, and to secure the future payment of it. The defence made by the answer and evidence was, that the company had purchased from the prior incumbrancer under a power of sale:—Held, that the plaintiff could not on such pleadings enforce a specific performance of the notice to treat regarded as a contract to purchase the plaintiff's interest. *Hill* v. *G. N. Ry.*, 5 De G. M. & G. 66; 23 L. J., Ch. 524; 18 Jur. 685; 2 W. R. 335.

Notice to treat by a railway company having compulsory powers to take land constitutes the company the equitable owner of the land. *Bristol and North Somerset Ry.* v. *Somerset and Dorset Ry.*, 22 W. R. 399. Reversed, 22 W. R. 601—L. C.

A notice to treat for lands constitutes the relative situation of vendor and purchaser, as between a company and the owner of property. *Doe* v. *London and Croydon Ry.*, 1 Railw. Cas. 257.

Where a company gives notice to the owner of land that they require it for the purposes of their act, the relative situation of vendor and purchaser is from that moment constituted between them and the owner; and if, being unable to agree with him upon the terms of compensation, the company afterwards refuses or delays to get it assessed by a jury, a court of equity will entertain a bill for specific performance at the suit of the owner. *Walker* v. *Eastern Counties Ry.*, 6 Hare, 594; 5 Railw. Cas. 469; 12 Jur. 787.

Notice creates Obligation to Buy or Sell.]—When a railway company gave a notice to treat for the purchase of property, and afterwards obtained an injunction ex parte, to restrain the owner from selling by auction, a motion to dissolve was refused, on the ground that after such a notice neither party could get rid of the obligation to buy and sell. *Metropolitan Ry.* v. *Woodhouse*, 34 L. J., Ch. 297 ; 11 Jur. (N.S.) 296 ; 12 L. T. 113 ; 13 W. R. 516.

Notice Given and Price Fixed.]—Notice by a railway company to take land under its compulsory powers, and the subsequent fixing of the purchase and compensation money by arbitration, together constitute a contract for sale and purchase, which the court will enforce at the instance of the vendor. *Mason* v. *Stokes Bay Pier and Ry.*, 1 N. R. 84 ; 32 L. J., Ch. 110 ; 11 W. R. 80.

A railway company, after notice to treat for land has been given to the landowner, and the price of the land has been fixed by arbitrators under the Lands Clauses Act, 1845, is in the same position with regard to the landowner as an ordinary purchaser, and will be compelled by a court of equity to complete the purchase. *Harding* v. *Metropolitan Ry.*, 41 L. J., Ch. 371 ; L. R. 7 Ch. 154 ; 26 L. T. 109 ; 20 W. R. 321.

When a company has given notice to take lands under its compulsory powers, and the price is fixed, the contract is complete, and the Court of Chancery will entertain a suit for specific performance. *Regent's Canal Co.* v. *Ware*, 23 Beav. 575 ; 26 L. J., Ch. 566 ; 3 Jur. (N.S.) 924 ; 5 W. R. 617.

W., by will, in 1859, bequeathed leaseholds to his sister A., and the residue of his estate to his sister E., and in 1865 was served with a notice on the part of a railway company to treat for the purchase under the provisions of its acts, of the leasehold for the purposes of the railway. Surveyors appointed by W. and the company, but not in writing, settled the value of the leaseholds, and the former verbally agreed to accept the sum named. W. died in February, 1869, the matter remaining in abeyance till April, 1870, when the sale was completed by his executor :—Held, that the notice to treat, followed by the valuation of the surveyors, was, notwithstanding the Statute of Frauds, a valid contract ; and there had been an ademption of the bequest to A. ; but that she was entitled to the rents which had accrued between the death of the testator and the completion of the purchase by the company. *Watts* v. *Watts*, 43 L. J., Ch. 77 ; L. R. 17 Eq. 217 ; 29 L. T. 671 ; 22 W. R. 105.

A railway company having need of certain lands for the construction of their railway, served, in November, 1846, notice to treat upon the owners of the legal estate in the land ; but the parties not having come to any arrangement in pursuance of that notice, the company in May, 1847, proceeded by inquisition before the sheriff and a jury, and a verdict was then given for certain sums for purchase-money and compensation ; and afterwards, in the same month, the company went into possession of the lands. In March, 1848, an abstract of the title of the owners was furnished to the company, and from that period up to January, 1851, a correspondence took place between the respective parties, partly relating to title and partly to a claim made by the owners for interest upon the purchase and compensation moneys. Eventually, the company refused to pay interest, and in January, 1851, lodged the purchase-money in the Bank of Ireland, to the credit of all persons interested in the lands. A cause petition having been filed by the owners, praying a specific performance :—Held that the ordinary relation of vendor and purchaser, under the circumstances above detailed, existed between the parties. *Blount* v. *Great Southern and Western Ry.*, 2 Ir. Ch. R. 40.

—— **Vendor's Death before Completion.**]—A railway company gave notice to purchase lands under its compulsory powers, but before a conveyance was executed the vendor died, having by his will, made before the contract was complete, devised his estate to his children, some of whom were infants. The company filed a bill for specific performance :—Held, that the company was justified in so doing, and was not liable to pay the costs of the suit. *L. & S. W. Ru.* v. *Bridger*, 10 Jur. (N.S.) 650 ; 10 L. T. 689 ; 4 N. R. 261 ; 12 W. R. 948.

Notice and Offer by Owner.]—Notice to take lands by a public body under their compulsory powers, and an offer by the owner to take a certain amount as compensation money, does not constitute a binding contract between the parties. *Arnold, In re*, 9 Jur. (N.S.) 883 ; 8 L. T. 623 ; 11 W. R. 793.

A landowner served by a company with a notice to treat sent in particulars of his claim, demanding a specified sum, and shortly afterwards served the company with the ordinary notice. The company not having summoned a jury within twenty-one days, the landowner brought an action for the sum specified against the company, upon which their solicitor wrote to the other solicitor saying, "The company will pay the amount claimed for the purchase of the landowner's interest in the land." The landowner having failed in the action, filed a bill in equity for a specific performance of the agreement :—Held, that the letter, together with the notice and claim, amounted to a binding agreement. *Inge* v. *Birmingham, Wolverhampton and Stour Valley Ry.*, 1 Sm. & G. 347 ; 1 W. R. 300. Affirmed on appeal, 3 De G. M. & G. 658 ; 2 Eq. R. 80 ; 2 W. R. 22.

Notice by Commissioners acting in Public Capacity.] — The commissioners of woods and forests gave notices, under 9 & 10 Vict. c. 38, s. 15, that they intended to take land specified in the schedule to that act, for the purpose of forming Battersea Park. One of the landowners obtained a mandamus to the commissioners to cause a jury to be summoned to assess compensation for his land. On a return stating the proceedings at length (and showing that the commissioners in pursuance of the act, and on behalf of the crown, gave the notices in order to ascertain whether the lands could be purchased for the sum limited by the act, which by the claims sent in it appeared they could not) :—Held that the commissioners were acting in a public capacity, and that the notice given by them did not constitute a quasi contract enforceable by mandamus. *Reg.* v. *Woods and Forests Commissioners*, 15 Q. B. 761 ; 19 L. J., Q. B. 497 ; 15 Jur. 35.

3. What Lands or Interests.

a. Quantity Generally.

Discretion as to.] — When the legislature authorises railway directors to take, for the purposes of their undertaking, any lands specially

described in their acts, it constitutes them the judges whether they will or not take these lands, provided that they act with the bonâ fide object of using the lands for the purposes authorised by the act, and not for any sinister or collateral purpose. Having provided for affording compensation to the owners of the lands, the legislature leaves it to the company to determine what lands are necessary to be taken. *Stockton and Darlington Ry.* v. *Brown*, 9 H. L. Cas. 246; 6 Jur. (N.S.) 1168; 3 L. T. 131; 8 W. R. 708.

Under 57 Geo. 3, c. xxix. s. 80, the city commissioners of sewers have power, if they please, to take compulsorily part only of a house for the purposes of the act, as well as to take the whole. But before the commissioners can take compulsorily any premises for the purposes of the act, they must formally adjudge the taking of the premises to be necessary for those purposes; and therefore, where the commissioners had adjudged part of a house to be necessary:—Held, that they were not entitled, on this adjudication, to take the whole. *Thomas* v. *Daw*, 36 L. J., Ch. 201; L. R. 2 Ch. 1; 15 L. T. 200; 15 W. R. 113.

An adjudication of the commissioners that a certain property is required for the purpose of alterations cannot be supported if there are no grounds on which any reasonable person could come to the conclusion that it was so required. The commissioners cannot validly adjudicate that a property is required for the purposes of an improvement until they have determined what the improvement is to be, so far as to furnish materials for judging whether the property is required. *Lynch* v. *Sewers Commissioners*, 55 L. J., Ch. 409; 32 Ch. D. 72; 54 L. T. 699; 50 J. P. 548—C. A. Reversing 34 W. R. 226.

Engineer's Opinion.]—The opinion of the company's engineer, if bonâ fide, is the only evidence required by the court as to the necessity or propriety of any purchase, and the onus of proving want of bona fides rests upon the party opposing the purchase. *Errington* v. *Metropolitan District Ry.*, 51 L. J., Ch. 305; 19 Ch. D. 559; 46 L. T. 443; 30 W. R. 663.

A railway company will be restrained from compulsorily taking land which does not appear to be wanted for making their line, unless the company produces more proof that it is really wanted than the mere affidavit of their engineer. *Flower* v. *L., B. & S. C. Ry.*, 2 Drew. & Sm. 330; 6 N. R. 200; 34 L. J., Ch. 540; 11 Jur. (N.S.), 406; 12 L. T. 10; 13 W. R. 518.

A dispute arose between a company and a landowner as to the right of the former to take some of his land alleged to be necessary for its purposes. The court referred the question to an engineer, whose opinion was in favour of the landowner:—Held, that neither the opinion of the engineer nor of the court could curtail the power of the company in respect to the quantity of land which the company, bonâ fide acting under its statutory powers, sought to obtain. *Stockton and Darlington Ry.* v. *Brown*, 9 H. L. Ca. 246; 6 Jur. (N.S.) 1168; 3 L. T. 131; 8 W. R. 708.

The court will accept as conclusive the evidence of the engineer in the service of the company as to the quantity of land required for the purposes of the railway, if the statement has a reasonable appearance of accuracy. *Kemp* v. *S. E. Ry.*, 41 L. J., Ch. 404; L. R. 7 Ch. 364; 26 L. T. 110; 20 W. R. 306.

Evidence of engineers as experts on the construction of the plans and of the act will not be admitted. *Dowling* v. *Pontypool, Caerleon, and Newport Ry.*, 43 L. J., Ch. 761; L. R. 18 Eq. 714.

b. For What Purposes.

Sanctioned by Act.]—Semble, that the court will not allow bodies to whom parliament has given powers of making compulsory purchases of land, to avail themselves of their parliamentary powers, by taking land which they do not require for a bonâ fide purpose sanctioned by their act of parliament. Semble, also, that although an attempt to obtain possession of land has been, in the first instance, made under colour of the powers of the act of parliament, when not really required for the bonâ fide purposes of the act, yet if the land afterwards becomes really necessary or desirable for such bonâ fide purposes, the court will not interfere to prevent its being taken. *Webb* v. *Manchester and Leeds Ry.*, 4 Myl. & C. 116; 1 Railw. Cas. 576.

Ownership acquired in land by a public company, under their compulsory powers, for the purpose of their works, is a qualified ownership, to be restricted to the purposes expressed in the act, those purposes being of the essence of the contract, and therefore the landowner, whose comfort and enjoyment of the remainder of his estate are affected by the company applying the ownership for other purposes not contemplated by the act, is entitled to an injunction to restrain the use of the land for such purposes. *Bostock* v. *North Staffordshire Ry.*, 3 Sm. & G. 283; 25 L. J., Ch. 325; 2 Jur. (N.S.) 245; 4 W. R. 336.

The defendants, in 1846, obtained an act of parliament for the construction of branch railways, called the W. and H. branches, in which were the usual compulsory powers for the purchase of land, but they were not to be exercised after the expiration of three years from the passing of the act, and the undertaking was to be completed within five years. The term limited for the exercise of the compulsory powers was subsequently enlarged until 1851. The defendants purchased of the plaintiff portions of his land for the purposes of the W. railway, an undertaking particularly advantageous to the plaintiff, and commenced constructing the line. It was, however, never completed, and in 1850 was entirely abandoned. In 1858 the defendants introduced a bill to construct another line of railway, and for that purpose intended to use the lands purchased of the plaintiff. On demurrer to a bill for want of equity:—Held, that although a landowner has been compelled to part with his land to a railway company, however beneficial it may be to him that the railway should be made, no obligation is thrown on the company to complete their undertaking, and no right exists in the landowner to compel them to do so; nor, if the company should altogether abandon the undertaking, and apply the land taken under the powers of the act to a different purpose than the making of the railway, has the landowner any new right, arising from the state of things, which can be enforced in a court of equity. *Astley* v. *Manchester, Sheffield, and Lincolnshire Ry.*, 2 De G. & J. 453; 27 L. J., Ch. 478; 4 Jur. (N.S.), 567; 6 W. R. 561. See *Dover Harbour* v. *S. E. Ry.*, 9 Hare, 489; 21 L. J., Ch. 886; *Norton* v.

L. & N. W. Ry., 13 Ch. D. 268; 41 L. T. 429; 28 W. R. 173—C. A.

A railway company empowered by act of parliament to construct "a railway and works" within certain limits as to space and time, is authorised under s. 16 of the Railway Clauses Consolidation Act, within such limits, without the consent of the owner, to take land for the purpose of constructing the various works mentioned in that section, although the line be opened, and the works be not necessary, but only convenient for the purposes of the line. *Sadd* v. *Maldon, Witham and Braintree Ry.*, 6 Railw. Cas. 779.

A railway company obtained an act of parliament in 1864 for extending their operations, containing compulsory powers to take additional lands in connection with their undertaking. The plaintiff's land was included in the deposited plans referred to in the act. It was provided by the act that a street called Albert Street should not be stopped up by the company without the consent of the vestry of the parish of Islington. In 1865, the company, having been unable to obtain the consent of the Islington vestry to the stopping up of Albert Street, obtained another act for the improvement of their Highbury station, and for other purposes, by which it was recited that it was expedient that the company should be empowered to stop up Albert Street, and also to acquire, by compulsion or otherwise, additional lands in connection with their undertaking, and the company was empowered to take the lands included in the deposited plans: and it was also enacted that they might stop up Albert Street, provided that they made another street in a prescribed direction. None of the plaintiff's land was included in the plans referred to in this act. The company, before the expiration of the compulsory powers of the act of 1864, gave notice to him to take some of his land included in the plans referred to in that act: although it was admitted that the land was wanted to form the new street under the provisions of the act of 1865. The plaintiff filed a bill in equity for an injunction:—Held, that he was entitled to an injunction, the stopping up of Albert Street not being one of the purposes of the act of 1864. *Lamb* v. *North London Ry.*, L. R. 4 Ch. 522; 21 L. T. 98; 17 W. R. 746.

Subsidiary Object.]—Compulsory powers to take land are given to railway companies, and must be exercised, for the sole purpose of constructing the railway and works; therefore where a railway company endeavoured by means of their compulsory powers to construct a road, so as to accomplish a subsidiary object, they were restrained, at the instance of the landowner whose property would be affected, though the proposed works were within the scope of their act. *Dodd* v. *Salisbury and Yeovil Ry.*, 1 Giff. 158; 5 Jur. (N.S.) 782.

A railway company, having taken land belonging to V., and completed the railway, after negotiating, gave a notice to V. to treat for other land, for the purpose of enabling them to carry out an agreement with L.:—Held, that they must be perpetually restrained from so doing. *Vane* v. *Cockermouth, Keswick, and Penrith Ry.*, 12 L. T. 821; 13 W. R. 1015.

The company, in order to avoid the necessity of completely blocking up the plaintiff's entrance, took land of his to divert a road so as to diminish the obstruction:—Held, that such land was necessary for the purposes of the act, though the plaintiff did not desire the diversion of the road, and objected to his land being taken for the purpose. *Dowling* v. *Pontypool, Caerleon, and Newport Ry.*, supra.

Waterworks — Surface Works.] — Where a waterworks company authorised to take certain lands by a special act, incorporating the Waterworks Clauses Act of 1847 and 1863, proposed to construct an aqueduct by means of a tunnel through a field, and deposited plans which gave no indications of surface works, and it afterwards appeared that they intended to sink a shaft to obtain additional water from the springs beneath the field, and to erect pumping-engines and other works on the surface:—Held, that the company was not authorised by the several acts referred to to construct such additional works, and that, save for the temporary purpose of construction their power over the land was limited to making a tunnel, in conformity with the plans deposited. *Simpson* v. *South Staffordshire Waterworks*, 4 De G. J. & S. 679; 34 L. J., Ch. 380; 11 Jur. (N.S.) 453; 12 L. T. 360; 13 W. R. 729. 908.

Colourable Proceeding.]—The plaintiff was owner of six adjacent houses, five in G. Place, and one in Butler's Alley. Four of the houses in G. Place adjoined Butler's Alley. On the 2nd of December, 1884, the commissioners of sewers resolved to alter, widen, and extend Butler's Alley, and adjudicated that the plaintiff's six houses were required for that purpose. Shortly afterwards they served the plaintiff with a notice to treat, which stated that the houses were required for altering and widening Butler's Alley. It appeared from a plan sent to the plaintiff that the part of Butler's Alley which lay at the back of the four houses in G. Place was only to be widened by a strip tapering from the width of twelve inches to a point, and it appeared that considerable alterations were to be made in the level of G. Place and Butler's Alley. The plaintiff moved for an injunction:—Held, that it was a question to be tried at the hearing whether the only real object of the commissioners as to the part of Butler's Alley adjoining the plaintiffs' houses was not to lower its level, and whether the minute widening of that street was not merely colourable, and proposed in order to give them power to purchase under their act, which gave them a power of compulsory purchase for the purpose of widening streets, but not for the purpose of altering levels; and that, therefore, the commissioners ought to be restrained, till the hearing or further order, from proceeding to assess the value of the plaintiff's houses. *Lynch* v. *Sewers Commissioners*, 55 L. J., Ch. 409; 32 Ch. D. 72; 54 L. T. 699; 50 J. P. 548—C. A. Reversing 34 W. R. 226.

For Purposes of Excavation, &c.]—A railway act empowered the company to make and maintain the works mentioned in it, and to enter upon, take and use such of the lands specified in the plans as should be necessary for such purposes:—Held, that the provision did not authorise the company to take compulsorily and permanently land required only for the purpose of excavating materials therefrom, although within the limits of deviation; and they were restrained from taking steps to have the value of such land assessed. *Eversfield* v. *Mid-Sussex Ry.*, 3 De

G. & J. 286 ; 28 L. J., Ch. 107 ; 5 Jur. (N.S.) 776 ; 7 W. R. 102.

An estuary company was empowered to make and maintain certain cuts and works, and to enter upon, take and use such of the lands delineated in the deposited plans as might be necessary for that purpose :—Held, that the company was not entitled to take compulsorily land which was required, not for the site of the cuts or works, but to supply materials for the execution of works on other land. *Bentinck* v. *Norfolk Estuary Co.*, 8 De G. M. & G. 714 ; 26 L. J., Ch. 404 ; 3 Jur. (N.S.) 345 ; 5 W. R. 327.

A railway company required a landowner to sell them certain lands, which they were empowered by their act to take for the purposes of their railway. Their engineer stated that they intended to use the land for the purpose of depositing spoil and materials during the construction of the railway, and that it was uncertain whether they would require the land after the completion of the railway. A motion by the landowner for an injunction to restrain the company from taking the land was refused. *Lund* v. *Midland Ry.*, 34 L. J., Ch. 276.

Where Corporation cannot make Profit.]—A corporation, being the local board of health for the town, was empowered by an order of the secretary of state, confirmed by act of parliament, to take certain lands and houses specified in the schedule, for the purpose of widening and improving a street ; and served the usual notices to treat under the Lands Clauses Act, 1845, upon the owner. The owner filed a bill to restrain the corporation from taking more of the property comprised in the schedule than was actually required for the purpose of widening the street :—Held, that as the corporation required this property for the improvement of the town, from which no profit or compensation was obtained, it was not confined, like a railway company, to the narrow limits of the property actually required for the purpose specified, but was at liberty to purchase all the property included in the schedule. *Quinton* v. *Bristol Corporation*, 43 L. J., Ch. 783 ; L. R. 17 Eq. 524 ; 30 L. T. 112 ; 22 W. R. 434.

A public body intrusted by the legislature to construct a public work for the public advantage, and with no profit to themselves, was authorised to take compulsorily more land than was required for the purpose of effecting the improvements specified in their act, with certain powers of disposing of superfluous lands :—Held, that they were entitled to take the whole of the lands scheduled in their act, even though with the avowed object of reselling a portion of such lands to a railway company ; one of the purposes of their act being to obtain money for the improvements. *Galloway* v. *London Corporation*, 35 L. J., Ch. 477 ; L. R. 1 H. L. 34 ; 12 Jur. (N.S.) 747 ; 14 L. T. 865.

Held, also, that they were not incapacitated from taking the whole of the lands comprised in the schedule, although, before they obtained their power to take land, they had contracted conditionally upon their obtaining such power to sell the lands for a certain sum. *Ib.*

"Street."]—The word "street" means a thoroughfare with houses on both sides, not merely a road or a footway. *Ib.*

Though the word "street" may include the houses abutting or fronting upon a public thoroughfare, as well as the actual roadway or footways, yet the strict and primâ facie meaning of the word "street" is confined to the roadway and footways ; and therefore, in the construction of the Holborn Valley Improvement Act, 1864, which gave the corporation of London powers to construct a viaduct or raised way over Holborn Valley, and to make certain new streets, and to acquire lands for the purposes of the act ; and which enacted that in any case in which the corporation might require to take any lands already purchased by the London, Chatham, and Dover Railway Company, and that company was unwilling to dispose of the same, or required the same for the purposes of their railway, it should be referred to arbitration in manner thereinbefore provided ; provided always, that this provision should not be construed to prevent the corporation taking all such lands of the railway company as might be required for the construction of the viaduct or raised way of the line of the new streets authorised by the act :—Held, that the latter provision did not apply to a case where the corporation required to take a piece of land already purchased by the railway company, but did not require the same for the construction of the actual roadway or footways of the viaduct or new streets. *L., C. & D. Ry.* v. *London Corporation*, 19 L. T. 250.

Taking not necessary — Object attained in another Way.]—When a railway company has given notice to take land for some object which is clearly within their compulsory powers, a court of equity will not interfere to restrain them merely on the ground that they might obtain the same object in some other way without taking the land. *Lamb* v. *North London Ry.*, L. R. 4 Ch. 522 ; 21 L. T. 98 ; 17 W. R. 746.

Question for Jury.]—A. was owner of a field, the whole of which was contained in the books of reference of a railway company, but fifteen perches of it lay beyond the limits of deviation laid down in the plans. The company served a notice upon A., requiring part of the field for the purposes of the railway. A. gave notice to the company that if they took part they must take the whole, to which they agreed. A. afterwards receded from his notice. The company entered upon the whole :—Held, that the question whether the fifteen perches were necessary for the works was for the jury, and also that A. having required the company to take the whole, could not object that their entry on that portion was unlawful. *Doe* d. *Armistead* v. *North Staffordshire Ry.*, 16 Q. B. 526 ; 20 L. J., Q. B. 249 ; 15 Jur. 944.

Restraining Proceedings—Estoppel by Conduct—Negotiations.]—The plaintiff was owner of six adjacent houses, five in G. Place, and one in Butler's Alley. Four of the houses in G. Place adjoined Butler's Alley. On the 2nd of December, 1884, the commissioners of sewers resolved to alter, widen, and extend Butler's Alley, and adjudicated that the plaintiff's six houses were required for that purpose. Shortly afterwards they served the plaintiff with a notice to treat, which stated that the houses were required for altering and widening Butler's Alley. The plaintiff sent in a claim for 2,500*l.* The parties could not agree about the price, and in October, 1885, the negotiations having come to an end, the commissioners proceeded to summon a jury. The

plaintiff then made inquiry as to their plans, and commenced this action to prevent them from taking the property. It appeared from a plan sent to the plaintiff in November, 1885, which was the first information he had as to the nature of the alterations proposed by the commissioners, that the part of Butler's Alley which lay at the back of the four houses in G. Place was only to be widened by a strip tapering from the width of twelve inches to a point, and it appeared that considerable alterations were to be made in the level of G. Place and Butler's Alley. The plaintiff moved for an injunction:—Held, that *Thomas* v. *Daw* (2 L. R. Ch. 1) was inapplicable, as in that case the plaintiff knew all along what the plans of the commissioners were, whereas in the present case the plaintiff did not know them till after the negotiations were at an end, and was justified in believing the representation in the notice that his houses were required for altering and widening Butler's Alley, and that the plaintiff's conduct had not been such as to debar him from asserting his rights. *Lynch* v. *Sewers Commissioners*, 55 L. J., Ch. 409; 32 Ch. D. 72; 54 L. T. 699; 50 J. P. 548—C. A. Reversing 34 W. R. 226.

Trifling Excess.]—Where a railway company takes land in excess of its powers, semble, the court will not grant relief by injunction if the quantity and value of the land are extremely small. *Dowling* v. *Pontypool, Caerleon and Newport Ry.*, 43 L. J., Ch. 761; L. R. 18 Eq. 714.

c. Limits of Deviation.

Powers of Company.]—By an act of parliament, authorising an extension of a line of railway and the construction of a station, which act incorporated the Lands Clauses Act and the Railways Clauses Act, it was enacted, that, subject to the powers of deviation in the said Railways Clauses Act contained, it shall be lawful for the said company to make and maintain the said extension and the said station, and the works connected therewith, in the lines, &c., and upon the lands delineated upon the said plans, &c., and to enter upon, take, and use such of the said lands as shall be necessary for the purpose. Plaintiff's lands were delineated upon the plans, and marked 1 and 4, and the line of deviation passed through both lots. The company required the entire of lots 1 and 4 for the purpose of extension and the station:—Held, dissolving an injunction obtained by plaintiff, that the company were empowered to take all or any part of the lands delineated on the plans, although beyond the line of deviation, and although they were not so entitled under the powers of deviation contained in the Railways Clauses Act. *Crawford* v. *Chester and Holyhead Ry.*, 11 Jur. 917.

It is not necessary, in order to entitle a railway company to take lands for the purposes of their works, that the particular works should appear on the deposited plans. It is sufficient that the lands should be within the limits of deviation delineated on the plan. *Weld* v. *L. & S. W. Ry.*, 32 Beav. 340; 1 N. R. 415; 33 L. J., Ch. 142; 9 Jur. (N.S.) 510; 8 L. T. 13; 11 W. R. 448.

A corporation, previously to an application to parliament for an act, served the usual parliamentary notice of its intention to apply for power to take certain land. In the margin of the schedule the property proposed to be taken was referred to as "property in the line of the proposed work as at present laid out (including property any part of which is within eleven yards or thereabouts of the centre line of such proposed work as delineated upon the plan)":—Held, that the corporation was not by this statement restricted from taking a greater total breadth than twenty-two yards, provided that what it took was within the limits of deviation prescribed by its act. *Huddersfield Corporation and Jacomb, In re*, L. R. 17 Eq. 476; 30 L. T. 78. Affirmed, 44 L. J., Ch. 96; L. R. 10 Ch. 92; 31 L. T. 466; 23 W. R. 100.

Held, also, that, if necessary, the words "or thereabouts" might be considered to extend the limit to an entire breadth of one-third more than the specified quantity of twice eleven yards. *Ib.*

A railway act empowered the company to take lands delineated on the deposited plans and described in the book of reference:—Held, that where the boundary of a plot was left unclosed outside the limits of deviation, the company might at any rate take up to the limits of deviation. *Dowling* v. *Pontypool, Caerleon and Newport Ry.*, 43 L. J., Ch. 761; L. R. 18 Eq. 714.

The deposited plans and book of reference showed a small plot, No. 38, nearly surrounded by a large plot, No. 37. The schedule to the notice to treat mentioned 37 but not 38, and the accompanying plan omitted both the number and the boundary of 38. The painted area on the notice plan in fact covered the site of No. 38, and this fact was known to the plaintiff long before he pointed out the objection:—Held, that the notice was sufficient under the circumstances to entitle the company to take 38. *Ib.*

Held, also, that the word "delineated" could not be limited to mean surrounded on every side by lines, but that it meant sketched or represented, or so shown that landowners would have notice that the land might be taken. *Ib.*

A railway company served an occupier with notice to treat for part of a property described on a plan annexed to a schedule to their notice, and which showed a plot of ground partly within and partly without the limit of deviation, and bounded at the extremity by a road. The deposited plans had marked upon them a field, which the proposed line of railway would not touch, but through which the limit of deviation would pass. The boundaries of the field outside the limit of deviation were not marked on the plan, but the boundaries which were within that line were. The court restrained the company from taking the land beyond the limits of deviation on the undefined side, though the name of the owner of the whole field was described in the book of reference. *Wrigley* v. *Lancashire and Yorkshire Ry.*, 4 Giff. 352; 9 Jur. (N.S.) 710; 8 L. T. 267.

A market company obtained a special act, the preamble of which recited that a convenient site might be obtained between certain streets on the east and certain other streets on the west, and which enacted that the Market and Fairs Clauses Act was incorporated therewith. Sect. 24 authorised the erection of a market-house on land described in the deposited plans, and by s. 25 the company were enabled to alter and widen streets in the way pointed out on the deposited plans, and by s. 30 to buy additional lands, not exceeding two acres. A. B. was the owner of land on the west side of one of the

streets on the western boundary of the area spoken of in the preamble, and his land was described in the deposited plans, but it did not thereby appear that more was intended to be taken than enough to widen one of the streets named in s. 25. The company proceeded to take the whole land of A. B. compulsorily, and to build upon it a covered building, in addition to the market-house authorised by s. 24; whereupon A. B. filed his bill for an injunction, which was granted, the Master of the Rolls deciding that the company could only erect one market-house and not two, and that on the east side; and that although the preamble could not control the enactments, it might be resorted to to remove obscurity. The company appealed:—Held, that as the land of the plaintiff was described in the plan, and as therefore it might be wanted, the company was authorised to take it; and as by the general act "the singular may mean the plural," the company were not restricted by the word "market-house;" that the enactments of the special act did not require a reference to the preamble to explain them, and the injunction must be dissolved, the company being the proper judges of what lands were necessary for the works. *Richards* v. *Scarborough Public Market Co.*, 23 L. J., Ch. 110.

The plaintiffs were tenants of a nursery-ground, through the S.W. part of which ran the central line of an intended railway, as shown on the deposited plans. Only the S.W. boundary and part of the S.E. boundary of the nursery-ground were delineated on the plans, the latter being carried to a point a little to the N.E. of the N.E. limit of deviation, and the paths in the ground were carefully delineated, and carried on to short unequal distances beyond the same limit. The company gave the plaintiffs notice to treat for a strip of land bounded on the N.E. by an imaginary line beyond, and distant about a chain and a half from, the N.E. limit of deviation. If this line had been traced on the plan, the tracings of the outer boundary of the nursery-ground, and those of nearly all the paths, would have stopped short of it. The plaintiffs applied for an injunction to restrain the company from taking any ground to the N.E. of the N.E. limit of deviation, as not being delineated on the plans:—Held, that nothing to the N.E. of the limit of deviation could be considered to be "delineated" on the plan, and that the company could not take compulsorily anything beyond that limit. *Protheroe* v. *Tottenham and Forest Gate Ry.*, [1891] 3 Ch. 278; 65 L. T. 323—C. A.

When a company seek to obtain power to acquire a limited portion only of a piece of land of great extent which is not broken up into closes, they must frame their deposited plans in such a way as to show how much of it they mean to acquire power to take. *Dowling* v. *Pontypool, &c., Ry.* (L. R. 18 Eq. 714) discussed. *Ib.*

Land reasonably Required.]—A railway company, authorised by its special act to take such of the lands shown and described in the deposited plans and books of reference as might be required for the purposes mentioned in the special act, has power to take lands outside the limits of deviation, if such lands are reasonably required for the construction of the line of railway within the limits of deviation, provided such lands have been properly shown and described in the deposited plans and books of reference. *Wrigley* v. *Lancashire and Yorkshire Ry.* (4 Giff. 352) explained. *Dowling* v. *Pontypool, &c., Ry.* (L. R. 18 Eq. 714) approved. *Finck* v. *L. & S. W. Ry.*, 59 L. J., Ch. 458; 44 Ch. D. 330; 62 L. T. 881; 38 W. R. 513—C. A.

The deposited plans and books of reference showed two tenements of land (numbered thereon as Nos. 122 and 123), which consisted of two houses with their respective curtilages. One of the houses, and part of the other house, as well as parts of the curtilages of both, were within the limits of deviation, but the remaining parts of the two tenements were outside those limits. The tenant of the house partly within and partly without the limits required the company to take the whole of his tenement, but the plaintiff, the landlord, refused to sell the whole of the two tenements to the company:—Held, that, under such circumstances, it became reasonably necessary for the company to take the whole of the two tenements numbered 122 and 123, and that, as they were shown and described in the deposited plans and books of reference, the company were entitled to take them. *Pulling* v. *L., C. & D. Ry.* (3 De G. J. & S. 661) distinguished. *Ib.*

For Siding.]—Land within the limits of deviation in the deposited plans and sections, but not actually taken in the first instance by the company, may be taken for the purposes of making a siding, so as to give local traffic an ingress on to the main line. *Dylar's Estate, In re*, 1 Jur. (N.S.) 975. See *Cother* v. *Midland Ry.*, 17 L. J., Ch. 235; 2 Ph. 453; 5 Railw. Cas. 187, *and cases* sub tit. RAILWAY.

Admissibility of Evidence.]—Evidence (not before the committee of parliament) was admitted to prove boundaries beyond those shown on the deposited plans, and was used in determining the extent of the "lands delineated." *Dowling* v. *Pontypool, Caerleon and Newport Ry.*, supra.

Evidence of engineers as experts on the construction of the plans and of the act will not be admitted. *Ib.*

d. Houses, Buildings and Manufactories.

i. *In General.*

"House."]—The word "house" in s. 92 comprises everything which would pass by that word in a conveyance. *King* v. *Wycombe Ry.*, 28 Beav. 104; 29 L. J., Ch. 462; 6 Jur. (N.S.) 239; 2 L. T. 107.

The word "house," in s. 92, includes only what would pass by a conveyance of a house, and does not include a field occupied with the house, which is not necessary to the occupation of the house. *Fergusson* v. *L., B. & S. C. Ry.*, 3 De G. J. & S. 653; 33 L. J., Ch. 29; 9 L. T., 134; 11 W. R. 1088; 2 N. R. 566.

The word "house" includes all that would pass by a devise of the house; but that does not include land which is not necessary for the convenient use and occupation of the house, but only for the personal use and convenience of the owner and occupier. *Steele* v. *Midland Ry.*, L. R. 1 Ch. 275; 12 Jur. (N.S.) 218; 14 L. T. 3; 14 W. R. 367.

The word "house" in s. 92 must be interpreted as used in the general, if not universal, sense in which the law understood it. *Grosvenor*

v. *Hampstead Junction Ry.*, 1 De G. & J. 446; 26 L. J., Ch. 731; 3 Jur. (N.S.) 1085; 5 W. R. 812.

The term "house" in s. 92 includes everything that would pass under an ordinary conveyance of a house. *Hewson* v. *L. & S. W. Ry.*, 2 L. T. 369; 8 W. R. 467.

Upon a compulsory purchase of a house under the powers of the Lands Clauses Act, the promoters are bound to take only the entire property which, as a matter of legal construction, would pass under a grant or devise simpliciter of the particular house in question in each particular case. *Kerford* v. *Seacombe, Hoylake, and Deeside Ry.*, 57 L. J., Ch. 270; 58 L. T. 445; 36 W. R. 431; 52 J. P. 487.

Form of Claim.]—The words "house or other building or manufactory," in s. 92 of the Lands Clauses Act, refer to three distinct things; and it is sufficient that the owner of premises, part of which is required by a company, should specify the premises which he requires them to take without stating whether he makes the claim on the ground that they are a house, or a building, or a manufactory. *Richards* v. *Swansea Improvement and Tramways Co.*, 9 Ch. D. 425; 38 L. T. 833; 26 W. R. 764.

Compelling Company to take less than Whole.]—When a railway company takes lands forming part of a house, the owner can compel the company to take the whole of the other property comprised in the word "house," but not a portion only of it. *Pulling* v. *L., C. & D. Ry.*, 3 De G. J. & S. 661; 33 L. J., Ch. 505; 10 Jur. (N.S.) 665; 10 L. T. 740; 12 W. R. 969.

Leasehold Interest.]—Sect. 92 is applicable although the landowner may have only a leasehold interest. *Ib.*

Garden and Orchard.]—A railway company, under the compulsory powers of the 8 & 9 Vict., c. 18, cannot take a portion of a garden and orchard essential to the enjoyment of a mansion and premises; it must take the entire house and curtilage. Where, therefore, a mansion and premises were surrounded by a brick wall, and a railway company took a portion of the garden and orchard, and divided one part of the premises from another, and destroyed all internal communication:—Held, that the company was bound to take the whole estate. *King* v. *Wycombe Ry.*, 28 Beav. 104; 29 L. J., Ch. 462; 6 Jur. (N.S.) 239; 2 L. T. 107.

A railway company proposing to take part of the garden attached to a dwelling-house, thereby cutting off the end of the garden and the summer-house, is bound to take the whole property. *Cole* v. *West London and Crystal Palace Ry.*, 27 Beav. 242; 28 L. J., Ch. 767; 5 Jur. (N.S.) 1114; 1 L. T. 178.

A man, with his dwelling-house situate in a piece of ground two and one-eighth acres in extent and surrounded by brick walls, using part of the land as a nursery garden for trade purposes, is entitled to compel a railway company proposing, without actually touching the house, to take the greenhouses and a part which has been planted and used for ornamental purposes, to take the whole of the land. *Salter* v. *Metropolitan District Ry.*, 39 L. J., Ch. 567; L. R. 9 Eq. 432.

A house had attached to it a shrubbery and a series of gardens, separated by walls, but all connected by a gravel walk passing through the dividing walls:—Held, that the garden farthest from the house, and inclosed at a more recent period than the others, was part of the house within the meaning of the act; so that a railway company could not take it without taking the whole house. *Hewson* v. *L. & S. W. Ry.*, 2 L. T. 369; 8 W. R. 467.

Meadow Land.]—A field, separated from the garden of a house by a ha-ha, traversed by a gravel walk leading to a coachman's house at the farthest end, and used occasionally for purposes of pleasure (as archery and dancing), though chiefly as pasture for cows, is not part of the house within s. 92. *Pulling* v. *L., C. & D. Ry.*, supra.

A. was, under one and the same instrument, lessee of a house and garden, and also of a piece of meadow land, separated from it by a road originally made for the convenience of himself and the lessees of the adjoining houses, but afterwards thrown open to the public. Each of the other lessees had also a strip of land on the other side of the road; and these strips were all thrown into one piece, and were used by the lessees in common as cricket and pleasure ground. It was let by them to a butcher for grazing purposes. A railway company required this piece of land for its line; but A. insisted that the company must take his house and garden as well:—Held, that this strip of land was not included in the word "house," inasmuch as it was of pleasure only, and not of necessity to the enjoyment and occupation of A.'s residence. *Fergusson* v. *L., B. & S. C. Ry.*, 33 Beav. 103; 3 De G. J. & S. 653; 2 N. R. 566; 33 L. J., Ch. 29; 9 L. T. 134; 11 W. R. 1088.

Meadow land, not being appurtenant to a house at the time of a notice, does not form part of the house and garden. *Chambers* v. *L., C. & D. Ry.*, 1 N. R. 517; 8 L. T. 235; 11 W. R. 479.

S. was owner and occupier of a house and six acres of meadow land on the west of the Edgware-road. He had a large family, and the ground he had being insufficient for the horses and cows which he kept for their use, he bought six and a quarter acres on the other side of the road, the nearest point being distant 120 yards from his entrance gate. At the nearest point of this land were a cow-house, loose box, and a cottage which was occupied by his grooms, because he had no accommodation for them on his own side of the road, and he for a number of years occupied the land for the purpose of feeding the horses and cows requisite for his establishment:—Held, that the six and a quarter acres could not be considered part of the house. *Steele* v. *Midland Ry.*, L. R. 1 Ch. 275; 12 Jur. (N.S.) 218; 14 L. T. 3; 14 W. R. 367.

The plaintiff, in the year 1853, acquired land on the north side of a road, on which he built a residence for his own occupation. In the year 1864 he acquired a plot of land on the south side of the same road immediately opposite his residence, whereon he built stables and formed a kitchen garden, and this property had since been continuously occupied by him as an adjunct to his residence. The defendants gave notice to exercise their compulsory powers in respect of the stables and garden only:—Held, that the property included in the notice was not part of the plaintiff's "house" within s. 92 of the act, and the defendants could not be compelled to take the plaintiff's residence itself. Quære, whether under such circumstances a piece of land detached

from a residence may not be part of the "house" within the meaning of the section. *Kerford* v. *Seacombe, Hoylake and Deeside Ry.*, 57 L. J., Ch. 270; 58 L. T. 445; 36 W. R. 431; 52 J. P. 487.

The owner of a property consisting of a strip of land about 100 yards long by 30 yards wide, with a road at each end, containing front garden, house, back garden and paddock, the latter abutting on the back road, and with private roads from the house to the front road, and from the house along the side of the paddock to the back road, received notice from a railway company of their intention to take the whole of the end of the paddock and private road, so as to cut him off from the back road:—Held, that they must take the whole property. *Barnes* v. *Southsea Ry.*, 27 Ch. D. 536; 51 L. T. 762; 32 W. R. 976.

House and Warehouse.]—A. was lessee for years of a house and of a warehouse, between which was a yard, over which he had a right of way granted by the same demise. B. was the occupier as under-lessee. A railway company proposed to take the warehouse, and gave notice, and paid a sum into court, and gave a bond conditioned to pay compensation-money to A., the lessee, "her heirs, executors, or administrators," and then took possession of the warehouse, which they began to pull down. A., the lessee, filed her bill against the company, and moved for an injunction to restrain the company from continuing in possession, and from proceeding to pull down the warehouse, contending that, under the Lands Clauses Act, the defendants were bound to take the whole of the premises. B., the under-lessee, was no party to the suit. The court refused to interfere by injunction, and directed a case for the opinion of a court of law. *Dakin* v. *L. & N. W. Ry.*, 3 De G. & Sm. 414; 13 Jur. 579.

Strip in front of House.]—A small piece of ground was situated in front of a public-house, and had always been occupied with it. On one side it was open to a narrow public street, and customers frequently left their horses and carts standing on it while they were inside the public-house. A strip immediately in front of the public-house was paved, and formed part of a public footway between two streets:—Held, that this piece of ground was part of the house. *Marson* v. *L., C. & D. Ry.*, 37 L. J., Ch. 483; L. R. 6 Eq. 101; 18 L. T. 319.

Two Demises.]—Where a proprietor of a house and garden held them under two demises, the house and part of the garden being comprised in one, and the other part of the garden in the other demise, the company must take the whole, and make compensation. *Macgregor* v. *Metropolitan Ry.*, 14 L. T. 354.

Part of House within Limit.]—A railway act enacted, that if "any house which shall be situated within fifty feet from the railway shall be deteriorated in value, and the owner shall require them to purchase the same, it shall be lawful for them to treat for such purchase, or for the amount of compensation to be paid for damage, and in case of disagreement, the amount of compensation to be settled by a jury: provided, that no party shall be entitled to receive compensation unless the jury determine that the property has been deteriorated: provided, that in no case shall the company be compellable to purchase any portion of any house which portion is situate at a greater distance than fifty feet from the railway: and provided, that the company, whenever called on to take part of such house, may at their option take the whole":—Held, that a house of which a very large proportion was within fifty feet of the railway, was a house within fifty feet, and that the compensation was claimable for the whole at the owner's option; the company also having an option to take the whole, if called on to take part. *Walker* v. *London and Blackwall Ry.*, 3 Railw. Cas. 396; 3 Q. B. 744; 3 G. & D. 549; 12 L. J., Q. B. 88: 7 Jur. 323.

By a railway act it was enacted, that, if the company wished to purchase any part of certain property, they should not be authorised to compel the sale of, or to take less than the whole of such property. The owner of any "house, manufactory, ground or building," situate within fifty feet of the railway, might require the company to purchase his rights and interests in such houses, manufactories, ground or buildings. A piece of ground, held under one lease, contained a principal dwelling-house, yard, and garden, occupied by a manufacturer, and a manufactory, and five smaller dwelling-houses, in the occupation of under-tenants. The principal dwelling-house and garden only were within the fifty feet of the railway, and the company did not wish to purchase any part of the property:—Held, that the owner could not compel the company to buy more than the dwelling-house, yard, and garden. *Reg.* v. *London and Greenwich Ry.*, 3 Railw. Cas. 138; 2 G. & D. 444; 3 Q. B. 166; 11 L. J., Q. B. 187; 6 Jur. 892.

Two Houses — Internal Communication.]—Where a man used two houses with internal communication as one house for the purpose of one business, holding them under separate leases of even date from the same lessor, the court held that the two houses constituted one entire house within the meaning of the Lands Clauses Act, 1845, s. 92, so that, if the company took the premises comprised in one lease, they were bound to take those comprised in the other. *Siegenberg* v. *Metropolitan District Ry.*, 49 L. T. 554; 32 W. R. 333.

The plaintiff was the lessee of two semi-detached villas under one continuous roof. The party-wall between them was only carried up to the ceilings of the bedrooms, so that the space between those ceilings and the roof formed one continuous space, through which a person might creep from one end of the roof to the other, but with this exception, there was no internal communication between the two villas. The party-wall was so ineffective that if one of the villas was to be pulled down, the other villa would become uninhabitable. Each villa had its own distinct garden. A railway company, under the Lands Clauses Act, 1845, gave notice to treat for a strip of the garden of one of the villas, and received a counter-notice requiring them to take the two villas. The company deposited only the assessed value of the strip of garden comprised in their notice to treat. The plaintiff filed a bill to compel the company to take the two villas, and thereupon they agreed to take the whole of one of the villas:—Held, that the two villas did not constitute one house within the meaning of the Lands Clauses Act, 1845, s. 92, and that the company could take one villa without taking the other. *Harvie* v. *South Devon Ry.*, 32 L. T. 1; 23 W. R. 202.

Where House Unfinished.]—Trustees of a charity purchased land, and covenanted to erect upon it buildings, consisting of a hall in the centre, with almshouses (some on each side of the hall, and others forming wings of the main building), with a garden in the centre. A portion was to be built within a specified time, and the rest as funds were subscribed. Before more than the centre was completed, a railway company required to take a portion of the land which, when the design was completed, would be part of the garden in front of one of the intended almshouses :—Held, that the land was part of a house. *Grosvenor* v. *Hampstead Junction Ry.*, 1 De G. & J. 446 ; 26 L. J., Ch. 731 ; 3 Jur. (N.S.) 1085 ; 5 W. R. 812.

A. had erected and covered in three new houses : but while they were in an unfinished state, a railway company required a portion of the land intended to be attached to them as gardens :—Held, that the company was bound to purchase the whole of the property, although the houses had never been completed, and had fallen into a state of great dilapidation. *Alexander* v. *West End and Crystal Palace Ry.*, 30 Beav. 556 ; 31 L. J., Ch. 500 ; 8 Jur. (N.S.) 833.

Special Act—Power to take Part only.]—Under 57 Geo. 3, c. xxix. s. 80, the city commissioners of sewers have power, if they please, to take compulsorily part only of a house for the purposes of the act, as well as to take the whole. And in this respect s. 80 is to be taken as making no distinction between houses and land. But before the commissioners can take compulsorily any premises for the purposes of the act, they must formally adjudge the taking of the premises to be necessary for those purposes ; and, therefore, where the commissioners had adjudged part of a house to be necessary :—Held, that they were not entitled, on this adjudication, to take the whole. *Thomas* v. *Dare*, 36 L. J., Ch. 201 ; L. R. 2 Ch. 1 ; 15 L. T. 200 ; 15 W. R. 113.

Counter-notice.]—A landlord is not compelled to sell a part of his house, if, before the company has begun to put its compulsory powers in motion, he gives them notice to take the whole. *Gardner* v. *Charing Cross Ry.*, 2 Johns. & H. 248 ; 31 L. J., Ch. 181 ; 8 Jur. (N.S.) 151 ; 5 L. T. 418 ; 10 W. R. 120.

A landowner, who, upon being served by a company with notice to treat for part of his property, replied by claiming a given sum for the part, is not thereby precluded, if that sum is refused, from asserting his right to require the company to take the whole. *Ib.*

The defendants gave notice to treat in respect of E. Villa and a strip of land at the back thereof that formed part of the garden of W. Villa. The owner gave a counter-notice requiring the defendants to take the whole of W. Villa ; the defendants then abandoned their notice to treat. The owner contending that he was entitled to treat the notice as applicable to E. Villa without the strip of land at the back, proceeded ex parte by arbitration, and compensation was assessed in respect of E. Villa ; in an action to recover the amount awarded :—Held, that there was only one notice to treat and that the owner could not treat the notice as two notices applicable to E. Villa and part of W. Villa, and therefore that he was not entitled to recover. *Thompson* v. *Tottenham and Forest Gate Ry.*, 67 L. T. 416 ; 57 J. P. 181. *And see also* COUNTER NOTICE, post, col. 1347.

In Case of Tunnel.]—A piece of land two and a half acres in extent, with a small cottage built upon it, was occupied by a market gardener, and used for the purposes of trade ; a company ran its tunnel under the house, and so that the line of the tunnel severed a portion of the land from the rest :—Held, that the owner of the land was not entitled, under the Lands Clauses Act, 1845, s. 92, to compel the company to take the whole of the land, but that he was entitled to compel it to take the whole cottage, with so much of the land as was used for ornament or otherwise in immediate connection with the cottage, and also the severed portion of the land, notwithstanding that the tunnel did not interfere with access. *Falkner* v. *Somerset and Dorset Ry.*, 42 L. J., Ch. 851 ; L. R. 16 Eq. 458.

"Town."]—Where premises were within the municipal boundaries of a town, but not surrounded by houses :—Held, that they were not in a town within the meaning of s. 93. *Ib. See* INTERSECTED LANDS, post, col. 1356.

"Buildings"—Additions to Hospital.]—A wing of a hospital, joined to a main building by a wall only, but used for the like purposes as the main building, and the garden of the hospital, are parts of the "house or other building" forming the hospital, within s. 92, although both wing and garden are modern additions to an ancient edifice. *St. Thomas's Hospital* v. *Charing Cross Ry.*, 1 Johns. & H. 400 ; 30 L. J., Ch. 395 ; 7 Jur. (N.S.) 256 ; 4 L. T. 13 ; 9 W. R. 411.

—— Agreement, whether ousting s. 92.]—Clauses were inserted, upon the requirement by counsel for the trustees of the hospital before a parliamentary committee, making provision for preventing passing trains from interfering with the conduct of the hospital :—Held, that such clauses were intended to meet the case of the trustees not requiring the company to take the entire building, and that they did not by implication, or as matter of agreement before the committee, interfere with the trustees' rights. *Ib.*

"Manufactories"—What are.]—When land is employed for the purpose of a business not involving manufacture, but portions of it are used for auxiliary manufacturing processes, the whole is not a manufactory within the Lands Clauses Act. *Reddin* v. *Metropolitan Board of Works*, 4 De G. F. & J. 532 ; 31 L. J., Ch. 660 ; 7 L. T. 6 ; 10 W. R. 764.

Where, therefore, a dust contractor used a large piece of land for the purpose of collecting and disposing of the contents of dust-heaps, one portion being used as a sorting-place, another for the conversion of parts of the heap into cement, and another for converting other parts into manure :—Held, that the first-mentioned portion might be taken compulsorily without the rest. *Ib.*

B. & Sons, tea merchants, carried on their business at P. House and also in houses in G. Street in the immediate vicinity. In the houses in G. Street the tea was stored, blended, and milled, and by those and similar processes special teas of a distinct quality were produced and sold in the market under B. & Sons' trade mark.

In P. House the packing requisites were prepared and made, and the tea packed, and thence it was delivered to customers. The Metropolitan Board of Works desired to take P. House under their compulsory powers :—Held, that manufacture meant producing something new from raw material, which was not the case here; but that, even supposing a manufacture was carried on at G. Street, there was no manufacture carried on at P. House, and as the business and manufacture were carried on in distinct premises, it was not incumbent on the board to take the premises as a whole. Consequently, B. & Sons were not entitled to an injunction restraining the board from taking P. House without taking the whole. *Benington* v. *Metropolitan Board of Works*, 54 L. T. 837; 50 J. P. 740.

The plaintiff was the owner of a leasehold house in High Street, Swansea, and of five freehold cottages in Bethesda Row, which run parallel to High Street, the yards at the back of the cottages abutting on the back yard and buildings held with the house in High Street. The plaintiff used the house in High Street as a dwelling-house and shop, and the buildings behind it as a candle manufactory, candle store, bread store, and provision store. One of the cottages in the row was turned into a store house, and was made to communicate with the High Street premises, and was used as a back entrance to them. A tramway company gave notice to treat for the five cottages in the row and the yards behind them. The plaintiff gave a counter-notice that the land proposed to be taken was part of premises occupied by him as a manufactory, and calling upon the company to take the whole of the premises; and on the company's refusal he brought an action asking for a declaration that he might not be compelled to sell the part only of his "manufactory building and land" which was comprised in the notice to treat; and for an injunction :—Held, that the whole block of buildings constituted one "manufactory" within s. 92 of the Lands Clauses Act, and that the company was bound to take the whole. *Richards* v. *Swansea Improvements and Tramways Co.*, 9 Ch. D. 425; 38 L. T. 833; 26 W. R. 764—C. A.

—— **Part or Whole.**]—A railway company, having given notice of their wish to purchase part of premises used as a manufactory, cannot be compelled to purchase the whole of such premises, under s. 92, which although it protects owners from being obliged to sell a part only, if willing and able so sell the whole, contains no words making it obligatory on the company, under notice of their wanting part, to take the whole. *Reg.* v. *L. & S. W. Ry.*, 5 Railw. Cas. 669; 12 Q. B. 775; 17 L. J., Q. B. 326; 12 Jur. 973.

Therefore, where a company has given a notice requiring part of a manufactory, a mandamus, directing them to summon a jury to assess compensation for the whole, cannot be sustained. *Ib.*

Where a mandamus requires the company to take the whole manufactory, the writ cannot go for a part only. *Ib.*

Land included in the same wall with tin-plate works, and used for the deposit of ashes from the works, is part of a manufactory, although the two portions of the property were separated by a road over which a stranger had a right of way. *Sparrow* v. *Oxford, Worcester, and Wolverhampton Ry.*, 2 De G. M. & G. 94; 21 L. J., Ch. 731; 16 Jur. 703.

A railway company gave notice to S. of their intention to take his dwelling-house and cottages, all separated from a manufactory carried on by S. only by a road, which cottages were used as warehouses, and were the only warehouses used in connection with the manufactory :—Held, that the cottages were part of the manufactory, and that the company could be compelled to take the whole manufactory. *Spackman* v. *G. W. Ry.*, 1 Jur. (N.S.) 790.

Where a railway company propose to take part of a building, a portion of which building is used as a manufactory, they are taking part of the manufactory within the meaning of s. 92 of the Lands Clauses Act, 1845. *Brook* v. *Manchester, Sheffield and Lincolnshire Ry.*, 64 L. J., Ch. 890; [1895] 2 Ch. 571; 13 R. 798; 73 L. T. 205; 43 W. R. 698.

—— **In Case of Tunnel.**]—A railway company having given notice to take the surface of land which constituted part of a manufactory, and which they were restrained from taking by an interim injunction :—Held, that they could not on the hearing set up the case that they could avoid taking part of the manufactory by making a tunnel underneath it. *Sparrow* v. *Oxford, Worcester, and Wolverhampton Ry.*, 9 Hare, 441.

Semble, by tunnelling under part of a manufactory, a company in effect would take part of the manufactory. *Ib.*

—— **Bridging over.**]—Throwing a railway bridge over a yard belonging to a manufactory, and used for the preparation of colours, a process which required air and light, is taking a part of the manufactory, notwithstanding that no part of the soil itself is actually taken or touched. *Pinchin* v. *London and Blackwall Ry.*, 1 Kay & J. 34; 2 Eq. R. 1172; 3 W. R. 52. See *S. C.*, on appeal, 5 De G. M. & G. 851; 24 L. J., Ch. 417; 1 Jur. (N.S.) 241; 3 W. R. 125; 3 Eq. R. 433.

A special act of a company incorporated so much of 8 & 9 Vict. c. 18, as was not inconsistent with it. It also provided that such parts of the line as passed through a piece of land should be arched over, so as to afford to the owner a communication between the severed portions :—Held, that this provision was not inconsistent with, and therefore did not exclude the operation of s. 92, that no party shall be required to sell part of a manufactory if he shall be able and willing to sell the whole. *Sparrow* v. *Oxford, Worcester, and Wolverhampton Ry.*, 2 De G. M. & G. 94; 21 L. J., Ch. 731; 16 Jur. 703.

A manufactory sometimes worked, or in part worked, by water power, had a reservoir, which was supplied by a goit, into which water was turned out of a natural river at some distance off. At the point where the goit commenced there was a weir in the river; there were shuttles for regulating the flow of water into the goit, and a mill-house for the occupation of a man whose duty it was to attend to the shuttles. A railway company gave notice to treat for certain parcels of land, including the weir, shuttles, mill-house, and parts of the bed of the river (which was included in the proprietor's lease, though not forming part of the manufactory), and of the goit. They proposed to pass over the shuttles, weir, mill-house, river and goit by bridges :—Held, that they were bound to take

the whole manufactory. *Furniss* v. *Midland Ry.*, L. R. 6 Eq. 473.

—— **Includes Trade Fixtures.**]—A company taking a manufactory is bound to take, as part thereof, the trade fixtures therein. *Gibson* v. *Hammersmith and City Ry.*, 2 Dr. & Sm. 603 ; 1 N. R. 305 ; 32 L. J., Ch. 337 ; 9 Jur. (N.S.) 221 ; 8 L. T. 43 ; 11 W. R. 299.

Yard—What is.]—By a railway act it was enacted, that, if the railway company should be desirous of purchasing part of any house, garden, yard, warehouse, building or manufactory, and the owner should signify his inclination to sell the whole of such house, yard, &c., he should not be compelled to sell to the company part only or less than the whole of such house, garden, yard, &c. :—Held, that a yard for bonding foreign timber, in which there were a deal shed and two buildings, containing saw-pits, was not a yard within the meaning of the enactment. *Stone* v. *Commercial Ry.*, 9 Sim. 621 ; 1 Railw. Cas. 375 ; 4 Myl. & C. 122.

Persons under Disability.]—Persons under disability, who can sell and convey under ss. 6, 7, of the Lands Clauses Act, are able to sell and convey within the meaning of s. 92. *St. Thomas's Hospital* v. *Charing Cross Ry.*, 1 Johns. & H. 400 ; 30 L. J., Ch. 395 ; 7 Jur. (N.S.) 256 ; 4 L. T. 13 ; 9 W. R. 411.

Termor.]—A termor is entitled to the benefit of s. 92 of the Lands Clauses Act, 1845, although his option would not affect the owner of the fee. *Pulling* v. *L. C. & D. Ry.*, 3 De G. J. & S. 661 ; 33 L. J., Ch. 505 ; 10 Jur. (N.S.) 665 ; 10 L. T. 741 ; 12 W. R. 969.

ii. *Counter Notice.*

Construction of s. 92.]—The proper construction of s. 92 of the Lands Clauses Act, 1845, which enacts, that "no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory if such party be willing and able to sell and convey the whole," is that a landlord shall not be compelled to sell a part of his house, if, before the company have begun to put their compulsory powers in motion, he gives them notice to take the whole. *Gardner* v. *Charing Cross Ry.*, 2 Johns. & H. 248 ; 31 L. J., Ch. 181 ; 8 Jur. (N.S.) 151 ; 5 L. T. 418 ; 10 W. R. 120.

Form of.]—A railway company gave notice to B. of their intention to take a part of his property. The surveyors of both parties met, and it was verbally agreed that the company would take the whole of the property. There was no written notice on the part of the landowner, requiring the company to take the whole. The company proceeded to have part of the property valued, to pay the money into court, and to take compulsory possession of that part of the property ; and thereupon B. filed a bill for an injunction to restrain them, and to compel them to take the whole :—Held, that the course which B. had taken was that to which he had a right, and that he was entitled to all the costs of the suit. *Binney* v. *Hammersmith and City Ry.*, 9 Jur. (N.S.) 773 ; 8 L. T. 161.

The defendants gave notice to treat in respect of E. Villa and a strip of land at the back thereof that formed part of the garden of W. Villa. The owner gave a counter-notice requiring the defendants to take the whole of W. Villa, the defendants then abandoned their notice to treat. The owner contending that he was entitled to treat the notice as applicable to E. Villa without the strip of land at the back, proceeded ex parte by arbitration, and compensation was assessed in respect of E. Villa ; in an action to recover the amount awarded :—Held, that there was only one notice to treat and that the owner could not treat the notice as two notices applicable to E. Villa and part of W. Villa, and therefore that he was not entitled to recover. *Thompson* v. *Tottenham and Forest Gate Ry.*, 67 L. T. 416 ; 57 J. P. 181.

It is quite sufficient, if, when the company have proposed to take a piece of land, the landowner has given them notice that he is able and willing to sell, and desires them to take the whole of a certain defined property ; whether or no he describes it inaccurately as a "manufactory," when he ought to have described it as a "house," or as a "building," when he ought to have described it as a "house," is immaterial. *Richards* v. *Swansea Improvements and Tramways Co.*, 9 Ch. D. 425 ; 38 L. T. 833 ; 26 W. R. 764.

In what Cases.]—A notice to treat in respect of a right of way does not confer on the owner a right to give a counter-notice requiring the company to take the whole of the manufactory, because a right of way could not be considered as part of the manufactory. *Pinchin* v. *London and Blackwall Ry.*, 5 De G. M. & G. 851 ; 24 L. J., Ch. 417 ; 1 Jur. (N.S.) 241 ; 3 Eq. R. 433 ; 3 W. R. 125.

A termor is entitled to the benefit of s. 92 of the Lands Clauses Act, 1845, although his option would not affect the owner of the fee. *Pulling* v. *L. C. & D. Ry.*, 3 De G. J. & S. 661 ; 33 L. J., Ch. 505 ; 10 Jur. (N.S.) 665 ; 10 L. T. 741 ; 12 W. R. 969.

Time for giving.]—In 1847 the G. W. Railway Company gave notice to S. of their intention to take his dwelling-house and certain cottages, all separated from a manufactory carried on by S. only by a road, which cottages were used as warehouses, and were the only warehouses used in connection with the manufactory. The company not having taken active steps on the notice of 1847, S. sued out a mandamus to compel them, but did not prosecute it. The compulsory powers of the act of 1847 expired, and were renewed by an act of 1852, under which the company again issued a new notice respecting the premises in question. The plaintiff's solicitor afterwards verbally informed the defendants' solicitor, at a casual meeting, that the plaintiff wished to part with the whole, and not a part only, of the premises. The company thereafter, without communication with the plaintiff, procured their surveyor to be appointed by two justices under the Lands Clauses Act, 1845, who valued that portion which they wished to take. The company then paid that sum into court, and executed a bond under the Lands Clauses Act, and entered and commenced work :—Held, that the plaintiff was entitled to give the defendants now, by his bill, notice of his intention to part with the whole, and not a part only, of the premises ; and an injunction was granted accord-

ingly, restraining the company from entering on the premises until the value should be properly ascertained. *Spackman* v. *G. W. Ry.*, 1 Jur. (N.S.) 790.

Effect of, on Notice.]—Semble, where a valid notice has been given to take part of a house or manufactory, and on that a valid counter-notice has been given to take the whole, the notice and counter-notice will be treated as constituting one notice, for the purpose of enabling the jury to assess the value of the property forming the subject-matter of the notice and counter-notice. *Pinchin* v. *London and Blackwall Ry.*, supra.

The effect of the counter-notice to take the whole does not operate to destroy, but only to suspend the original notice to take a part of the property. *Schwinge* v. *London and Blackwall Ry.*, infra.

Effect of Claiming given Sum.]—A landowner, who, upon being served by a company with notice to treat for a part of his property, replied by claiming a given sum for the part, is not thereby precluded, if that sum is refused, from asserting his right, under s. 92 of the Lands Clauses Act, to require the company to take the whole. *Gardner* v. *Charing Cross Ry.*, supra.

Assent—Expiration of Compulsory Powers.]—On the 30th June, 1853, the L. and B. Railway Company gave the plaintiff notice that they should, under the provisions of their acts for widening the railway, require the messuage in which he resided, and such portions of the yard as would be requisite for the sites of the piers, and for the right or easement of making and maintaining the widening over the intermediate spaces. On the 11th July following the plaintiff gave the railway company notice, under s. 92 of the Lands Clauses Act, that he was willing and able to sell the whole, but declined to sell a part of his property. On the 27th July, 1853, the compulsory powers of the company, which had been extended from 1849, expired. Negotiations for the settlement of the terms having failed, nothing more was done by either party until the 2nd November, 1854, when the railway company gave the plaintiff notice that they intended to issue their warrant to the sheriff for summoning a jury to assess the price or compensation to be paid to the plaintiff for the whole of his property. On motion for an injunction to restrain the railway company from summoning a jury, from taking any proceedings at law against the plaintiff, and from taking possession of the property: —Held, that as the railway company, before the expiration of their compulsory powers, gave notice to take part of the plaintiff's property, and as the plaintiff, within the time limited, gave notice to the company to take the whole of his property, it was not necessary that the company should, upon the construction of the acts of parliament, signify their assent to take the whole before the expiration of their compulsory powers; and therefore a letter written on the 9th September, 1854, was a sufficient assent by the company of their disposition to treat for the purchase of the whole of the property. *Schwinge* v. *London and Blackwall Ry.*, 3 Sm. & G. 30; 3 Eq. R. 536; 24 L. J., Ch. 405; 1 Jur. (N.S.) 368; 3 W. R. 360.

Appointment of Surveyor — Contract.] — A notice by a railway company to treat for a part of a manufactory was met by a counter-notice by the owners, requiring them to take the whole. The company then gave the owners notice of their intention to apply to the Board of Trade for the appointment of a surveyor to determine the value of the premises comprised in the notice to treat, and of the further lands and hereditaments which the owners could lawfully require and had required the company to purchase and take. The owners then filed a bill praying for a declaration that the company could not take a part of the manufactory without taking the whole; whereupon the company gave notice of its intention to withdraw from the notice to treat, offering to pay the plaintiff's costs of suit up to that date; but they declined the offer, and insisted on an answer, which was filed. The bill was then amended, and, as amended, prayed for a declaration that the company was bound to take the whole manufactory:—Held, that notice of its intention to apply for the appointment of a surveyor did not amount to a binding contract by them to take the property; hence that they were at liberty to withdraw their notice to treat; and specific performance as prayed by the amended bill was refused. *Grierson* v. *Cheshire Lines Committee*, 44 L. J., Ch. 35; L. R. 19 Eq. 83; 31 L. T. 428; 23 W. R. 68.

Compelling Proceedings to ascertain Value.]—A railway company gave to the plaintiffs a notice to treat for the purchase of a portion of a piece of land: and the plaintiffs gave the company a counter-notice to take the whole. The company paid into court the value of the portion of the piece of land described in its notice to treat, gave to the plaintiffs the usual bond for the amount, and went into possession of the portion. In a suit for a declaration that the company was bound to purchase the whole of the premises comprised in the counter-notice, and for an injunction, it was declared that the company was so bound, and an inquiry was directed as to title, reserving further consideration. The title having been found to be good, but the company not having gone into possession of the rest of the premises described in the counter-notice, or taken any further steps:—Held, that the plaintiffs were entitled to an order compelling the company forthwith to take all necessary and proper proceedings for the purpose of ascertaining the amount to be paid by them to the plaintiffs as the value of the premises. *Marson* v. *L. C. & D. Ry.*, 38 L. J., Ch. 371; L. R. 7 Eq. 546; 20 L. T. 773.

—— **Delay of Owner.**]—A railway company having served upon a landowner notice to treat for a part of his premises, he served the company with a counter-notice, requiring them to take the whole of his premises. The company thereupon withdrew their notice to treat, and the landowner after lying by for three months, withdrew his counter-notice, and applied for a mandamus to compel the company to take the part according to their original notice:—Held, that he had lain by for an unreasonable time, and that the writ must be refused. *Quicke, Ex parte*, 12 L. T. 580; 13 W. R. 924.

Notice before summoning Jury.] — After a notice to take part of a manufactory, and a counter-notice under s. 92, it is not necessary that there should be a formal notice by the company, under s. 18, before summoning a jury

under s. 23; but, under s. 21, the company must give a reasonable opportunity to the landowner to agree with them before causing a jury to be summoned. *Schwinge* v. *London and Blackwall Ry.*, 3 Sm. & G. 30; 3 Eq. R. 536; 24 L. J., Ch. 405; 1 Jur. (N.S.) 368; 3 W. R. 260.

Held, also, that the opportunity offered by a subsequent proposal to treat for the purchase of the whole was such a reasonable notice as justified the company giving a notice of summoning a jury. *Ib.*

Semble, that the term of twenty-one days mentioned in s. 21, and included in the original notice, does not apply to the case of a notice, given under s. 92, to take the whole of the property. *Ib.*

Entry—Amount of Deposit.]—The plaintiff was the lessee of two semi-detached villas under one continuous roof. The party wall between them was only carried up to the ceilings of the bedrooms, so that the space between those ceilings and the roof formed one continuous space, through which a person might creep from one end of the roof to the other, but with this exception, there was no internal communication between the two villas. The party wall was so ineffective that if one of the villas was to be pulled down, the other villa would become uninhabitable. Each villa had its own distinct garden. A railway company, under the Lands Clauses Act, 1845, gave notice to treat for a strip of the garden of one of the villas, and received a counter notice requiring them to take the two villas. The company deposited only the assessed value of the strip of garden comprised in their notice to treat. The plaintiff filed a bill to compel the company to take the two villas, and thereupon they agreed to take the whole of one of the villas:—Held, that the company was right in proceeding on their own notice, and not depositing the value of the two villas, as the counter-notice was not good, and that the bill must be dismissed with costs. *Harvie* v. *South Devon Ry.*, 32 L. T. 1; 23 W. R. 202.

Right of Company to Assess Value of whole.]—A railway company, having obtained an act of parliament authorising them to widen their line of railway, gave notice, in July, 1853, to the proprietors of a manufactory which lay at each side of the railway (passing through on arches) of their intention to widen the railway by means of beams not resting in any manner upon the land belonging to the manufactory, and that they were willing to treat for the purchase of the right or easement (a stratum of air over the land belonging to the manufactory). That notice was given only three days before the expiration of the compulsory powers. Immediately upon the receipt of that notice the owners gave a counter-notice, under s. 92 of the Lands Clauses Act, requiring the company to purchase the whole manufactory. Nothing was done on these notices until May, 1854, when the company gave the owners notice of their intention to summon a jury to assess the amount to be paid for the easement. Thereupon the landowners filed their bill for an injunction, which was granted, restraining the company from proceeding on their notice unless and until the company would purchase the manufactory, the plaintiffs undertaking to sell and make a good title thereto. The company then abandoned their first notice, and gave notice of their intention to summon a jury to assess the value of the whole manufactory:—Held, that by the owners having given their counter-notice to the company to take the whole manufactory, an equity was created in favour of the company's right to give their last notice. *Pinchin* v. *London and Blackwall Ry.*, 5 De G. M. & G. 851; 24 L. J., Ch. 417; 1 Jur. (N.S.) 241; 3 Eq. R. 433; 3 W. R. 125.

Bad Counter Notice—Acceptance by Company's Solicitor — Authority to bind Company.]—A railway company served the plaintiff with notice to treat for the purchase of certain property, and the plaintiff served the company with a counter-notice requiring them to take certain other property as well as that comprised in the notice to treat. The solicitors of the company wrote accepting the counter-notice, but the company afterwards insisted on their right to take only the property comprised in the notice to treat. It having been found as a fact that the properties were separate and distinct, and that therefore the counter-notice was bad:—Held, that the acceptance of the bad counter-notice by the solicitors could not bind the company to take land which they were not otherwise compellable to take. *Treadwell* v. *L. & S. W. Ry.*, 54 L. J., Ch. 565; 51 L. T. 894; 33 W. R. 272.

Abandonment of Notice.]—A company on receiving a counter-notice to take the whole of certain premises cannot be deprived of their right to abandon their notice to treat. *Morrison* v. *G. E. Ry.*, 53 L. T. 384. S. P., *Grierson* v. *Cheshire Lines Committee*, 44 L. J., Ch. 35; L. R. 19 Eq. 83; 31 L. T. 428; 23 W. R. 68. *King* v. *Wycombe Ry.*, 28 Beav. 104; 29 L. J., Ch. 462; 6 Jur. (N.S.) 239; 2 L. T. 107.

e. Lands Omitted by Mistake (s. 124).

What is "Mistake."]—A corporation was empowered by special acts, which embodied the Lands Clauses Act, to construct waterworks and to take certain lands belonging to A. and B., the boundary between which was improperly described in their plans and books of reference. In consideration of B.'s withdrawing his opposition to its bill in committee, they agreed to settle the value of the land required from, and the compensation due to him, by arbitration under the above act, and to fix the exact quantity of land within six months after the passing of the bill. In the proceedings under the reference to arbitration, the mistake of the boundary was pointed out; but the award fixed a value, in terms only, for the land within the boundary so inaccurately delineated, and the corporation took that land accordingly, leaving between it and the true boundary line a narrow strip of land belonging to B., but which the corporation had agreed to purchase from A. as part of his land, and for which they paid a sum of money to A., and of which they took possession as part of the land purchased from A. B. recovered the strip of land afterwards from the corporation in ejectment, and a rule for a new trial was refused. The corporation thereupon proceeded, within six months from such refusal, to make themselves legal owners of the strip of land in question under the compulsory powers given in case of mistake by s. 124 of the Lands Clauses Act, 1845. B. filed a bill for an injunction to restrain them from so doing, which, upon motion,

was refused with costs :—Held, that the circumstances amounted to mistake within the meaning of s. 124. Held, also, that that section applied to land altogether omitted to be purchased, by mistake, as well as to an outstanding interest therein so omitted to be purchased. *Hyde* v. *Manchester Corporation*, 16 Jur. 180.

A railway company in 1856 took possession of a meadow, a large part of which belonged to one owner, and a small part to another who did not know the position or the exact extent of his land. The company, in 1859, took a conveyance of the large part, on which conveyance the extent of the small part was stated. The company did not pay for the small part, and the owner, in 1868, brought an ejectment against the company, obtained judgment, and was put into possession. His possession was disturbed by the company, and he filed a bill to restrain them. The company offered to pay the value of the land as in 1856, and interest thereon, which the landowner refused. The company then produced a notice to treat, given in 1856, and gave notice of their intention to proceed under that notice. The landowner filed a second bill to restrain them :—Held, that under the circumstances there had been no mistake or inadvertence so as to bring the case under the Lands Clauses Act, s. 124. *Stretton* v. *Great Western and Brentford Ry.*, 40 L. J., Ch. 50 ; L. R. 5 Ch. 751 ; 23 L. T. 379 ; 18 W. R. 1078.

A railway company, requiring possession of land which was subject to an equitable mortgage by deposit, proceeded to pay into court the amount of a valuation, and to enter into the usual bonds with the landowner and the equitable mortgagees. It afterwards assessed the purchase-money and compensation before a jury, as between themselves and the landowner, without giving notice to the mortgagees, who, however, were aware of, though they took no part in, the inquiry. The amount fixed by the jury was not enough to pay the mortgagees their debt, and was, moreover, less than the sum paid into court by the company. The mortgagees then filed a bill against the company and the landowner :—Held, that the company was not, under the circumstances, entitled to proceed under the Lands Clauses Act, s. 124, which provides for the purchase of interests, omitted to be purchased by mistake or inadvertence. *Martin* v. *L. C. & D. Ry.*, 35 L. J., Ch. 795 ; L. R. 1 Ch. 501 ; 12 Jur. (N.S.) 775 ; 14 L. T. 814 ; 14 W. R. 880.

Effect of s. 124.]—Semble, that the true effect of s. 124 of the Lands Clauses Act, 1845, is not to prevent a claimant from bringing ejectment to establish his title, but merely to authorise the court to stay execution upon the judgment, when obtained. *Salisbury* (*Marquis*) v. *G. N. Ry.*, 5 C. B. (N.S.) 174 ; 28 L. J., C. P. 40 ; 5 Jur. (N.S.) 70 ; 7 W. R. 75.

A railway company, in July, 1858, entered upon lands of which the mortgagor had been in possession ; and although the purchase-money was not paid to him, the parties were treating for arrangement, and the entry was with the knowledge and consent of the mortgagor. A mortgagee in fee of those lands subsequently gave notice of his interest, but the mortgage was not known by the company to exist until his attorney, having discovered the entry by the company, sent a letter in August, 1859, to their attorney, asserting his rights. A correspondence ensued, in which the mortgagee gave no information of his title, and the company did not dispute his title, but asked for a short delay while their legal advisers were absent from London. In October the mortgagee brought ejectment :—Held, that ejectment could not be maintained, inasmuch as the title not being in dispute, s. 124, gave the company a right of possession for six months after notice of his claim. *Jolly* v. *Wimbledon and Dorking Ry.*, 1 B. & S. 807 ; 31 L. J., Q. B. 95 ; 8 Jur. (N.S.) 1037 ; 5 L. T. 615 ; 10 W. R. 253—Ex. Ch.

Omission—Intermediate Lessees.]—The Railways Clauses Act, 1845, s. 7, providing a mode of correcting "any omission, misstatement or erroneous description of any lands described on the plans or books of reference," is intended to meet the case of any omission of land in the plan, or of description of any owner of it in the book of reference, or the omission of the number, or the misstatement of the acreage, or a mistake in the names of the owners, &c., as from an error in copying or the like ; but the section was not intended to apply to the case of the names of intermediate lessees for a long term being entirely omitted from the book of reference. *Kemp* v. *West End and Crystal Palace Ry.*, 1 Kay & J. 681 ; 1 Jur. (N.S.) 1012 ; 3 W. R. 607.

Costs.]—"Full costs and expenses" of any proceedings at law or in equity, mentioned in s. 126 of the Lands Clauses Act, which the promoters are to pay in respect of any litigation for taking the lands therein mentioned, mean costs as between attorney and client. *Hyde* v. *Manchester Corporation*, 12 C. B. 475.

f. By Companies with Conflicting Powers.

Rights arising.]—A railway company having acquired a legal right to and possession of land, and constructed their railway over the same, under the provisions of their act, another railway company, to whom the legislature had given power to purchase the same land for the purposes of their undertaking, was restrained by injunction from exercising such power pending the trial of the legal question of the effect of such conflicting powers. *Manchester, Sheffield, and Lincolnshire Ry.* v. *G. N. Ry.*, 9 Hare, 284.

A railway company had power to make and maintain the railway and works on the line and upon the lands delineated in the parliamentary plan, and described in the books of reference, and to enter upon, take, and use the said lands, or such of them as should be necessary for that purpose, but they were not to enter upon, take, or use any of the land or property of a certain pre-existing railway company, or in any manner to alter, vary, or interfere with that railway, or any of the works appertaining thereto, save only for the purpose of effecting the junction thereby authorised, in manner in the said act authorised, and not otherwise, one of the clauses of the act giving certain powers to the company for effecting a junction with the pre-existing railway :—Held, that there being nothing to shew that it was absolutely necessary for the company to take, as owner, certain lands which the line of the pre-existing railway actually passed, in order to effect the junction, it had no power to do so, but there

was a right to enter upon such land by way of easement for the purpose of effecting the junction. *Oxford, Worcester, and Wolverhampton Ry.* v. *South Staffordshire Ry.*, 1 Drew. 255 ; 1 W. R. 75.

The defendants, a railway company, were by their act restrained from interfering with the plaintiffs, and other railway companies previously established, except as to the compulsory purchase of lands within certain limits. The plaintiffs had power, by their act, to take some lands compulsorily and others by consent. The defendants had power to take certain lands, part of which had been purchased by plaintiffs' consent subsequently to the defendants' act :—Held, that the plaintiffs, having occupied the ground before the defendants, were entitled to hold so much of it as was not actually wanted for the formation of the defendants' railway, and an injunction was granted. *Lancaster and Carlisle Ry.* v. *Maryport and Carlisle Ry.*, 4 Railw. Cas. 504.

It is not competent to a later railway company, in the absence of a power for that purpose given in express terms by their special act, to require compulsorily the soil and freehold in lands already vested in, and actually used by, an earlier railway company for the purposes of their undertaking, although the land lies within the limits of deviation shewn by the parliamentary plans of the later company, and the special act confers upon them the general power to enter and take such of the lands delineated upon the plans as may be required for the purposes of their railway. *Dublin and Drogheda Ry.* v. *Navan and Kingscourt Ry.*, Ir. R. 5 Eq. 393.

The words in the Railways Clauses Act, 1863, s. 10—"unless otherwise provided in the special act"—are not satisfied by anything less than an express and definite provision in the special act authorising the compulsory purchase of land already vested in, and actually used by, another railway company for the purposes of their undertaking. *Ib.*

The words in the Railways Clauses Act, 1863, s. 10—"for the purposes of the junction"—are not be confined to the actual union of the lines, but include the formation of all works necessary for effecting the junction. *Ib.*

Where both the plaintiff and defendant companies had parliamentary powers to take the same land, and each had given notice to treat, without more, but the landowner had not come to an agreement with either company, nor had any other step required by the Lands Clauses Act, 1845, been taken :—Held, that assuming parliament to have given a preference to the plaintiff company, the court would not, after the plaintiff company's powers had expired, restrain the defendant company by interlocutory injunction from entering and commencing works on the land. *Bristol and North Somerset Ry.* v. *Somerset and Dorset Ry.*, 22 W. R. 601—L.JJ.

Held, also, that the plaintiff company, in taking possession without an agreement, and without taking the steps required by the Lands Clauses Act, 1845, were transpassers ; and that their act of parliament did not apply till they had got a title. *Ib.*

The South Wales Company having power to take and purchase lands, and to construct a railway according to the plans and books of reference deposited, gave notice to the Llanelly Railway and Dock Company that the South Wales Company required to purchase a small piece of land on part of which the Llanelly Railway was actually constructed, such piece of land being set out in the plans and books of reference as part of the proposed line of the South Wales Railway, but they afterwards refused to issue their warrant to the sheriff to assess the amount of purchase-money on the ground that the Llanelly Railway and Dock Company had no power under their act to sell any portion of land on which their railway was constructed :—Held, that as there was no express clause in any special or general act of parliament which authorised either the Llanelly Railway and Dock Company to sell any part of their actual line of railway, or the South Wales Company to purchase it, the authority was not to be implied from the general power given to the South Wales Company to make their line, and to purchase lands according to their deposited plans and books of reference. *Reg.* v. *South Wales Ry.*, 14 Q. B. 902 ; 6 Railw. Cas. 489 ; 19 L. J., Q. B. 272 ; 14 Jur. 828.

g. Intersected Lands.

What are.]—The word "such" in s. 94 is not confined to "lands not being situate in a town," as described in s. 93, but applies to the words in the general heading, "small portions of intersected lands." *Eastern Counties Ry.* v. *Marriage*, 9 H. L. Cas. 32 ; 31 L. J., Ex. 73 ; 7 Jur. (N.S.) 53 ; 3 L. T. 60 ; 8 W. R. 748.

A railway company, in making their line, cut off a small portion of the land of A., not situate in a town, and he required them to make a communication between the severed parts :—Held, that the operation of s. 94 was not confined to lands not situate in a town, or not built upon, but applied also to land situate in a town, and that therefore the company could compel A. to sell the severed parts of his land, and was not bound to make the communication required. *Ib.*

"Town."]—Where premises were within the municipal boundaries of a town, but not surrounded by houses :—Held, that they were not in a town within the meaning of s. 93. *Falkner* v. *Somerset and Dorset Ry.*, 42 L. J., Ch. 851 ; L. R. 16 Eq. 458.

Tunnel.]—A piece of land two and a half acres in extent, with a small cottage built upon it, was occupied by a market gardener and used for the purposes of trade ; a company ran its tunnel under the house, and so that the line of the tunnel severed a portion of the land from the rest :—Held, that the owner of the land was not entitled, under the Lands Clauses Act, 1845, s. 92, to compel the company to take the whole of the land, but that he was entitled to compel it to take the whole cottage, with so much of the land as was used for ornament or otherwise in immediate connection with the cottage, and also the severed portion of the land, notwithstanding that the tunnel did not interfere with access. *Falkner* v. *Somerset and Dorset Ry.*, 42 L. J., Ch. 851 ; L. R. 16 Eq. 458.

h. Charity Lands.

Where a railway company under its compulsory powers had taken a certain house belonging to a city ward :—Declared, on adjourned summons, that neither the consent of the charity commissioners nor of the lords of the treasury was necessary, and that it was not necessary for the

sale to be completed under the provisions of the Lands Clauses Acts, 1845, 1860, and 1869. *Finnis* to *Forbes*, *Finnis*, *Ex parte*, 24 Ch. D. 587; 48 L. T. 813; 32 W. R. 55.

Where a railway company under its compulsory powers took a certain house belonging to a charity school:—Held, that being supported by voluntary contributions the school came within the exemptions of s. 62 of the Charitable Trusts Act, 1853, and s. 48 of the act of 1855; that the consent of the charity commissioners was not necessary, and that it was not necessary that the sale should be completed under the provisions of the Lands Clauses Acts, 1845, 1860, and 1869. *Finnis* to *Forbes*, *Tower Ward Schools Trustees*, *Ex parte*, 24 Ch. D. 591; 48 L. T. 814; 32 W. R. 55.

Payment of Purchase Money to Persons absolutely entitled.]—*See* post, col. 1406.

i. Lands belonging to Lunatics.

Lunatic not so found—Real or Personal Representatives.]—Sect. 7 of the Lands Clauses Act, 1845, does not authorise a person of unsound mind to sell land to a company or public body who have statutory power to take it; the section only authorises the committee of a lunatic to sell. A public body having given notice under their statutory powers to take land belonging to a lady of unsound mind not so found, the value of the land was ascertained by two surveyors, one appointed by an uncle of the lady, who purported to act on her behalf, and the other by the public body; the sum thus ascertained was paid into court, and the public body took possession of the land. The lady afterwards died intestate, being still of unsound mind, and her heir-at-law petitioned for payment of the money to him:—Held, that the land had never been converted into personalty, and that the heir was entitled to the money. *Flamank*, *Ex parte* (1 Sim. (N.S.) 260), dissented from. *Tugwell*, *In re*, 53 L. J., Ch. 1006; 27 Ch. D. 309; 51 L. T. 83; 33 W. R. 132.

Money paid into court by a railway company for land taken under the Lands Clauses Act, from a person who was in a state of mental imbecility, and who continued in that state until his death, but was not the subject of a commission of lunacy, ordered, after his death, not to be reinvested in or considered as land, but to be paid to his executors. *Flamank*, *Ex parte*, *East Lincolnshire Ry.*, *In re*, 1 Sim. (N.S.) 260.

Investment of Money.]—The purchase-money of a lunatic's land taken by a public body under the Lands Clauses Act, 1845, s. 69, was, under the circumstances, ordered to be invested in guaranteed railway stock; but the name of the public body was directed to be omitted from the title of the account, an investment of this nature being treated as equivalent to a reinvestment in land. *Buckingham*, *In re*, 2 Ch. D. 690—C. A.

Release of Rent-Charge—Annuity.]—Lands which were subject to a rent-charge in favour of a lunatic during his life were taken by a corporation acting under the Lands Clauses Act. The court authorised the committee of the lunatic to release the lands from the rent-charge upon the corporation purchasing in the name of the lunatic a government annuity of the same yearly amount for his life. *Brewer*, *In re*, 1 Ch. D. 409; 34 L. T. 466; 24 W. R. 465—C. A.

Payment to Credit of Lunatic.]—Land belonging to a lunatic having been purchased by a railway company under the powers of its act, an order was made for payment of the purchase-money to the credit of the lunacy, and for its investment to the joint account of the lunatic and the company, without its being first paid into court, under the Lands Clauses Act, 1845, s. 69. *Milnes*, *In re*, 1 Ch. D. 28; 34 L. T. 46; 24 W. R. 98—C. A.

The application for such an order must not be made in the Lunacy only, but also in the Chancery Division. *Ib.*

——Appointment of New Committee—Payment of Dividends.]—The dividends arising from a sum of stock in court, to the credit of H. D. R., a lunatic, ex parte the Metropolitan Board, which represented the purchase-money of land belonging to the lunatic taken by the board under the Lands Clauses Act, 1845, were ordered to be paid to the joint committees of the estate of the lunatic. Upon the death of one of the joint committees the survivor was appointed sole committee, but the master declined to order the dividends to be paid to him, and a petition intituled in Lunacy and in the Chancery Division was presented for that purpose:—Held, that the dividends ought to be transferred to the lunacy and paid to the committee, and that upon the appointment of a new committee the order appointing him ought to direct payment to him of the dividends, and that the Metropolitan Board need not be served with the application, and that the board ought to pay the costs of the petition. *Ryder*, *In re*, 57 L. J., Ch. 459; 37 Ch. D. 595; 58 L. T. 783—C. A.

4. Time for Purchase.

Where no Time Specified.]—When a special act contained no clause limiting the time for purchase of land for the accommodation works of a railway company:—Held, that the period of three years, specified in s. 123 of the Lands Clauses Act, applied. *Seymour* v. *L. & S. W. Ry.*, 5 Jur. (N.S.) 753.

Where an act of parliament creates a company for the execution of certain works, but does not specify any time for their completion, no limitation of time will be presumed, and the works may be completed at any period. *Thicknesse* v. *Lancaster Canal Co.*, 4 M. & W. 472; 8 L. J., Ex. 49.

The powers for the compulsory purchase and taking of lands referred to in s. 123 of the Lands Clauses Act are powers given to the several promoters of the several special acts in which that act might be incorporated, and not several powers given to the promoters of each special act. *Sparrow* v. *Oxford*, *Worcester*, *and Wolverhampton Ry.*, 9 Hare, 436. And see *S. C.*, 2 De G. M. & G. 94; 21 L. J., Ch. 731; 16 Jur. 703.

Sect. 123 of the Lands Clauses Act refers to the powers given by the act for the purchase and taking of land, and not to the powers thereby given for carrying into effect a purchase already made. *Ib.*

Cambridge Commissioners.]—The commissioners appointed under the local acts of parliament for improving the town of Cambridge have, upon the true construction of those acts.

a continuing right to exercise from time to time the power thereby vested in them, of taking property for the purposes of the acts, and of referring the assessment of the price to a jury, so long as may be required for carrying into full effect the purposes contemplated by the acts. *Salman* v. *Randall*, 3 Myl. & C. 439.

Extension of Time by subsequent Acts.]—By a local act of 1863, a board of health was authorised to construct waterworks, and purchase and establish markets, and to exercise compulsory powers for the purchase of land for those purposes. These compulsory powers expired on the 13th of July, 1870, and on the 1st of August, 1870, a second act was passed to extend the time for the compulsory purchase of lands and completion of the waterworks, and to authorise the board to construct gasworks, and for other purposes, not including the establishing of markets. On motion by the owner of property required for establishing a market to restrain the board from compulsorily taking the property under a notice to treat served on him in December, 1870, on the ground that the powers of the first act had ceased to exist and could not be extended, and that the second act must be read as creating new powers for the purposes of the second act only:—Held, that the powers were extended as well as the time for their exercise, and that the notice to treat was effectual. *Bentley* v. *Rotherham Local Board*, 46 L. J., Ch. 284; 4 Ch. D. 588.

A railway company, incorporated by an act of parliament which passed on the 29th July, 1864, limiting the time for the exercise of the compulsory powers to three years, and the time for the completion of the railway to five years, served a notice to treat for lands belonging to the plaintiff company on the 21st April, 1866. By an act of parliament of the 26th July, 1869 (against which the plaintiff company petitioned), the railway company was dissolved, and its undertaking was amalgamated with that of the defendant company, and by the same act the time for completing the works was extended for three years; but the period within which the compulsory powers given by the first act were to be exercised was not extended. On the 18th August, 1871, the defendant company took possession of the lands, whereupon the landowners filed a bill to restrain them from continuing in possession:—Held, that the time for completion of the works having been extended by the act of 1869 (of which the plaintiff company had notice to the 29th July, 1872), the notice to treat was not invalidated by lapse of time. *Ystalyfera Iron Co.* v. *Neath and Brecon Ry.*, 43 L. J., Ch. 476; L. R. 17 Eq. 142; 29 L. T. 662; 22 W. R. 149.

The time within which a railway company were authorised to take lands expired on the 4th of August, 1848. Long before this period they gave notice to a landowner to treat, and afterwards delivered to the plaintiff, to whom the lands had been in the meantime devised, a bond, and paid the estimated value of the lands comprised in the notice into the bank under the Lands Clauses Act, 1845, s. 85. Under an amendment act, the powers of which extended beyond 1848, the company were authorised to take the land included in the notice; and on August 3rd, 1848, they gave a notice to the plaintiff that, in pursuance of the powers of both those acts, they intended to take the lands. After the 4th of August, 1848, but without taking any further steps under the acts, the company entered upon the land. On a motion for an injunction, the court declined to interfere, on the ground that, although the company might not be then entitled to take possession under their compulsory powers, they were able, by some proceedings under the second act, to obtain the land; and the motion was ordered to stand over, with liberty to the plaintiff to bring an action. *Williams* v. *South Wales Ry.*, 3 De G. & Sm. 354; 13 Jur. 443.

A railway company were empowered to take lands, and to deviate to the extent of 100 yards from the line laid down in their map, provided such deviation was made before the 4th of July, 1838. In January, 1837, a deviation in the line, within the prescribed limits, was made. A subsequent act, passed in May, 1837, enacted that the time by the first act limited for the compulsory purchase of lands should be enlarged for the term of one year, but providing that no deviation from the line laid down should be made after the expiration of the period by the first act limited. The railway company, subsequently to the 4th of July, 1838, gave notice to certain owners of lands on the line to which they had deviated in January, 1837, of their intention to take the lands under the powers given by the acts. On a motion for an injunction to restrain the railway company from so proceeding to obtain possession, on the ground that the company, having allowed the time limited by the first act to expire, had no power to take the lands by the compulsory process:—Held, that the company having, previously to the expiration of the time limited by the first act, and previously also to the passing of the second act, deviated within the authorised limits from the line laid down in the map, the second act must be construed to give them an enlarged period of one year in which to exercise the power of taking the land in the line to which they had so deviated. *Dun River Navigation Co.* v. *North Midland Ry.*, 1 Railw. Cas. 135.

Agreement to purchase Lands.]—An agreement between a railway company and landowner provided that in case the company should require additional land for the purpose of their railway and works, they should pay for it at the rate of 200*l.* per acre, without further payment in respect of severance or other damages:—Held, that the company was thereby authorised to take land for the purpose of diverting a footway within the time for completing their works, which had not expired although the time for compulsory taking of land had expired. *Rangeley* v. *Midland Ry.*, 37 L. J., Ch. 313; L. R. 3 Ch. 306; 18 L. T. 69; 16 W. R. 547.

A landowner agreed with a railway company to sell them ten acres of land and one acre for a station, at a certain price, and that if the company should require more land for the station, or for any purpose, they should pay for the same at the rate of 100*l.* per acre, and the agreement was to be supplemental to the Lands Clauses Act. The ten acres were paid for and conveyed. Before the compulsory powers of the company had expired they gave (apparently by mistake) notice to treat for three acres more, and before the time for completion expired they took possession of these three acres, alleging that they required the land. They also took possession of some small pieces of land which were covered by earth slipped from the railway:—Held, that,

under the agreement, the company had power, until the expiration of the time limited for the completion of the railway, to take such land as they required for the purpose of a station or for slips of earth at 100*l.* an acre. *Kemp* v. *S. E. Ry.*, 41 L. J., Ch. 404; L. R. 7 Ch. 364; 26 L. T. 110; 20 W. R. 306.

Companies having compulsory powers of purchase cannot contract to purchase lands and insist on a custom to defer completion to the extreme period of time allowed for taking lands and for completing the works. No such custom exists, and they are bound to complete their contract within a reasonable time. *Baker* v. *Metropolitan Ry.*, 31 Beav. 504; 32 L. J., Ch. 7; 9 Jur. (N.S.) 61; 7 L. T. 494; 11 W. R. 18.

Possession taken—Notice to Treat.]—A railway company in 1856 took possession of a meadow, a large part of which belonged to one owner, and a small part to another who did not know the position or the exact extent of his land. The company, in 1859, took a conveyance of the large part, on which conveyance the extent of the small part was stated. The company did not pay for the small part, and the owner, in 1868, brought an ejectment against the company, obtained judgment, and was put into possession. His possession was disturbed by the company, and he filed a bill to restrain them. The company offered to pay the value of the land, as in 1856, and interest thereon, which the landowner refused. The company then produced a notice to treat, given in 1856, and gave notice of their intention to proceed under that notice. The landowner filed a second bill to restrain them:—Held, that under the circumstances the company was not entitled to proceed under the notice to treat. *Stretton* v. *Great Western and Brentford Ry.*, L. R. 5 Ch. 751; 23 L. T. 379; 18 W. R. 1078.

Compulsory Powers shortly Expiring—Notice to Treat given within Time limited.]—A railway company served a landowner with notice to treat for part of his property before the period of three years limited for the exercise of its compulsory powers had expired. The landowner served a counter-notice requiring the company to take the whole property, and nothing further was done towards ascertaining the compensation. Thirteen days before the expiration of the period of five years allowed for the completion of the works, the company entered upon the land under s. 85 of the Lands Clauses Act, having previously made a deposit and given a bond as required by that section. After the five years had expired without the railway having been made on the land, the landowner brought his action for an injunction to restrain the company from executing works on the land and from continuing in possession of it:—Held, that whether the railway could or could not have been completed within the thirteen days, the entry of the company under s. 85 was lawful, and that they were entitled to retain possession, and that the compensation must be assessed under s. 68 of the Lands Clauses Act; that the company could not be restrained by injunction, but were entitled to remain and complete the railway after the expiration of the five years. *Loosemoore* v. *Tiverton and North Devon Ry.*, 53 L. J., Ch. 812: 9 App. Cas. 480; 50 L. T. 637; 32 W. R. 929—H. L. (E.)

By an act of parliament, with which the Lands Clauses Act was incorporated, it was enacted that the power of taking land compulsorily for the purpose of making a certain railway should not be exercised after the expiration of three years from the period of the passing of the act. The company gave notice to a landowner of their intention to take a part of his land; but took no other step until three days before the expiration of their compulsory powers, when they delivered a bond, and proceeded to take possession under s. 85 of the Lands Clauses Act. The landowner thereupon filed his bill, praying an injunction to restrain the company from proceeding further with the purchase, on the ground that their compulsory powers had ceased. The vice-chancellor directed the interim injunction, but directed a case for the opinion of the Court of Exchequer. *Kinnersly* v. *North Staffordshire Ry.*, 6 Railw. Cas. 662.

A railway company having given notice of their intention to purchase lands for the undertaking, deposited the purchase-money and delivered the bond (according to the provisions of s. 85 of the Lands Clauses Act) before the expiration of the period prescribed for the exercise of their compulsory powers, neither their power to purchase the land, nor their power to enter, is gone by the subsequent expiration of that period. *Sparrow* v. *Oxford, Worcester and Wolverhampton Ry.*, 9 Hare, 436. And see *S. C.*, 2 De G. M. & G. 94; 21 L. J., Ch. 731; 16 Jur. 703.

On an application for a mandamus against a railway company by a landowner over whose land the line was authorised to be made, but to whom no notice had been given by the company requiring his land to complete the line, and to purchase the necessary land for that purpose:—Held, that it was no answer to the rule, that the prescribed period for the compulsory purchase of the necessary land had nearly expired, if there was still a period during which the company might take the requisite initiatory steps. *Reg.* v. *York, Newcastle and Berwick Ry.*, 6 Railw. Cas. 648; 16 Q. B. 886; 20 L. J., Q. B. 503. S. P., *Reg.* v. *Lancashire and Yorkshire Ry.*, 6 Railw. Cas. 654; 20 L. J., Q. B. 507, n.

Notice within Time limited—Other steps after Expiration.]—Where within the prescribed period the promoters of a company gave notice to a landowner on the intended line of railway that they required to purchase his lands, and the landowner served them with a notice to treat, and demanded that the amount of compensation should be settled by a jury, and no further steps were taken to complete the purchase until after the expiration of the period prescribed for the exercise of the powers of the company for the compulsory purchase of lands:—Held, that the company might, on the application of the landowner, notwithstanding the lapse of time, be compelled by mandamus to issue their warrant to the sheriff to summon a jury to assess the amount of compensation. *Birmingham and Oxford Junction Ry.* v. *Reg.*, 15 Q. B. 647, n.; 20 L. J., Q. B. 304—Ex. Ch.

If, within the period prescribed by their special act for the exercise of all the powers of compulsory purchase given to them by the Lands Clauses Act, a company gives notice to a landowner that his land is required for the purpose of the undertaking, they have exercised within the prescribed period all the powers of compulsory purchase given them by that act, and they may, after the expiration of the prescribed period, take all the other steps necessary to

complete their purchase, and may enter upon and take possession of the land. *Salisbury (Marquis)* v. *G. N. Ry.*, 17 Q. B. 840; 21 L. J., Q. B. 185; 16 Jur. 740.

The entry on the land is not the exercise of any of the powers of compulsory purchase, but the exercise of a power for carrying that purchase into effect. *Ib.*

On an application for an injunction to restrain a railway company from taking proceedings to summon a jury, under the compulsory clauses of the Lands Clauses Act, 1845, the court thought that the plaintiff would have been entitled to an injunction but for the circumstance that the time limited for the exercise of the compulsory powers was on the point of expiring; but that the doubt as to the validity of such proceedings after that period, although the usual notice had been given of the intention of the company to take the land, was sufficient ground for declining to grant the injunction, on the company undertaking not to act on the result of the jury process without the leave of the court, and bringing into court 200*l.* to answer the plaintiff's costs and charges by reason of the process, without prejudice to any question. *Wood* v. *North Staffordshire Ry.*, 3 De G. & Sm. 368.

The time allowed to a railway company for the exercise of their power to take lands was three years from the passing of their act. During that time they gave the plaintiff notice of their intention to take his lands, and summoned a jury to assess the value of them; but the three years expired before the jury gave their verdict, and on that account the vice-chancellor held, that the company were not entitled to take steps for obtaining possession of the plaintiff's lands; but the Lord Chancellor did not agree with his honour, and directed the opinion of a court of law to be taken on the point. *Brocklebank* v. *Whitehaven Junction Ry.*, 15 Sim. 632; 5 Railw. Cas. 373; 16 L. J., Ch. 471; 11 Jur. 663.

Arbitration after Period Expired.]—Where the time limited for making a line had expired, and where consequently the powers of the company under their act had expired:—Held, that the company could not be called upon to enter into an arbitration under a contract which had assumed them to be in full possession of their authority. *Scottish North Eastern Ry.* v. *Stewart*, 3 Macq. H. L. 382; 5 Jur. (N.S.) 607; 7 W. R. 458.

Proceedings by Attorney-General.] — The attorney-general may properly take proceedings on behalf of the public, when acts tending to the injury of the public are being done without lawful authority, even though no evidence be produced of actual injury having been inflicted. After the expiration of the parliamentary powers of a bridge company the company continued to carry on their operations on and off their own lands, intending to apply for a new act to revive and extend the powers conferred by their original act. An action having been commenced by the attorney-general, on the information of two of the shareholders, for the purpose of restraining the company from proceeding with their works without due authority, and from using the moneys of the company for such works, or for other unauthorised purposes, the company obtained their new act, and the plaintiffs thereupon obtained leave to discontinue so much of their claim as related to matters other than the claim to have the company restrained, before the passing of the new act, from executing works off their own lands. The action being brought to a hearing:—Held, that the action was justifiably commenced, and that the company must pay the costs of the action, other than those relating to the part of it which had been discontinued. *Att.-Gen.* v. *Shrewsbury (Kingsland) Bridge Co.*, 51 L. J., Ch. 746; 21 Ch. D. 752; 46 L. T. 687; 30 W. R. 916.

5. Subscription of Capital.

Certificate of Justices.]—A certificate of two justices under the Lands Clauses Act, 1845, s. 17, or of one police magistrate under 2 & 3 Vict. c. 71, s. 14, that the capital of a company is all subscribed, being made sufficient evidence by the Lands Clauses Act, is conclusive on all landowners with whom the company deals, unless it is proved to have been obtained by fraud. *Ystalyfera Iron Co.* v. *Neath and Brecon Ry.*, 43 L. J., Ch. 476; L. R. 17 Eq. 142; 29 L. T. 662; 22 W. R. 149.

Sects. 16 and 17 of the Lands Clauses Act, requiring the whole capital to be subscribed and a certificate obtained from justices to that effect before proceeding to take lands compulsorily, do not apply to a case of a branch railway authorised to be made by an already existing company. *Weld* v. *L. & S. W. Ry.*, 32 Beav. 340; 1 N. R. 415; 33 L. J., Ch. 142; 9 Jur. (N.S.) 510; 8 L. T. 13; 11 W. R. 448.

Assessment of Compensation.]—It is no answer to an action against a railway company for not issuing their warrant for the assessment of compensation for land which they have given notice of their intention to purchase, that the undertaking was intended to be carried into effect by means of a certain capital, and that the whole amount has not been subscribed, as required by s. 16—the notice to treat not necessarily being an exercise of the powers of the act "in relation to the compulsory taking of land." *Guest* v. *Poole and Bournemouth Ry.*, 39 L. J., C. P. 329; L. R. 5 C. P. 553; 22 L. T. 589; 18 W. R. 836.

The inquisition of a jury is sufficient in form, though it does not set out that the whole capital has been subscribed. In an ejectment by the landowner against the company, this fact must be pleaded by the plaintiff. *Doe* d. *Payne* v. *Bristol and Exeter Ry.*, 6 M. & W. 320; 9 L. J., Ex. 232.

Right to cross Line of another Company.]—By the act incorporating the S. Railway Company the Lands Clauses Act, 1845, except where expressly varied thereby, was incorporated therewith, and it was enacted that the words to which meanings were assigned by the Lands Clauses Act should in the special act have the same meanings unless there was something in the subject or context repugnant thereto. The S. Company, "subject to the provisions of this act," were empowered to purchase any of the lands in their deposited plans. By s. 8, which was inserted for the protection of the G. W. Railway Company, it was provided (sub-s. 1) that the S. Company should not enter upon or interfere with or execute any work over or under the line of the G. W. railway until plans had been approved by the engineer of the G. W. Company or an engineer appointed by the Board of Trade. Sub.-s. 2 provided that the railway of the S. Company should be carried in one place over and in another under the G. W. railway by a bridge and tunnel. By

sub-s. 4, the bridge and tunnel were to belong to the G. W. Company. By sub-s. 8 the S. Company were not to interfere with the land of the G. W. Company except for the purposes of the above crossings, and it was enacted that the S. Company should not purchase or take any land of the G. W. company, but that the S. Company might purchase and the G. W. Company should grant an easement or right of using the crossings in perpetuity. By sub-s. 9 every dispute between the two companies respecting the above matters or any of them was to be referred to arbitration. The S. Company were proceeding to make the crossings, and the G. W. Company brought their action to restrain them from doing so, on the ground that the capital of the S. Company had not been subscribed, and that under the 16th section of the Lands Clauses Act they could not proceed to put in force any of their powers for the compulsory purchase of land until it had been subscribed:—Held, that, as under their act the S. Company had the right of taking an easement over the land of the G. W. company, the word "land" in s. 16 of the Lands Clauses Act as incorporated in this act must be held to include this easement, and that the S. Company must be restrained from taking steps to acquire such easement until their capital had been subscribed. But held, on appeal, that as the provisions of the special act for referring disputes to arbitration provided a better means of ascertaining the compensation to be paid for crossing the line of the G. W. Company than the verdict of a jury, and the powers of the Lands Clauses Act as to compulsory purchase were therefore not necessary for the purpose of assessing the compensation, there was no necessity for giving to the word "land" in the Lands Clauses Act as incorporated with the special act a more extensive meaning than it had in the Lands Clauses Act standing alone, which did not include a new easement, that what the S. Company were proceeding to do was therefore not a compulsory taking of land within s. 16 of the Lands Clauses Act, and that the decision below could not be sustained. *G. W. R.* v. *Swindon and Cheltenham Extension Ry.*, 52 L. J., Ch. 306; 22 Ch. D. 677; 47 L. T. 709; 31 W. R. 479—C. A. *S. C.*, in H. L., 53 L. J., Ch. 1075; 9 App. Cas. 787; 51 L. T. 798; 32 W. R. 957; 48 J. P. 821.

6. Vendor's Title.

"Owner"—Who is.]—A railway company took possession of land under a contract for a sixty years' title. The vendor failed to shew more than a possessory title for thirty-six years:—Held, that he could not compel the company to deposit the purchase-money in the bank, under the Lands Clauses Act, s. 76. *Douglas* v. *L. & N. W. Ry.*, 3 Kay & J. 173; 3 Jur. (N.S.) 181.

By the term "owner" in that section, the legislature meant a person having some title; and in providing for the event of an owner failing to make out a title to the satisfaction of the promoters of the undertaking, the legislature had in contemplation the possibility of the land being subject to dower or jointure, or some other independent estate or interest outstanding in a third party, who is under no legal or equitable obligation to concur in the sale, but which does not displace the owner's title. *Ib.*

A surviving partner selling partnership lands in discharge of his duty as survivor, to wind up the partnership, is an "owner," within s. 76; and by virtue of that section and s. 77, the promoters of an undertaking depositing the purchase-money in the bank to the credit of the vendor, and of the representatives of his deceased partner, would acquire all the estate and interest of both. *Ib.*

A person in possession, but shewing a bad title, is not the "owner," within s. 76, and where the lands are in such possession, and the true owner cannot be found, the promoters must have recourse to the jury clauses of the act. *Ib.*

The plaintiffs contracted to sell land to the defendants, but failed to make any title to a small strip thereof. Thereupon the defendants paid the purchase-money of the whole land into court under s. 76 of the Lands Clauses Act, and executed a deed-poll under s. 77, purporting to vest the whole of the land in themselves:—Held, that the plaintiffs were not "owners" of the strip of land with the meaning of ss. 76 and 77, and that under the circumstances the defendants could not acquire the land under those sections. *Wells* v. *Chelmsford Local Board*, 49 L. J., Ch. 827; 15 Ch. D. 108; 43 L. T. 378; 29 W. R. 381; 45 J. P. 6.

The "owner" of land taken by a railway company, for which compensation had been made by them, and the money paid into court in the usual way, must be the owner at the time when the land is so taken. *Sunderland (Freemen), Ex parte*, 1 Drew. 184; 16 Jur. 37.

Investigation of Title.]—When a railway company, without giving a landowner any notice to treat with him, takes his land under their compulsory powers, makes no subsequent agreement with him, but pays into court a deposit as security for duly-ascertained compensation-money, the parties are not in the position of ordinary vendor and purchaser; and the company cannot call upon the landowner to produce his title for their investigation. *Martin* v. *L. C. & D. Ry.*, 17 L. T. 487.

The court will not, in a suit on the part of a landowner against a railway company for specific performance of an agreement to take lands, make a decree where there has been no investigation of title, but will refer it to chambers to see whether a good title can be made. *Gunston* v. *East Gloucestershire Ry.*, 18 L. T. 8.

An act enacted, with reference to the purchase of lands by the company, that if the owner of any such lands should "fail to make out a title to the lands in respect whereof such purchase-money or compensation should be payable," the company should deposit the purchase-money in the bank; and that thereupon all interest in the lands in respect whereof such purchase-money should have been deposited should vest in the company:—Held, that, in order to enable the company to avail themselves of this provision, they must have previously applied to the owner of the lands to furnish them with an abstract of his title thereto. *Hutchinson* v. *Manchester Ry.*, 2 Car. & K. 162; 15 M. & W. 687; 15 L. J., Ex. 293; 9 Jur. 949.

Declaration of Title—Jurisdiction of High Court.]—A., in possession of land under a building agreement, which required the houses to be erected by November, 1885, was in 1882 informed by a railway company of their intention to obtain a special act to extend their railway system, which scheme would affect his land. A. there-

upon arranged with his landlord for an extension of the time limited by his agreement—no definite period being fixed—and suspended his building operations. The company obtained their special act in 1883, and in 1884 gave A. the usual notice to treat for part of the land comprised in his building agreement, but A. sent in no claim under the notice. In 1886 the company took adverse possession of the land in question, treating the building agreement as at an end, and insisting that A. had no interest whatever in the land. On action brought by A. against the company for a declaration that the building agreement was still subsisting, and that he was entitled to have his interest thereunder assessed in the usual way: —Held, that the jurisdiction of the court was not ousted by the procedure under the Lands Clauses Act, 1845, and that A. was entitled to the declaration he claimed. *East and West India Docks Co.* v. *Gattke* (3 Mac. & G. 155), and *London and Blackwall Ry.* v. *Cross* (31 Ch. D. 354), distinguished. *Birmingham and District Land Co.* v. *L. & N. W. Ry.*, 40 Ch. D. 268; 60 L. T. 527—C. A. Affirming, 57 L. J., Ch. 121; 36 W. R. 414.

Ascertainment of Parties entitled.]—Where under private acts, &c., the court has jurisdiction to proceed in a summary way by petition, it is not usual, on directing a reference to ascertain the parties entitled, to direct the production of deeds and documents, and to examine the parties. *London Dock Co., In re*, 11 Beav. 78; 17 L. J., Ch. 111; 12 Jur. 405.

Semble, that where money is paid into court under the usual provision in a railway act for payment into court of the purchase-money for lands held by disputed titles, the respective interests of the parties claiming title to the money so paid into court may be adjusted on a petition presented in the matter of the act. *Issanchard, Ex parte*, 3 Y. & Coll. 721.

Where money is paid into court to the account of certain classes of persons, and one of those classes of persons petitions for payment out, the court cannot, without the consent of all parties, send the question, whether the claimants have the right they claim, to be tried by a jury or an arbitrator, but is bound to decide the question by its own machinery. *Brandon* v. *Brandon*, 2 Dr. & Sm. 305; 34 L. J., Ch. 333; 11 Jur. (N.S.) 30; 11 L. T. 658; 13 W. R. 251.

Where, in such a case, the claimant can only establish his title to a lesser interest than that represented by the money paid in, the court will determine the value of such interest, pay that sum to the claimant, and repay the rest of the money to the party who paid it in. *Ib.*

Where a sum of money has been paid into court by a railway company, under s. 76 of the Lands Clauses Act, as representing the value of the interest claimed by the occupier of lands taken, and the claimant, on petitioning for payment out to him, can only shew a title to a less valuable interest, the court will ascertain, by a reference to chambers, the value of his actual interest, pay that to the petitioner, and repay the balance to the company which paid it in. *Cooper, Ex parte, North London Ry., In re*, 3 Dr. & Sm. 312; 34 L. J., Ch. 373; 11 Jur. (N.S.) 103; 11 L. T. 661; 13 W. R. 364.

When the person in possession of lands taken by a railway company produced his abstract of title, it appeared that a will under which he claimed was susceptible of, and had received from four eminent conveyancers, four different interpretations:—Held, that it was not the duty of the court, on a petition by the person claiming as tenant in possession, to examine into the title of the person so claiming; and payment of the income ordered to the petitioner accordingly. *Perry's Estate, In re*, 1 Jur. (N.S.) 917; 3 W. R. 561. And see *Alston, In re*, 5 W. R. 189.

It is, however, the duty of the company, like as of a trustee, to state to the court the difficulties which come to its knowledge; not, however, to argue on the case. *Ib.*

Where compensation-money was paid into court by a railway company on an agreement with tenant for life for purchase of the fee simple, but, on investigating the title, part of the land was found to be copyhold, with a defective title as to one undivided moiety, the court ordered an apportionment of the money, so as to carry over the amount representing the price of that part of the land to which a good title was made, and the dividends to be paid to the tenant for life, but the capital not to be paid out without notice to the company. *Perk's Estate, In re*, 1 Sm. & G. 545; 7 Railw. Cas. 705; 2 W. R. 24.

There being two adverse claimants to money assessed for compensation in respect of land injuriously affected within the Lands Clauses Act, the parties by whom the compensation-money was payable filed a bill for an inquiry as to which of the two claimants was entitled to such money. But the court, holding the real question at issue to be the title to the land, refused to order a reference to chambers to inquire into that title, and directed the question to be tried by an action of ejectment. *Metropolitan Board of Works* v. *Sant*, 38 L. J., Ch. 7; L. R. 7 Eq. 197; 19 L. T. 260; 17 W. R. 25.

When land had been taken compulsorily under an act of parliament, and the value assessed by a jury, and the party afterwards turned out to have only a partial interest, the court refused to stay proceedings in his suit for specific performance, as they would have done in the case of an ordinary purchase. *Gedye* v. *Public Works Commissioners*, 19 L. T. 82; 16 W. R. 1106.

Doubt as to Ownership—Determining Value.]—When there is a doubt as to the true ownership of land taken by a railway company, but neither claimant is absent nor prevented from treating, the value of the land should not be determined by a surveyor appointed under the Lands Clauses Act, ss. 58, 59, but by the verdict of a jury, or by an award under s. 23; and when the wrong course has been adopted the compensation-money so deposited will not be paid out till the value has been ascertained in the proper manner and paid into court. *L. & S. W. Ry., Ex parte*, 38 L. J., Ch. 527.

—— **Repayment of Purchase-money.**]—A railway company had, under the compulsory powers of their act, taken land from a corporation, and the price had been agreed on but was not paid, and the company entered into the possession of the land and constructed their works. The abstract of title was sent to the company, and a conveyance was prepared and engrossed, and a plan of the ground indorsed thereon, and the engrossment with plan thereon was sent to the solicitor of the corporation and remained with him for two or three years, but was not executed, on account of the

purchase-money not having been paid. It turned out that part of the land alleged to be purchased by the company was claimed by the Crown, and it certainly formed part of the plan sent by them to the corporation. While a negotiation was going on between the parties respecting this claim, against which the company asked the corporation to indemnify them before completing the purchase and paying the purchase-money, the corporation brought an action of ejectment to recover the possession of the land, and the company having let judgment go by default, execution was issued, and the company were obliged to pay the purchase-money to get the sheriff out of possession. They accordingly did pay it, but under protest as to their rights in respect of the conveyance, and, as they alleged (but this was denied by the corporation), on an undertaking by the corporation to pay the same into the bank, in accordance with the provisions of the Lands Clauses Act. The corporation kept the money in their own hands, and lent part thereof to the Board of Health of Lancaster (they themselves being, in fact, the Board of Health). The company filed their bill to compel payment of the purchase-money into the bank, according to the provisions of the act, in order to relieve the company from responsibility, and for an injunction. By the answer it was admitted that a part of the money was still in the hands of the corporation, and the company moved for an order to pay the money into court. It was ordered that the part of the money in hand must be paid in, but not that lent to the Board of Health. But, quære, on the principle of preserving the property during the litigation, ought not the latter to be paid in also. *L. & N. W. Ry.* v. *Lancaster Corporation*, 15 Beav. 22; 16 Jur. 677.

Costs of Deducing.] — *See* infra, cols. 1428 et seq.

7. Conveyances.

Parties to.]—Where a railway company has given notices to treat to a legal tenant for life under a settlement and to the trustees of the settlement who have a bare power of sale with his consent, and the purchase-money for the life estate is fixed as between the company and the tenant for life by award under a reference to arbitration under the Lands Clauses Act in the usual way, the trustees taking no part in the reference, the company cannot require the sale to be completed as a sale by the trustees, but it must be completed as a sale by the tenant for life under the act. *Pigott and G. W. Ry., In re*, 50 L. J., Ch. 679; 18 Ch. D. 146; 44 L. T. 792; 29 W. R. 727.

Construction of—Private Way—"Rights, Members, &c."]—In a conveyance to a railway company of a piece of land on which was a stable, the words, "rights, members and appurtenances," used in the form given in schedule A., appended to the Lands Clauses Act, were inserted. The vendor had many years previously made a private road from the highway to the stable over his own land, for his own convenience, and had used it ever since. The soil of the road was not conveyed to the company, and no express mention of it was made in the conveyance:—Held, that the right of way passed to the company. *Bayley* v. *G. W. Ry.*, 26 Ch. D. 434; 51 L. T. 337—C. A.

Assignment of Lease to Company—Usual Covenants.]—A railway company which, after giving notice to treat, has paid the purchase-money for leaseholds, and has, with the consent of the lessee, been admitted into possession, will, at the suit of the lessee within a reasonable time, be compelled to accept an assignment containing the usual covenants. *Harding* v. *Metropolitan Ry.*, 41 L. J., Ch. 371; L. R. 7 Ch. 154; 26 L. T. 109; 20 W. R. 321.

Stamping—Compensation for Loss of Trade.]—The schedule of the Stamp Act of 1870, prescribes an ad valorem duty on every "conveyance or transfer on sale of any property." By s. 70 the term "conveyance on sale" includes every instrument whereby any property upon the sale thereof is transferred to or vested in the purchaser. By deed of conveyance S. & Co. conveyed business premises to a railway company. The deed stated that the jury in a compensation trial under the Lands Clauses (Scotland) Act, 1845, had found that S. & Co. were entitled to 28,586*l.* 2*s.* 1*d.*, as the value of the premises which had been taken by the company under the powers of their special act; 14,572*l.* 16*s.* 3*d.* for the value of the buildings, &c., upon the premises, and 9,499*l.* 8*s.* 3*d.* as compensation for loss of business, and that the company had paid the three sums so assessed to S. & Co.:—Held, that the 9,499*l.* 8*s.* 3*d.* allowed by the jury as compensation for loss of business was part of the "consideration for the sale" of the premises, and liable to an ad valorem duty accordingly. *Inland Revenue Commissioners* v. *Glasgow and South Western Ry.*, 56 L. J., P. C. 82; 12 App. Cas. 315; 57 L. T. 570; 36 W. R. 241—H. L. (Sc.)

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1. Vendor's Lien.

Jurisdiction of Court—Subsequent Statute.]—On a bill by unpaid vendors of land taken possession of by a railway company, specific performance of an agreement and of an award determining the value of the land and binding the company to construct a bridge was decreed, payment of the unpaid purchase-money ordered, and the right of the vendors to a lien declared. The money was not paid, and the bridge not constructed, and the vendors accordingly presented a petition for sale of the land and for a reference to chambers to assess the damages in respect of the non-construction of the bridge:—Held, that they were entitled to the order prayed for, and an objection that the court had no jurisdiction, from the fact that the company's line was, under an act of parliament passed subsequently to the decree, being worked by another company as an integral portion of its own undertaking, and that all matters and disputes in which that company was interested were, by the same act, referred to the decision of arbitrators, was overruled, on the ground that the act did not contemplate any interference with the previously-existing and paramount rights of the vendors. *St. Germans (Earl)* v. *Crystal Palace and South London Junction Ry.*, L. R. 11 Eq. 568; 24 L. T. 288; 19 W. R. 584.

Ordinary Rights of Vendor when Land taken.]—A vendor of land to a railway company which has entered and used it for the purpose of its railway is entitled to the same lien on the land for the unpaid purchase-money, and the same remedies for enforcing it, as an ordinary vendor. *Wing* v. *Tottenham and Hampstead Junction Ry.*, 37 L. J., Ch. 654; L. R. 3 Ch. 740; 16 W. R. 1098.

A railway company having taken possession of land for their railway without the consent of the landowner, an agreement was come to for a certain sum payable on a certain day. The money was not paid, and the railway was completed and was in operation. The landowner filed a bill for specific performance, and moved for payment on a fixed day or delivery up of the land:—Held, that a railway company was exactly in the same position as an individual, and the money must be paid within six months or the land delivered up. *Sutton* v. *Hoylake Ry.*, 20 L. T. 214.

The owners of land taken by public companies under their compulsory powers have the ordinary vendor's lien for unpaid purchase-money, and they are entitled to enforce that right by a sale of the land. *Walker* v. *Ware Ry.*, 35 Beav. 52; 35 L. J., Ch. 94; L. R. 1 Eq. 195; 12 Jur. (N.S.) 18; 13 L. T. 517; 14 W. R. 158.

Arrears of Rent-charge.]—A company, under the powers conferred by the Lands Clauses Act, 1845, contracted, in 1851, in consideration of the payment of an annual rent-charge, to purchase land for the construction of docks. The company entered upon the land, and completed the construction of the docks, but had made no payments in respect of the rent-charge:—Held, that the vendor was not entitled to a lien on the land for the unpaid arrears of the rent-charge. *Jersey (Earl)* v. *Briton Ferry Floating Dock Co.*, L. R. 7 Eq. 409.

Costs of Arbitration and Award.]—And when land is taken by a railway company under the Lands Clauses Act, and the price is settled by arbitration, the costs of the arbitration and award payable to the vendor do not stand on the same footing as the purchase-money, and the vendors have no lien on the land for such costs. *Ferrers* v. *Stafford and Uttoxeter Ry.*, 41 L. J., Ch. 362; L. R. 13 Eq. 524; 26 L. T. 652; 20 W. R. 478.

Amount of Compensation.]—This lien extends not only to the value of the land, but also to the amount of compensation for damages. *Walker* v. *Ware Ry.*, supra.

Money Deposited by Company.]—This right of lien is unaffected by the deposit under the Lands Clauses Act, s. 85, and by a deposit, by agreement, before the amount payable has been ascertained. *Ib.*

Priority.]—The rights of the public, and of debenture creditors and others claiming under the company, are subordinate to the vendor's lien for unpaid purchase-money. *Ib.*

A landowner has no claim against a fund deposited as security under the Lands Clauses Act, 1845, s. 85, for his costs under the act. *Neath and Brecon Ry., Ex parte*, 43 L. J., Ch. 277; L. R. 9 Ch. 263; 30 L. T. 3; 22 W. R. 242.

—— **Surplus Lands — Debenture Stock — Charge.**]—Sect. 23 of the Railway Companies Act, 1867, does not give to the holders of debenture stock in a railway company any lien or charge on the surplus lands, or on the proceeds of the sale of surplus lands of the company, nor does that section give debenture-holders any priority in payment over judgment creditors of the company in proceedings taken by such creditors under the Judgments Law Amendment Act, 1864, for the sale of surplus lands of the railway company. The right to priority in payment given to debenture-holders by s. 23 arises in the following cases at all events—(1) in the distribution of moneys collected under s. 4 of the Railway Companies Act, 1867, by the receiver appointed under that section; (2) in the winding-up of an abandoned railway under the joint provisions of the Abandonment of Railways Acts, 1850 and 1869, and of the Companies Acts, 1862 and 1867; and (3) in the working out of a scheme of arrangement under the provisions of the Railway Companies Act, 1867. *Hull, Barnsley and West Riding Ry., In re*, 58 L. J., Ch. 205; 40 Ch. D. 119; 59 L. T. 877; 37 W. R. 145—C. A.

Enforcing Lien—Crown.]—Where the Crown, as vendor in a suit for a specific performance against a railway company, had obtained a decree directing payment by the company of a sum of money due by way of purchase-money, compensation, damages and costs, in respect of Crown land taken by the company, but not declaring any lien in favour of the Crown upon the land, and in another suit by incumbrancers against the company, a receiver of the tolls had been appointed; a petition presented on behalf of the Crown in the first-mentioned suit, for the purpose of enforcing a lien upon the land, was dismissed, and with costs as against the incumbrancers. *Att.-Gen.* v. *Sittingbourne and Sheerness Ry.*, 35 L. J., Ch. 318; L. R. 1 Eq. 636; 14 L. T. 92; 14 W. R. 414.

—— **Declaration of Lien.**]—When a decree for specific performance had been obtained by a vendor against a railway company of a contract for sale, and the company afterwards became insolvent:—Held, on a petition subsequently presented by the vendor, that he was entitled to a declaration of lien for his unpaid purchase-money. *Heriot* v. *L. C. & D. Ry.*, 16 L. T. 473.

—— **Sale when Ordered.**]—Where a landholder has sold land to a railway company, on some of which it had entered under the Lands Clauses Act, s. 85, and on the rest under an agreement with the vendor, and the vendor had obtained a decree for specific performance and for payment of the purchase-money within three months:—Held, that, in default of payment, the vendor was entitled to a sale of the land, although the railway was actually made and ready for traffic. *Wing* v. *Tottenham and Hampstead Junction Ry.*, 37 L. J., Ch. 654; L. R. 3 Ch. 740; 16 W. R. 1098. S. P., *Keane* v. *Athenry and Ennis Ry.*, 19 W. R. 43.

When a decree has been made against a railway company as purchaser, decreeing specific performance and declaring a lien for unpaid purchase and compensation-money, the court will, on petition, direct a sale in default of payment by a short day. *Williams* v. *G. E. Ry.*, 16 W. R. 821; 18 L. T. 458.

A decree for an immediate sale of a leasehold interest in lands, over which a railway had been completed, was made against a railway company in a suit instituted by the vendor to enforce his lien for the unpaid purchase-money. *Sedgwick* v. *Watford and Rickmansworth Ry.*, 36 L. J., Ch. 379.

The court, in a landowner's suit to enforce his lien, will order a sale of land over which the railway is carried. *Raper* v. *Crystal Palace and South London Ry.*, 18 L. T. 8; 16 W. R. 413.

An unpaid vendor of land who has obtained a declaration of lien in his favour for purchase-money, interest and costs, is entitled, in default of payment, to an order in the cause for sale of the land, and need not file another bill to enforce his lien. *Vyner* v. *Hoylake Ry.*, 17 W. R. 92.

On a bill by unpaid vendors of land, taken possession of by a railway company, specific performance of an agreement and of an award, determining the value of the land, and binding the company to construct a bridge, was decreed, payment of the unpaid purchase-money ordered, and the right of the vendors to a lien declared. The money was not paid, and the bridge not constructed, and the vendors accordingly presented a petition for sale of the land, and for a reference to chambers, to assess the damages in respect of the non-construction of the bridge:—Held, that they were entitled to the order as prayed. *St. Germans (Earl)* v. *Crystal Palace and South London Junction Ry.*, L. R. 11 Eq. 568; 24 L. T. 288; 19 W. R. 584.

Parties to Proceedings.]—Bill by unpaid vendors against two railway companies—the purchasers and their lessees—in possession of the land for specific performance of the contract, for the payment of the purchase-money, for an injunction against both companies, for a declaration of lien, and that it might be enforced by a sale, and that a receiver might be appointed of the rents and profits of the purchasers' estate:—Held, that the lessees were properly made parties, and the court decreed specific performance and payment of the purchase-money within three months, declared a lien as against both companies, and gave leave, in case the money should not be paid, to apply for an injunction, and for the appointment of a receiver to enforce the lien. *Winchester (Bishop)* v. *Mid-Hants Ry.*, 37 L. J., Ch. 64; L. R. 5 Eq. 17; 17 L. T. 161; 16 W. R. 72.

In a suit for specific performance of an agreement entered into between the plaintiff and a railway company for the purchase of land belonging to the plaintiff, two holders of mortgage debentures on the undertaking of the company (who had in a suit instituted by them on behalf of themselves and all other mortgagees of the undertaking of the company obtained an account and the appointment of a receiver) were made parties:—Held, following *Winchester (Bishop)* v. *Mid-Hants Ry.*, supra, that they were properly made parties, and their costs were directed to be

added to their securities. *Drax* v. *Somerset and Dorset Ry.*, 38 L. J., Ch. 232 ; 19 L. T. 626.

A railway company agreed to purchase land, and they had constructed their line of railway over it, but had not paid the whole of the purchase-money. The line was worked by another company under a traffic agreement, and the net profits were divided between the two companies. The vendor filed a bill against both companies for specific performance, for a declaration of lien, and an injunction against both companies for continuing in possession of the land or interfering with it, and for a receiver:—Held, that the second company was properly made a defendant. *Marling* v. *Stonehouse and Nailsworth Ry.*, 38 L. J., Ch. 306 ; 17 W. R. 484.

A railway company working the line of another company under parliamentary powers is a proper and necessary party to a bill for specific performance, filed against that other company by an unpaid vendor, and must bear its own costs of the suit. *Goodford* v. *Stonehouse and Nailsworth Ry.*, 38 L. J., Ch. 307 ; 20 L. T. 137 ; 17 W. R. 515.

Sale free from all Claims.]—When land purchased by a railway company is sold to enforce the vendor's lien for unpaid purchase-money, it is sold free from all claims of the public to use it as a highway. *Munns* v. *Isle of Wight Ry.*, 39 L. J., Ch. 522 ; L. R. 5 Ch. 414 ; 23 L. T. 96 ; 18 W. R. 781.

Injunction or Receiver not Granted before Judgment.]—When an unpaid vendor of land taken by a railway company has commenced an action against the company to enforce his lien, the court will not grant an injunction or a receiver against the company before judgment has been obtained in the action, even though the company admits its liability. *Latimer* v. *Aylesbury and Buckingham Ry.*, 9 Ch. D. 385 ; 39 L. T. 460 ; 27 W. R. 141—C. A.

Appointment of Receiver—Injunction Refused.]—A person who had sold to a railway company some land, over which the railway had been made and opened, obtained a decree ordering specific performance and declaring his lien for the balance for purchase-money. The company having become insolvent, an order was made, on the petition of the vendor, for sale of the land and payment of the deficiency, and for an injunction restraining the company until payment from running any engine over or otherwise using or continuing in possession of the land:—Held, that an injunction was not the proper form of relief, as it would make the land useless to both parties. The order for an injunction was therefore discharged, and an order made for a receiver, with a direction to the company to give him immediate possession. *Munns* v. *Isle of Wight Ry.*, 39 L. J., Ch. 522 ; L. R. 5 Ch. 414 ; 23 L. T. 96 ; 18 W. R. 781.

A railway company, by agreement with a landowner, were let into possession of land which they required for part of their line, and made their railway over it, giving a bond for payment of the purchase-money on a future day. Default was made in payment of the bond:—Held, that the landowner was not entitled to an injunction to restrain the company from continuing in possession until the purchase-money was paid. *Pell* v. *Northampton and Banbury Junction Ry.*, 36 L. J., Ch. 319 ; L. R. 2 Ch. 100 ; 15 L. T. 169 ; 15 W. R. 27.

Whether the landowner might not be entitled to a receiver or to have the money paid into court—quære. *Ib.*

Second Receiver, when Appointed.]—When an unpaid vendor to a railway company has obtained an order in a suit, declaring his lien, but the company has failed to pay, an order for sale by public auction or private contract will be made on petition ; and when a receiver has already been appointed in another suit against the same company, liberty will be given to apply to appoint another receiver without prejudice to the former appointment, and to obtain any surplus after satisfying all claims in such other suit. *Ware* v. *Aylesbury and Buckingham Ry.*, 28 L. T. 893 ; 21 W. R. 819.

Restraining Company from continuing in Possession.]—A railway company agreed to purchase lands required for the purposes of the undertaking. The purchase-money was ascertained, and the company took possession and constructed the railway, but no part of the purchase-money was paid, nor was a conveyance executed. The vendor brought a suit to obtain payment, in which suit a receiver was appointed, and he afterwards obtained a decree ordering specific performance and declaring his lien for the purchase-money, with liberty in default of payment to apply in chambers as to enforcing his lien by a sale. Default having been made, the lands were put up for sale, but no person bid ; whereupon the plaintiff moved that the order for sale might be discharged, that the company might be ordered to give up possession to the plaintiff, and in the meantime be restrained from running any engine over or otherwise continuing in possession of the land:—Held that an injunction to restrain the company from continuing in possession ought not to be awarded, at all events, until after another attempt had been made to sell the land. *Williams* v. *Aylesbury and Buckingham Ry.*, 28 L. T. 547 ; 21 W. R. 819.

But the Court of Chancery will not, for the purpose of enforcing the lien of an unpaid vendor against a railway company for his purchase- and compensation-money, interest and costs, restrain the company from running trains or engines over the land until the sale (directed by the order) of the land agreed to be taken. *Lycett* v. *Stafford and Uttoxeter Ry.*, 41 L. J., Ch. 474 ; L. R. 13 Eq. 261 ; 25 L. T. 870.

Where the unpaid vendor of land taken by a railway company has commenced an action against the company to enforce his lien, and an order has been made in such action that the defendants should, on or before a day named, pay the purchase-money and interest, with a declaration that the plaintiff was entitled to a lien on the lands in respect of the purchase-money, interest and costs, and that in default of payment the plaintiff was to be at liberty to apply to enforce such lien, such order containing no order for sale, the court will on default in payment, there being evidence that the land is unsalable, grant an injunction to restrain the defendants from running trains over the railway and from continuing in possession of the land. *Williams* v. *Aylesbury and Buckingham Ry.* (21 W. R. 819) and *Munns* v. *Isle of Wight Ry.* (L. R. 5 Ch. 414), discussed. *Allgood* v. *Merrybent and Darlington Ry.*, 55 L. J., Ch. 743 ; 33 Ch. D. 571 ; 55 L. T. 835 ; 35 W. R. 180.

Effect of levying Execution.]—A railway company gave a bond to a vendor of land to them for the purchase-money. The vendor brought an action and levied execution upon the bond. By reason of interpleader proceedings he did not recover the full amount of the purchase-money by the execution:—Held, that he was not deprived of his lien for the remainder of the purchase-money, and was entitled to a decree for specific performance. *Pell* v. *Northampton and Banbury Ry.*, 16 W. R. 1077.,

A landowner sold land to a railway company by an agreement under which the company were to pay him "2,000*l.* to be paid in cash or at the option of the company in such securities as should be agreed upon between the parties." The company took possession of the land, and opened their line upon it. Under the agreement they elected to give security in lieu of cash payment, and a bond was accordingly settled and given. The company made default on the day for payment mentioned in the bond, and the landowner sued them on the bond at law, and recovered a part of his money by a sheriff's sale:—Held, that this was not a contract to take securities instead of cash, and that he had a lien for the balance of his purchase-money, and was entitled to an injunction restraining the company from continuing in possession of the land, and to a sale in default of payment. *Pell* v. *Midland and South Wales Ry.*, 20 L. T. 288; 17 W. R. 506.

Statute restraining Actions against Company.]—An unpaid vendor to a railway company may have leave to work out a decree for specific performance against the company, notwithstanding the passing of an act of parliament to restrain the continuance of suits without the leave of the court. *Griffith* v. *Cambrian Ry.*, 21 L. T. 290; 17 W. R. 979.

Unpaid Vendors—Winding-up—Petition.]—Where land has been compulsorily taken by a company under the Lands Clauses Act, 1845, the court held that the owners of such land were not, as their title had not been made out and accepted, creditors of the company in respect of the unpaid purchase-money (the amount whereof had been determined by arbitration), so as to enable them to support a petition for a winding-up order under the Companies Act, 1862. *Lister, Ex parte, Milford Docks Co., In re*, 23 Ch. D. 292; 48 L. T. 560; 31 W. R. 715.

2. Interest on.

a. Generally.

Express Contract.]—Where a purchaser knowingly enters into a definite contract to pay interest on his purchase-money, and in certain events a higher rate of interest, and those events occur, it is not open to him afterwards, and in the absence of fraud, to complain of the contract into which he has so entered. Specific performance decreed according to the terms of the contract, with payment of the higher rate of interest. *Herbert (Lady)* v. *Salisbury and Yeovil Ry.*, 14 L. T. 507.

Conveyance executed—Subsequent Demand for Interest.]—An owner of lands taken by a railway company, under its compulsory powers, executed a conveyance to the company of his interest in the lands in consideration of 80*l.*, the amount of compensation awarded by a jury. No claim for interest was made at the time of the execution of the conveyance:—Held, that the execution of the conveyance did not estop the owner from afterwards claiming interest on the amount awarded from the time of entering on the lands down to the date of payment of the amount awarded. *Baltimore Extension Ry., In re, Daly, Ex parte*, [1895] 1 Ir. R. 169.

Acquiescence.] — A railway company gave the usual notice to a tenant for life of settled estates, that they required a portion of the estates for their line, and afterwards made an offer for the fee-simple. The solicitor for the tenant for life accepted the offer, stipulating that interest at 5 per cent. should be paid from the time of the company taking possession, and proposing that, as the title was well known, the company should be satisfied without the production of the deed. To this the company objected, and proposed to pay the money into a banker's in the names of the respective solicitors pending the investigation of the title. The tenant for life's solicitor thereupon suggested that, as the money must be paid into court, it had better be so at once. The company thereupon paid the money into court to the account of the railway act only, and communicated to the tenant for life's solicitor that they had paid the money into court under s. 69 of the Lands Clauses Act. The solicitor for the tenant for life thereupon reminded them that interest at 5 per cent. would continue to be payable till the purchase was completed. To this the company's solicitor returned no answer; and although several other communications passed between the solicitors respecting the purchase, the company's solicitor did not till a year afterwards express any objection to the payment of interest. The money remained uninvested during the whole of that period:—Held, that the company had acquiesced in the vendor's view of the case, and were bound to pay interest up to the investment. *Hardwicke (Earl), Ex parte*, 1 De G. M. & G. 297.

b. From what Period payable.

Taking Possession of Land.]—Interest at 4 per cent. is payable by a railway company upon the purchase or compensation money from the time of their taking possession of the land under their statutory powers, and not merely from the subsequent period of ascertaining the price by the verdict of a jury. *Rhys* v. *Dare Valley Ry.*, L. R. 19 Eq. 93; 23 W. R. 23. S. P., *Cooper* v. *Metropolitan Board of Works*, 53 L. J., Ch. 109; 25 Ch. D. 472; 50 L. T. 602; 32 W. R. 709—C. A.

Circumstances under which it was held that the ordinary relation of vendor and purchaser existed between a railway company and the owner of certain lands taken by the company; and that the owner was entitled to interest on the purchase-money from the time the company took possession of the lands, up to the time of lodging the money in the bank. *Blount* v. *Great Southern and Western Ry.*, 2 Ir. Ch. R. 40.

A company entered into possession of land and paid into court the sum awarded by the arbitrator, on the amount being afterwards increased it was ordered that interest at 4 per cent. upon the difference was payable from the entry into

possession. *Navan and Kingscourt Ry., In re*, Ir. R. 10 Eq. 113.

Payment into Court or Bank.]—A company had paid into court the sum assessed by a jury, and executed a deed-poll under s. 76:—Held, that the court has no jurisdiction to make any order as to interest on the purchase-money. *Divers, In re*, 1 Jur. (N.S.) 995.

Where the Great Western Railway Company have paid the purchase-money of property under settlement into the Bank of England, the vendors (the trustees) cannot apply under the act, by petition, to charge them with interest during the time it has lain idle, on the ground that the company ought to have paid it to the trustees who were authorised by the settlement to receive it. *White, Ex parte, G. W. Ry., In re*, 9 L. J., Ex. Eq. 9. See *Chambers* v. *White*, 14 Jur. 1129.

Award.]—A lessee under a building lease, agreed in 1866, to sell part of the demised premises to a railway company, the price, in case of difference, to be referred to a surveyor, to be agreed upon between the parties in the usual manner. The company had, at the date of the agreement, a bill before parliament to enable them to take his land, but it had not then become law. The surveyor made his award in 1868, but made no provision as to the costs of the reference:—Held, that the relation of vendor and purchaser was not established till the price was ascertained, and that the lessee must pay the outgoings from the land until the date of the award, and was not entitled to interest on the purchase-money up to that date. *Catling* v. *G. N. Ry.*, 21 L. T. 769: 18 W. R. 121—L.J.J.

Verdict.]—A sheriff's jury, in awarding compensation to a landowner against a railway company in 1864, found that so far back as 1852, he was entitled to 5,272*l.*, saying nothing as to interest. The order of the court below, adding to the principal twelve years' interest, was reversed. *Caledonian Ry.* v. *Carmichael*, L. R. 2 H. L. (Sc.) 56.

In an action to recover a sum awarded to the plaintiff by a jury, under 43 Geo. 3, c. 140, and 48 Geo. 3, c. 11, as compensation to be made by the Bristol Dock Company for an injury done to the plaintiff's property by means of the works authorised by those acts:—Held, that the jury might give interest for the detention of the sum awarded. *Hilhouse* v. *Davies*, 1 M. & S. 169.

The interest of landowners who were entitled in fee-simple subject to certain tenacies was assessed by a jury under the Lands Clauses Act:—Held, that interest at 4 per cent. was payable from the date of the verdict, although de facto possession of the land was not obtained until the expiration, at a subsequent period, of the tenacies subject to which the land was held. *Eccleshill Local Board, In re*, 49 L. J., Ch. 214; 13 Ch. D. 365; 28 W. R. 536.

When good Title shewn.]—A complete contract being established between a railway company and a landowner by the notice to treat, and an award under the Lands Clauses Act, 1845, fixing the amount of the purchase-money, the ordinary rules as between vendor and purchaser apply to such a contract, including the liability of the purchasing company, in a proper case, to pay interest on their unpaid purchase-money. Thus, where the title has not been accepted before the award, and the company, not being in possession, delay paying or depositing the purchase-money, they are liable to pay interest at 4 per cent. per annum, not from the date of the award, but from the time they might prudently have taken possession; that is, when a good title was shewn. *Eccleshill Local Board, In re* (13 Ch. D. 365), disapproved of. *Pigott and G. W. Ry., In re*, 50 L. J., Ch. 679; 18 Ch. D. 146; 44 L. T. 792; 29 W. R. 727.

In the case of a compulsory purchase under the Lands Clauses Act, 1845, interest is payable to the vendor by the purchaser from the time when possession might have been taken, it appearing that a good title could be shewn. And the land being subject to mortgage, interest is payable by the vendor to the mortgagee in lieu of notice. *Spencer-Bell to L. & S. W. Ry.*, 33 W. R. 771.

Recovery of Arrears.]—In 1857 S. made an equitable mortgage of a public-house in Leeds, to secure the repayment of 400*l.* with interest at 5*l.* per cent. The mortgagor, and those claiming under him, continued in possession of the house without paying any interest on the debt. There appeared to have been some arrangement as to that, though what, exactly, was not shewn. In September, 1875, the corporation of Leeds gave notice to the parties interested in the house of their intention to take it, under their compulsory powers, for the benefit of the borough, and then The mortgagees presented a petition for payment paid the purchase-money, 1,150*l.*, into court, out of court to them of their principal money and interest for nineteen years at 5*l.* per cent., together with their costs:—Held, that they were entitled to their principal money, with interest, for the whole period claimed; but on a re-argument, that six years' arrears of the interest could only be recovered. *Stead's Settlement Trusts, In re*, 45 L. J., Ch. 634; 2 Ch. D. 713; 35 L. T. 465; 24 W. R. 698.

Vendor delaying Completion.]—If the owner of land compelled to sell under the Lands Clauses Act delays the completion of the purchase, interest will stop upon an appropriation of the purchase-money with notice that it is employed. *Ware* v. *Regent's Canal Co.*, 23 Beav. 575; 26 L. J., Ch. 566; 3 Jur. (N.S.) 924; 5 W. R. 617.

3. Disposal of.

a. Generally.

Apportionment.]—A dean and chapter and their lessee for twenty-one years, under covenant not to assign without their leave, entered into a joint contract for sale of part of the demised premises to a railway company, at an aggregate price. On the completion of the purchase and the conveyance of the property to the company, they paid the amount into court, under s. 69 of the Lands Clauses Act, 1845. The court declined, upon the petition of the lessee, to apportion the purchase-money. By consent the money was ordered to be invested, and the dividends to be paid to the lessee for his term, or until further order. *Ward, Ex parte*, 2 De G. & Sm. 4; 5 Railw. Cas. 398; 17 L. J., Ch. 249; 12 Jur. 322.

Renewable Leaseholds—Fine.]—Where lands in lease, subject to a customary right of renewal

in an ecclesiastical corporation sole, have been taken for public purposes under the provisions of the Lands Clauses Act, s. 74 of that statute empowers the court on the occurrence of every period at which, if the land had not been taken, the lease might have been renewed to authorise the payment, out of the fund in court arising from the purchase-money and its accumulations, of an equivalent to the fine payable upon such renewals. *St. Paul's (Precentor), Ex parte*, 1 Kay & J. 538; 24 L. J., Ch. 395; 1 Jur. (N.S.) 444; 3 Eq. R. 634; 3 W. R. 430.

Purchase Money or Compensation.]—A railway company when constructing their line excavated soil on the land of M., and used the stuff for ballast. No notice was given to him that his land was required for the purposes of the company. After a delay on their part of some years the matter was, with other claims for consequential injury, referred to arbitration. The articles recited his allegation that the lands had been "taken and used and otherwise injured," and provided for the ascertainment of the purchase-money for the lands taken and used. The award found that the company had "cut the soil of a portion of the lands, and that it has been taken and used," &c., and awarded a sum "as and for the purchase-money of the portion of the lands," &c. The money was paid to the owner, and subsequently the pond formed in the excavation was taken by another railway company, under their compulsory powers. He claimed that on the construction of the deeds, and under the facts of the case, he had remained the owner of the lands:—Held, that the lands were taken by the company, and that the money was paid for the purchase and not merely as compensation for injury thereto. *Belfast Central Ry., In re, Macrory, Ex parte*, 19 W. R. 238.

Death pending Proceedings.]—Order made on a petition by a rector for the investment of the money arising from the sale to a railway company of a part of the rectory lands. Pending the proceedings in the master's office, the rector died. The new rector consenting that the proceedings should go on, no supplemental order necessary. Semble. *Lea (Rector), Ex parte*, 21 L. J., Ch. 776.

Service.]—Semble, where purchase-money has been paid into court, it is not necessary for the person in possession as owner to serve any other person than the company with the petition for investment. *Sterry's Estate, In re*, 3 W. R. 561.

b. Interim Investment.

No Option in Company.]—The court will not allow a railway company to retain any option after the order for investment as to the fund in which, or the time when, the moneys are to be invested. *Newport, Abergavenny and Hereford Ry., Ex parte*, 11 Jur. 160.

"Cash under Control of Court."]—The purchase-money of a settled estate sold under the Lands Clauses Act may be invested like cash under the control of the court. *Foy, In re*, 33 L. T. 161; 23 W. R. 744.

Money paid into court under a private act, and invested in exchequer bills, is "cash under the control of the court," within the meaning of the act 23 & 24 Vict. c. 38, and the General Order of the 1st of February, 1861, and may be invested in any of the securities sanctioned by the court, although such private act directs the investment to be in exchequer bills. *Jackson* v. *Tyas*, 52 L. J., Ch. 830.

Purchase-money paid into court under the Lands Clauses Act, 1845, is cash under the control of the court within the meaning of 22 & 23 Vict. c. 38, s. 10, and accordingly the court has power to direct the investment of it in East India stock. *Boyd's Settled Estate, In re* (42 L. J., Ch. 506; 21 W. R. 667); *Langmead* v. *Cockerton* (25 W. R. 315); *Kirksmeaton (Rector), Ex parte* (infra), overruled. *St. John's College, Oxford, Ex parte*, 52 L. J., Ch. 268; 22 Ch. D. 923; 48 L. T. 331; 31 W. R. 55—C. A.

Money paid into court under the Lands Clauses Act, 1845, is not to be invested as cash under the control of the court, but only in the manner specified in the act. *Fryer's Settlement, In re* (L. R. 20 Eq. 468), not followed. *Kirksmeaton (Rector), Ex parte*, 51 L. J., Ch. 581; 20 Ch. D. 203; 30 W. R. 539. Overruled by preceding case.

Money in court paid for the redemption of 3 per cent. consols, representing money paid into court under the Lands Clauses Act, 1845, is "cash under the control of the court," within the meaning of the act 23 & 24 Vict. c. 38, s. 10, and may be invested as such. *St. John's College, Oxford, Ex parte* (22 Ch. D. 93), followed. *Brown, In re*, 59 L. J., Ch. 530; 63 L. T. 131; 38 W. R. 529—C. A.

Purchase-money in court arising from a sale under the Lands Clauses Act, is "cash under the control of the court," within the meaning of 23 & 24 Vict. c. 38, ss. 10, 11, and the court has accordingly power to invest it as such, e.g. in East India 4*l.* per cent. stock. *Fryer* v. *Salisbury and Dorset Junction Ry.*, 45 L. J., Ch. 96; L. R. 20 Eq. 468.

When money has been paid into court under a special act (e.g. the Lands Clauses Act, 1845), by which it is provided that moneys paid into court may be invested in specified investments, the court has no jurisdiction to order the money, as being "cash under the control of the court" within Lord St. Leonards' Act (23 & 24 Vict. c. 38), to be invested in investments allowed by the General Order under that act, which are not included in the investments specified in the special act, e.g. India 4*l.* per cent. stock. *Boyd's Settled Estates, In re* (42 L. J., Ch. 506), followed; *Taddy's Settled Estates, In re* (L. R. 16 Eq. 532); *Fryer's Settlement, In re* (L. R. 20 Eq. 468); *Kay's Trusts, In re* (23 W. R. 744); and other cases not followed. *St. Mary, Wigton (Vicar), Ex parte*, 18 Ch. D. 646; 45 L. T. 134; 29 W. R. 883.

The court will allow an investment in metropolitan consolidated stock (under 34 & 35 Vict. c. 47, s. 13), of purchase-money paid into court by a school board. *Redhead, In re*, 39 L. T. 60.

On Mortgage.]—The purchase-money of land taken by a railway company for the purposes of their act was, on petition, directed to be invested in a mortgage of real estate; and the company was also ordered to pay the costs of all parties thereto and to the petition. *Reading* v. *Hamilton*, 5 L. T. 628.

Where purchase-money had been paid into court under the Lands Clauses Act and invested in consols, upon an application for its reinvest-

ment on mortgage security :—Held, that such reinvestment could not be treated as a permanent investment, and that the company must pay the costs without any condition as to the costs of any future permanent investment. *Blyth's Trusts, In re*, L. R. 16 Eq. 468 ; 28 L. T. 890 ; 21 W. R. 819.

Purchase-money for lands taken by a railway company having been paid into court, the tenant for life of the estate petitioned that the money might be reinvested on mortgage :—Held, that the mortgage could not be considered a permanent investment, and a direction that the company should not be required to pay the costs of a future permanent investment refused. *Sewart, In re*, L. R. 18 Eq. 278 ; 30 L. T. 355 ; 22 W. R. 625.

The court will sanction the interim investment on real security of purchase-money paid into court under the Lands Clauses Act. *Smith's Trust Estate, In re*, L. R. 9 Eq. 178 ; 18 W. R. 369.

The court ordered the interim investment of purchase-money on mortgage of real estate at the cost of the company. *Flemons' Trusts, In re*, 40 L. J., Ch. 86 ; L. R. 10 Eq. 612.

Order directing that Mortgage should be Permanent Investment.]—The compensation moneys of lands compulsorily taken by a railway company were invested in reduced annuities, the company paying the costs. The fund was subsequently reinvested on mortgage, the company again paying the costs. On this occasion it was ordered that for the purposes of costs of any future application, such reinvestment should be treated as a permanent reinvestment. An arrangement for a transfer of the mortgage security having been entered into by the owner of the fund, an application was made to the court for a declaration that the transferees were absolutely entitled to the moneys secured by the mortgage. The question was whether under s. 80 of the Lands Clauses Act, 1845, the company was liable to pay the costs of this application :—Held, that the company was not liable to pay such costs, the meaning of the previous order being that it was not to be subjected to the payment of the costs of any future application in respect of the purchase-moneys. *Gedling Rectory, In re*, 53 L. T. 244.

Affidavit of no Title dispensed with.]—The affidavit of no title in any other person required by the Consolidated Orders XXXIV. r. 3, in support of petitions under acts of parliament for the interim investment of purchase-money and payment of dividends to the persons entitled thereto was, in the case of a petition under the Lands Clauses Act, 1845, s. 70, by a large public corporation, dispensed with. *Magdalen College, Oxford, In re*, 42 L. T. 822.

c. Payment of Dividends.

i. *Annuitants.*

No Conveyance.]—A railway company paid money into court for the purchase of land which was subject to an annuity ; no conveyance had been made. The court, on petition of the owner of the land, ordered the dividends to be paid to the annuitant. *Cofield, Ex parte*, 11 Jur. 1071.

Enforcing Payment—Parties to Petition.]—Under an act of parliament for making docks, the value or compensation for property taken for the purpose of the act was directed in certain cases to be paid into the bank in the name of the accountant-general, and to be laid out in bank annuities, and until such bank annuities should be sold, and the produce invested in other hereditaments, the dividends were to be paid to the person or persons who would be entitled to the rents and profits of the hereditaments if unsold. The act also directed that the court, on the application of any person or persons making claim to the money awarded as a compensation by motion or petition should, in a summary way of proceeding, or otherwise, order the same to be laid out and invested in the funds, or distribution thereof, or payment of the dividends according to the estate, title, or interest of the person making claim thereto. On the petition of an annuitant, whose annuity was charged on the property with powers of distress and entry, and further secured by a term, for payment of his annuity and the arrears thereof, out of a fund brought into court under the act, the court held, that it had no authority to proceed in a summary way on the petition of an incumbrancer, but only at the instance of the persons who would have been entitled to the rents if the property had been unsold, and dismissed the petition. *Back, Ex parte*, 2 Y. & J. 386 ; 31 R. R. 603.

ii. *Ecclesiastical and other Corporate Property.*

Leaseholds—Term unexpired.]—The rector of Lambeth, seised in right of office of certain houses taken by a railway company, under the powers of their act, applied by petition for the investment of a sum of money which had been paid by the railway company for compensation and further reversion, and thereby prayed for the payment of dividends to the petitioner and his successors. It appearing that the houses were subject to leases, of which thirty years were unexpired, at a nominal rent ; the court refused to make the order as prayed, but directed the investment and accumulation of the sum, with liberty to apply. *Lambeth (Rector), Ex parte, L. & S. W. Ry., In re*, 4 Railw. Cas. 231.

The Bishop of Winchester, the lessor of lands of the see, demised for lives and years :—Held, not to be entitled to any portion of the purchase-money and compensation for damage and severance paid into court in respect of lands comprised in the demise and taken by a railway company, or to the dividends of such money when invested, on the ground of the diminution of the fine which would be payable, until the lease should become renewable. *Winchester (Bishop), Ex parte*, 10 Hare, 137 ; 16 Jur. 649.

A railway company took some land belonging to an ecclesiastical corporation, which at the time was let on lease, and a large sum was awarded as a compensation, on the principle of the lessee continuing to pay the rent reserved by his lease. The land being valuable for building purposes, and it being the custom of the corporation to make it available by accepting surrenders, and regranting building leases at a great advance of rent :—Held, that the corporation was entitled to the dividends on the compensation money, in addition to the rent, during the term granted by the lease. *Westminster (Dean), In re, Hampstead Junction Ry., In re*, 26 Beav. 214 ; 28 L. J., Ch. 144 ; 5 Jur. (N.S.) 232 ; 7 W. R. 81.

Where land belonging to a dean and chapter, but subject to a lease, was purchased by a railway company, and the money paid into court, it was held that the dean and chapter were only entitled, during the continuance of the lease, to so much of the dividends of the purchase-money as would equal the amount of rent, and the rest of the dividends were to be accumulated till the expiration of the lease. *Christchurch (Dean), Ex parte*, 23 L. J., Ch. 149.

Lands belonging to a see, and held on lease, are taken under an act, and the money paid into court. The sum being under 150*l.*, a petition is presented praying payment of the dividends to the bishop and his successors. Application refused. *Bath and Wells (Bishop), In re*, 2 W. R. 1.

Where real estate of a college, subject to a lease, was taken by the commissioners of public works, and the purchase-money paid into court:—Held, that during the continuance of the lease, the college was entitled only to so much of the dividends as was equal to the rent, and that the rest of the dividends must be accumulated until the determination of the lease. *Merton College (Warden), Ex parte*, 1 N. R. 176.

"Possession"—Sect. 79.]—The mere fact of the receipt of rents and profits by the trustees of a burial ground, who were appointed for the management thereof solely as a burial ground, and for the receipt and application of the burial fees, at the time when a portion of the burial ground is taken by a railway company (the ground being at that time closed for ever as a burial ground, and the rents and profits being received springing from the use of the ground for other purposes), is not such a possession as brings the application of the trustees for the investment of the purchase-money paid into court by the company, and for the payment of the dividends to them, within the Lands Clauses Act, s. 79. *St. Pancras Burial Ground, In re*, 36 L. J., Ch. 52; 14 W. R. 576.

Where the income arising from property taken under the Lands Clauses Act had been applied for several hundred years by the rector and churchwardens of the parish to the relief of indigent parishioners, but it was uncertain in whom the legal estate in the land was vested, the court made an order under s. 79, directing payment of the dividends to the rector of the parish for the time being. *St. Benet's, In re*, 12 L. T. 762.

Burial Ground — Payment to Rector.]—A portion of a closed churchyard was taken by the corporation of a town to widen the street, and the amount of the purchase-money was paid into court:—Held, that the rector was entitled to have the dividends paid to him for his life, and to his successors after him. *Liverpool (Rector), Ex parte*, 40 L. J., Ch. 65; L. R. 11 Eq. 15; 23 L. T. 354; 19 W. R. 47.

Part of the burial ground of a parish was required by a railway company. The freehold of the ground was, by act of parliament, vested in the rector and churchwardens, in trust for the parish. The ground was subsequently closed as a burial place. The company paid the purchase-money into court:—Held, that the rector for the time being was entitled to the dividends. *St. Martin's, Birmingham (Rector, Ex parte)*, 40 L. J., Ch. 69; L. R. 11 Eq. 23; 23 L. T. 575; 19 W. R. 95.

Archbishop.]—Dividends of investments of purchase-money, paid into court by a railway company for lands belonging to the Archbishop of Canterbury, ordered to be paid to the archbishop for the time being. *Canterbury (Archbishop), Ex parte*, 2 De G. & Sm. 365; 5 Railw. Cas. 699; 12 Jur. 1042.

Dean and Chapter.]—Upon a petition for payment of the dividends of stock, representing money paid in by a railway company for glebe land, to the dean and chapter for the time being:—Held, that the dividends must accumulate. *Battle (Dean), Ex parte*, 1 W. R. 271.

Form of Order.]—In order to obviate the necessity of repeated applications to the court, in cases where the purchase-moneys of glebe lands had been paid into court, and invested, the form of the order was, that the dividends should be paid to the vicar for the time being, and churchwardens and overseers, or either of them. *Bicester Churchwardens, Ex parte, Buckinghamshire Ry., In re*, 5 Railw. Cas. 702.

Municipal Corporation.]—A part of some lands which had been vested in trustees under the Municipal Corporations Act was taken by a railway company, and the purchase-money was paid into court. Order made for the investment in consols, and the payment of the dividends to any two of the trustees for the time being. *Collins's Charity, In re*, 20 L. J., Ch. 168.

Charity Property.]—Where purchase-money was paid into court in respect of lands vested in charity trustees, subject to leases for years dependent on lives, the court, in the exercise of its discretion, ordered the money to be invested and the dividends to be paid to the trustees instead of being accumulated. *St. Thomas's Church Trustees, Bristol, Ex parte*, 23 L. T 135.

Order for investment of the proceeds of lands belonging to a charity which had been taken under the Lands Clauses Act, 1845, and payment until further order of the interest to the secretary, and to his successors the secretaries for the time being, of the trustees of the charity, of which there was no treasurer. *Codrington's Charity, In re*. L. R. 18 Eq. 658.

Upon a petition for investment and payment of dividends of purchase-money for charity lands paid into court under the Lands Clauses Act, payment of dividends ordered to the rector for the time being, he being a perpetual trustee of the charity. *Davenant's Charity, In re*, 2 W. R. 344.

iii. *Tenant for Life.*

Compensation for Right claimed by.]—When lands are taken under 8 & 9 Vict. c. 18, and besides the sum paid for the inheritance a further sum is awarded as compensation, in recognition of a right claimed by the tenant for life, he will not be entitled to that further sum but only to the interest on it. *Wilson, In re*, 32 L. J., Ch. 191: 9 Jur. (N.S.) 1043; 7 L. T. 772; 11 W. R. 294. S. P., *Marlborough's (Duke) Estates, In re*, 13 Jur. 738, and cases, post, col. 1407.

Devise subject to Lease at less than Rack Rent.]—A testator devises real estate, subject to

a lease for a term of years at 25*l.* 10*s.* rent, to A. for life, remainder to B. A railway company purchases the interests of A. and B., subject to the lease, for 1,700*l.*, which is invested. The lease was granted at the said rent (less than a rack-rent) in consideration of a covenant to expend money, 600*l.*, on the estate during twenty years:—Held, that the tenant for life was entitled to the whole of the dividends of the purchase-money. *Steward's Estate, In re*, 1 Drew. 636; 1 W. R. 489.

Conveyance not executed—Possession taken.]—Where a railway company has taken possession of lands under agreement, part of the purchase-money being paid into court, and part remaining in the company's hands at 4*l.* per cent., the tenant for life of the lands is entitled to have the whole invested, and the dividends paid to him, although all parties have not executed the conveyance, in the absence of any improper conduct on his part relative to the execution. *Wrey, In re*, 11 Jur. (N.S.) 296; 12 L. T. 171; 13 W. R. 543.

Upon a petition for the reinvestment in land of money paid into court under the Lands Clauses Act, and invested in stock, and for payment to the petitioner, the tenant for life of the lands taken by the company, of the dividends of the fund in court, the court will order the dividends of the fund to be paid to the tenant for life before conveyance, where the company are in the possession of the land. *Hungerford, In re*, 1 Kay & J. 413; 1 Jur. (N.S.) 845.

Accumulated — Power of Appointment.]—A sum of 682*l.* 16*s.* 2*d.* consols, representing the accumulated dividends arising from the purchase-money of settled freeholds let for a long term of years at a peppercorn rent taken by a railway company, paid out to the tenant for life, who had an absolute testamentary power of appointment, with consent of the remaindermen, the presumption being that a woman aged fifty-one years and eleven months, who had been married fifteen years and had never had any children, would not have any children. *Allason's Trusts, In re*, 36 L. T. 653.

Apportionment.]—Where compensation money was paid into court by a railway company on an agreement with tenant for life for purchase of the fee-simple, but, on investigating the title, part of the land was found to be copyhold, with a defective title as to one undivided moiety, the court ordered an apportionment of the money, so as to carry over the amount representing the price of that part of the land to which a good title was made, and the dividends to be paid to the tenant for life, but the capital not to be paid out without notice to the company. *Perks' Estate, In re*, 1 Sm. & G. 545; 7 Railw. Cas. 609; 2 W. R. 24.

Land, which was devised by a will dated in 1795 to A. for life, with remainder over, was taken by a railway company under the powers of their special act; and the purchase-money was duly ascertained, paid into court, and invested in consols, and the dividends ordered to be paid to the tenant for life. The tenant for life died in February, 1853. In October in that year the remainderman petitioned for the transfer of the fund and payment of the last dividend to him:—Held, that the money in court could not be considered as land for the purpose of the Apportionment Act of 1738, and that therefore the executors of the tenant for life took no part of the last half-year's dividend. *Longworth's Estate, In re*, 1 Kay & J. 1; 23 L. J., Ch. 104; 2 W. R. 124.

Land which was limited to A. for life, remainder to B. in fee, was taken by a canal company, under statutory powers. The purchase-money was paid into court, and afterwards invested in consols. A. died without having received any of the dividends. His residuary legatee bequeathed all her residuary personal estate to the petitioner, who prayed for payment to himself of the fund and the dividends. The legal personal representative of A. was not before the court. The court refused to pay to B. the dividends accrued during the life of A., and ordered them to be paid to A.'s personal representative. *Ackers' Trusts, In re*, 9 Jur. (N.S.) 224; 7 L. T. 525; 11 W. R. 182.

Service.]—Certain property being taken by the Commissioners of Woods and Forests under the Metropolitan Building Act, on a petition for payment of the dividends of the proceeds in court to a tenant for life:—Held, that service upon the commissioners was unnecessary. *Dryland's Estate, In re*, 1 W. R. 139.

Form of Order.]—A tenant for life had sold land to a company by jury process, the purchase-money being paid into court and invested in consols. On a petition of the tenant for life and two of his annuitants (not bound by the contract) for payment of the dividends to the former, the order was made as prayed, prefaced with an undertaking by the annuitants not to distrain on any part of the land in the contract. *Pedley's Estate, In re*, 1 Jur. (N.S.) 654.

A public company having purchased land for the purposes of their act, and paid the money into court, it is competent for the court, the whole matter being before it, not only to order the transfer into the separate account of the landowner having a limited interest, but also by the same order to direct payment of the dividends according to the rights of parties. *Joliffe, In re*, 3 Jur. (N.S.) 633.

Proof of Title.]—A tenant for life, on applying to the court for payment of the interest and dividends of money paid in and invested as the value of land taken by a railway company, must satisfy the court that he alone is the person entitled as tenant for life. *Milne's Estate, In re*, 1 N. R. 516; 8 L. T. 199.

Further Inquiry.]—A railway company took leasehold houses which had been improved by the tenant, and paid into court 2,200*l.*, as representing his interest. It turned out that the lease was void, and the court directed an inquiry as to the increase of pecuniary value by the lessee's outlay, such increase to be paid to him. The reversioner having then declined to intervene, the company had the fee-simple value assessed at 4,000*l.*, and paid that into court; and the reversioner, by petition, asked a declaration that he was entitled to the whole 4,000*l.*, or to such part as to the court should appear just; and for all proper inquiries, investment, and payment of the dividends to the tenant for life:—Held, that a second inquiry must be

directed as in the former order, and an interim investment. *Luntley, In re*, 13 L. T. 490; 14 W. R. 93.

Settled Leaseholds.]—*See next sub-division.*

iv. *Leaseholds in Settlement.*

Tenant for Life and Remaindermen.]—Where leaseholds which are taken by a railway company are limited to a tenant for life and remainderman, the purchase-money paid for such leaseholds must be divided according to the number of years of the lease remaining unexpired at the time of taking such lands, and the representatives of the tenant for life are entitled to the portions in respect of the years during which the tenant for life lived, and the residue is payable to the remainderman. *Money, In re*, 2 Dr. & Sm. 94; 31 L. J., Ch. 496; 10 W. R. 399.

Leaseholds bequeathed to one for life, with remainder over, were taken by a railway company, and the purchase-money was invested in consols. The tenant for life only received the dividends:—Held, on her death (her representatives assenting to take it), that her estate was entitled, out of the consols, to the difference between the dividends received and the aggregate amount of the rental which would have accrued during her life, if the premises had not been taken. *Jeffreys* v. *Conney*, 28 Beav. 328.

Deficiency of Income.]—Leaseholds under a dean and a chapter, renewable by custom, were held by trustees for a tenant for life, with remainder over; and the trustees were directed, "two years or sooner before the time for renewal," to bring a part of the rental into a fund until a sufficient sum was raised for the renewal, "so that the estates may be always kept renewed . . . for ever." In June, 1865, and February, 1866, notices to treat for parts of the leaseholds, then having about thirteen and five years respectively to run, were given by a railway company. At Lady Day, 1866, the dean and chapter ceased to renew leases; and about the same date their property was taken over by the ecclesiastical commissioners. The values of the two properties having been assessed at amounts which, when paid, and invested in 3*l.* per cent. stock, gave a diminished income to the tenant for life:—Held, that the tenant for life was not entitled to be recouped the deficiency of income out of the corpus of the fund. *Wood's Estate, In re*, 40 L. J., Ch. 59; L. R. 10 Eq. 572; 23 L. T. 430; 19 W. R. 59.

Where a tenant for life of a leasehold is compelled by a railway company to sell, and the value of the property when invested does not produce an income equal to the net rental of the leasehold, the court will allow a proportion, according to circumstances, but generally not the whole of the difference, to be made up from year to year out of capital. *L. B. & S. C. Ry., Ex parte, Birch, In re*, 10 Jur. (N.S.) 673; 10 L. T. 690.

The income of the investment of purchase-money of leaseholds being insufficient to give a tenant for life of the lease the same benefit as she would have had if the lease had continued in existence, the court directed a government annuity equal to the net income from the leaseholds to be purchased, or if the fund was insufficient for that purpose, then that the dividends be paid to the petitioner for life, and the principal half-yearly divided by the number of years unexpired of the term, and half of the quotient part of the stock to be sold, and the amount paid to the petitioner during her life in addition to the dividends. *Pfleger, In re*, L. R. 6 Eq. 426.

Amount of Rent not Income from Purchase-money.]—When land in trust is let on lease at rack-rent, and taken under the Lands Clauses Act, the tenant for life is entitled during the remainder of the term to the amount of rent, and not the income derived from the purchase-money. *Mette, In re*, 38 L. J., Ch. 445; L. R. 7 Eq. 72.

Ground Rent.]—Where a railway company takes lands, subject to a lease at a low ground-rent, the tenant for life is only entitled to the amount of the ground-rent out of the income of the purchase-money, and the excess of income must be accumulated until the expiration of the lease for the benefit of the estate. *Wootton's Estate, In re*, 35 L. J., Ch. 305; L. R. 1 Eq. 589; 14 L. T. 125; 14 W. R. 469.

Higher Rent obtainable.]—When a railway company takes lands of a leasehold tenure in the occupation of a tenant for life, and it appears that if not taken they would let for an increased rent, the court will allow a slight increase upon the original rent by way of income out of the purchase-money. *North, In re*, 19 L. T. 43.

Continuance of Leases.]—A railway company took freehold lands settled by a will, and subject to leases at beneficial rents made by the tenant for life. The company paid the purchase-money into court, and the lands were conveyed to them subject to the leases. The tenant for life made an arrangement with the lessees that they were to continue to pay the same rents as before, although parts of the properties leased had been taken by the company. The tenant for life presented a petition asking for the investment of the money in court, and the payment of the dividends to her:—Held, that the court would not allow the tenant for life to derive any benefit from the purchase by the company, and that she could not receive the dividends on the purchase-money during the continuance of the leases, but that they must be accumulated. As each lease fell in the tenant for life would be entitled to so much of the dividends as was produced by the purchase-money of the land comprised in the lease which had fallen in, as also the income of the accumulations of the past dividends of such portion of the purchase-money. *Griffith's Will, In re*, 49 L. T. 161.

A. tenant for life of certain leaseholds, part of which are taken by a railway company. The compensation money is paid into court, and afterwards invested, and the dividends ordered to be paid to A. for life. The lease expires in the lifetime of A.:—Held, that A. is entitled to the whole of the compensation money and the dividends thereon. *Oxford, Worcester, and Wolverhampton Ry., In re, Beaufoy's Trusts, In re*, 1 W. R. 14.

A railway company took freeholds settled by a will, and subject to eight leases, one granted by the testator and the other seven granted under powers in the will, either by the trustees or the tenant for life, and containing covenants by the lessee to repair or rebuild. The company

purchased the leasehold interests from the tenants themselves, and paid the purchase-moneys of the fee, subject to the lessee's interests, into court under the Lands Clauses Act, 1845. The income of the purchase-moneys when invested would be greater than the aggregate rents payable under the leases:—Held, upon petition by the tenant for life for investment and payment to him of the dividends, that, having regard to s. 74 of the Lands Clauses Act, 1845, he was entitled, during the continuance of the leases, to so much only of the dividends as equalled the amount of the rents he would have received in case the property had not been taken by the railway company; that the rest of the rents must be accumulated; and that, upon the date of falling in of each lease, the tenant for life would be entitled to an additional annual sum representing the income of so much of the capital of the purchase-moneys as was attributable to the property comprised in the lease which had fallen in, and of the accumulations thereof, less the rent under such lease. *Wootton's Estate, In re* (L. R. 1 Eq. 589), followed. *Wilkes' Estate, In re*, 50 L. J., Ch. 199; 16 Ch. D. 597.

Payment out of Capital—Actuary.]—When leaseholds settled upon one for life with remainders over had been purchased, the court, upon making an order to invest the purchase-money, directed a reference to an actuary to ascertain how much of the capital ought to be paid in each year to the tenant for life. *Phillips, In re*, L. R. 6 Eq. 250.

A testator devised in strict settlement his residuary estate consisting of freeholds, leaseholds, &c., and directed his trustees to sell as they might think fit. Nearly twenty years after his death some of the leaseholds were taken by a railway company under its compulsory powers, and the purchase-money was paid into court:—Held, that the tenant for life was entitled to such an annual payment out of the purchase-money invested in consols, with the dividends thereon, as would exhaust the whole fund invested and the dividends thereon, at the date of the expiration of the lease, such annual payment to be ascertained by a reference to an actuary. *Sewell's Estate, In re*, 40 L. J., Ch. 135; L. R. 11 Eq. 80; 23 L. T. 835.

T. being entitled to a moiety in leaseholds, that interest was settled on her marriage (after reserving 40*l.* a year thereout) on herself and husband and children. The Metropolitan Board of Works took the property and paid the money into court. On a petition to deal with the fund, the court ordered that sufficient of the purchase-money should be invested to produce the 40*l.* a year, and the residue being also invested, and there being six and a quarter years of the lease to run, two twenty-fifths should be sold every half-year to be paid to T. for her life, and also the dividends. *Treacher, In re*, 18 L. T. 110.

Petitioner was entitled for life under a marriage settlement to leaseholds, which had eight years to run. The trustees of the settlement had power to sell the leaseholds with his consent, which he declined to give. The leaseholds were taken under the powers of the Lands Clauses Act, and the proceeds of sale were paid into court and invested. The purchase-money was sufficient to provide an annuity for eight years of much larger amount than the net annual proceeds of the leaseholds:—Held, that the petitioner was entitled to receive an annuity of such an amount that the payment of it would exhaust the fund in the number of years which the leaseholds had to run. *Askew* v. *Woodhead*, 49 L. J., Ch. 320; 14 Ch. D. 27; 42 L. T. 567; 41 L. T. 670; 28 W. R. 874.

v. *In other Cases.*

Trustees.]—The court may, if it sees fit, make the dividends arising from an investment of a fund in court payable to one of several trustees. *Coulson, In re*, 17 L. T. 27.

Upon an investment of money paid into court in respect of lands taken by a company:—Ordered, that payment of the dividends might be made to the trustees "or either of them." *Clinton, In re*, 6 Jur. (N.S.) 601; 8 W. R. 492.

The dividends on the purchase-money of a settled estate sold under the Lands Clauses Act may be paid to the trustees for the time being or one of them. *Foy, In re*, 33 L. T. 161; 23 W. R. 744.

Mortgage—Possession.]—A railway company contracted to purchase lands of C., and paid the purchase-money into court under s. 69 of the Lands Clauses Act. It afterwards appeared that C.'s title was derived under an indenture of mortgage, dated in 1814, he having been in possession ever since. C. petitioned for investment and payment of the dividends to him. The petition was granted, s. 112 not applying. *Cook, In re*, 8 L. T. 759; 11 W. R. 1015.

Commoners.]—Every freeman of Bedford was entitled, so long as he was resident there, to turn one head of stock annually upon certain commonable land. Non-resident freemen had no such right, but might obtain it by residing in Bedford. Part of the land was taken and compensation paid for the extinction of the commonable rights:—Held, that until reinvestment in land the money should be invested in stock and the dividends divided among such freemen as would have been entitled in each year to rights of common over the land. *Nash* v. *Coombs*, 37 L. J., Ch. 600; L. R. 6 Eq. 51; 16 W. R. 663.

d. Discharge of Debts or Incumbrances.

Inclosure Act.]—Under an inclosure act some lands were allotted to a rector, who had a power of selling to pay the expenses. Under a railway act compensation was made in respect of other lands of the rectory, and paid into court. The court sanctioned the application of the money in court to the payment of the expenses of the inclosure. *Lockwood, Ex parte*, 14 Beav. 158.

Incumbrance on other Lands.]—Under s. 42 of the Eastern Counties Railway Act (which is in the same terms as s. 69 of the Lands Clauses Act), money paid for the purchase of land compulsorily taken by a company from a municipal corporation may be applied in paying off an incumbrance affecting other lands belonging to the same corporation. *Cambridge Corporation, Ex parte, Eastern Counties Ry., In re*, 6 Hare, 30; 5 Railw. Cas. 204. And see *London Corporation, Ex parte*, 37 L. J., Ch. 375; L. R. 5 Eq. 418; 17 L. T. 489; 16 W. R. 355.

Corporation Debts.]—Where lands of a corporation had been taken by government for

fortification purposes under 43 Geo. 3, c. 55, and 45 Geo. 3, c. 95, and the compensation paid into court, to be disposed of under its order:—Held, that since the 5 & 6 Will. 4, c. 76, s. 92, the court has no authority to direct it to be applied in discharge of corporation debts incurred since the statute; although the dividends must be so applied, yet the capital is to be preserved. The trusts of the latter act apply to personal as well as real estate. *Hythe Corporation, Ex parte*, 4 Y. & Coll. 55.

Re-entry—Lease.]—The right of re-entry in default of payment of rent is an incumbrance on the leasehold interest compulsorily taken by a company. *London Street, Greenwich, and L., C. & D. Ry., In re*, 57 L. T. 673.

Existing Lease.]—The residue of a term of years is an incumbrance upon the inheritance, under s. 69 of the Lands Clauses Act. The purchase-money of lands taken under the Lands Clauses Act may be applied in obtaining the surrender of a lease on the lands of the vendors. *Sheffield Corporation, Ex parte*, 21 Beav. 162; 25 L. J., Ch. 587; 2 Jur. (N.S.) 31; 4 W. R. 70. See *Brasher's Trust, In re*, 6 W. R. 406.

Mortgages of Tolls and Bonds.]—Money paid into court under the Lands Clauses Act, s. 69, by a railway company, for the purchase of lands belonging to a corporation, was ordered to be applied in the payment off of mortgages of certain tolls and of bonds which had been given by the corporation for moneys borrowed under the provisions of s. 21 of the Baths and Wash Houses Act, 1846, and were payable out of the borough fund, which fund was largely composed of the rents and profits of the real estates of the corporation. *Derby Municipal Estates, In re*, 3 Ch. D. 289; 24 W. R. 729.

Re-instating Structures.]—Where expenses had been incurred by a tenant for life under a will in reinstating structures on a portion of the devised property, in conformity with the requirements of the Metropolitan Building Act, 1856, which authorises the commissioners to sell the structures if the owner refuses or neglects to pay the expenses of reinstatement:—Held, that these expenses constituted a charge on the property, and that their repayment was a proper application of the proceeds of other lands devised to the same uses, and taken under the Lands Clauses Act. *Davies' Estate, In re, Crystal Palace and West End Ry., In re*, 3 De G. & J. 144: 27 L. J., Ch. 712; 4 Jur. (N.S.) 1029; 6 W. R. 844.

Rent-charge—Anticipating future Payments.]—A railway company took part of glebe lands which were subject to a yearly rent-charge created under the General Land Drainage and Improvement Company's Act, 1849, to repay money borrowed by a former rector for outlay on the glebe. The company paid the purchase-moneys into court under the Lands Clauses Act, 1845, and the incumbrancer being willing to take a lump sum in lieu of the remaining payments of the rent-charge (eleven in number), the rector petitioned to have this sum paid off out of the fund in court, and to have the residue of the fund invested as if it were cash under the control of the court:—Held, that even supposing that the rector could himself have charged the inheritance of the glebe to provide for or to repay similar outlay, the court ought not to disturb the existing state of things and allow the fund in court to be applied in anticipating the future payments of the rent-charge. *Kirksmeaton (Rector), Ex parte*, 51 L. J., Ch. 581; 20 Ch. D. 203; 30 W. R. 539.

—— **Deduction for, how calculated.**]—A company having taken a small portion of an estate, the whole of which was subject to a rent-charge, and a reference having been directed to ascertain what would be a proper amount to be deducted from the purchase-money by way of compensation, but no reference as to indemnity:—Held, that regard being had to the provisions for indemnity thereinafter directed, a proper sum to deduct was a sum which bore such a proportion to the whole present worth of the rent-charge as the quantity of lands taken by the company bore to the whole lands out of which the rent-charge issued. The provision for indemnity then directed by the order was a covenant by the vendor to pay the annuity; and that all the other lands should, as between the vendor and purchaser, be solely chargeable therewith, in exoneration of the small parcel now sold. *Powell* v. *South Wales Ry.*, 1 Jur. (N.S.) 773.

Committee releasing Rent-charge.]—Lands which were subject to a rent-charge in favour of a lunatic during his life were taken by a corporation acting under the Lands Clauses Act. The court authorised the committee of the lunatic to release the lands from the rent-charge upon the corporation purchasing in the name of the lunatic a government annuity of the same yearly amount for his life. *Brewer, In re*, 1 Ch. D. 409; 34 L. T. 466; 24 W. R. 465—C. A.

Payment off—No Deed acknowledged.]—On a petition by husband and wife and mortgagee, a small sum of money belonging to the wife was ordered to be paid out of court to the mortgagee, without requiring the wife to be examined in court, and without the mortgage deed being acknowledged. *Pollock* v. *Birmingham, Wolverhampton and Stour Valley Ry., Clarke, In re*, 11 Jur. (N.S.) 7; 11 L. T. 663; 13 W. R. 401.

—— **Deposit—Other Lands of Mortgagor.**]—When lands subject to a mortgage are taken compulsorily by a company, the court has jurisdiction to order the payment of the mortgage debt and costs out of the deposit paid in by the company, without reference to the fact that that deposit covered other lands of the same mortgagor not subject to the mortgage. *Martin* v. *L., C. & D. Ry.*, 13 L. T. 355; 14 W. R. 24.

Mortgage Debt exceeding Compensation.]—A railway company having given notice of its intention to take a portion of premises upon which a business was being carried on, and of which mortgagees were in possession, the amount of compensation to be paid for the lands taken, and for the damage which might be sustained by reason of severance, or by reason of the execution of the works, or of the exercise of the parliamentary powers of the company, was submitted to arbitration, and the amount awarded was 11,950*l.*, of which the arbitrator certified that 2,800*l.* was given in respect of trade profits. The mortgagees, whose debt exceeded the entire amount of compensation, were held entitled to the whole sum. *Pile* v. *Pile, Lambton, Ex parte*,

45 L. J., Ch. 841; 3 Ch. D. 36; 35 L. T. 18; 24 W. R. 1003.

A baker, having mortgaged the leasehold shop in which he carried on business, was served with a notice to treat by a railway company who required the mortgaged premises. He sent in a claim for the lease and loss of profits. The gross amount of his claim was reduced by agreement between the parties:—Held, that as against the mortgagee, whose debt was greater than the amount thus agreed upon, the mortgagor was not entitled to any portion of the purchase-money. *King* v. *Midland Ry.*, 17 W. R. 113.

e. Redemption of Land Tax.

Where an act of parliament enabling a railway company to purchase lands of corporations, tenants for life, &c., directed that the purchase-money should be applied in the redemption of the land tax upon other parts of the property unsold:—Held, that a tenant for life, who had redeemed the land tax before the passing of the act, might reimburse himself out of the proceeds of the lands purchased of him by the company. The costs of an application to the court, under such an act of parliament, to have the purchase-money applied in the redemption of the land tax, will be allowed out of the purchase-money, although the act only makes an express provision for such costs in cases where the money is to be laid out in the purchase of lands to be settled to the like uses. *Northwick, Ex parte*, 1 Y. & Coll. 166.

A railway company having taken a portion of glebe land, the court allowed the purchase-money to be invested, not only in other lands, but also in the drainage of the remaining glebe, and in the redemption of the land tax on the lands purchased. *Queen Camel (Vicar), In re*, 8 L. T. 233; 11 W. R. 503.

The application of the purchase-money of land taken by a railway company to the redemption of land tax is a reinvestment within the Lands Clauses Act, and the costs of it are chargeable on the company under s. 80; and the land being part of a charity estate, the petition must be sanctioned by the charity commissioners' certificate, and must be intituled in the matter of the statute of 52 Geo. 3, c. 101, must have the fiat of the attorney-general and be signed by two individual petitioners and not by a corporation and an individual. *L., B. & S. C. Ry., In re*, 18 Beav. 608.

f. Purchase of other Lands.

Where situate.]—Money paid into court under the Lands Clauses Act, 1845, was allowed to be re-invested in the purchase of land in the Isle of Man. *Taylor's Estate, In re*, 40 L. J., Ch. 454.

Form of Order.]—Form of order made upon and practice relative to a petition for the investment in land of money which had been paid into court by a railway company for land taken by the company. *Anon.*, 18 Jur. 742.

See form of order for the investment in lands of purchase-money paid for the lands of incapacitated persons, &c., sold to railway companies, or otherwise, and paid into court under the Lands Clauses Consolidation Act, &c. *Anon.*, 10 Hare (App.), lxx.

The company are entitled to have inserted in that part of the order relating to costs, the words, "upon the approval and execution of the conveyance." *Eton College, Ex parte*, 7 W. R. 710.

Lands having been taken for the purposes of a railway company, and the money paid into court, and other lands being approved of to be purchased therewith, and to be settled to the like uses as the former lands:—Held, that only one application to the court would be necessary for carrying this purpose into effect; and that the draft conveyance, approved by the conveyancing counsel, being engrossed, with a blank for the date and other particulars of the order, the court would make one order directing the blank to be filled up and the contract to be completed. *Caddick's Estate, In re*, 9 Hare (App.), lxxxv.: 17 Jur. 84; 1 W. R. 12. Contra, *Duckle, Ex parte*, 16 Jur. 511.

A railway company took, under its compulsory powers, land which was settled in such a way that a father and a son had at that time between them the absolute beneficial interest. The purchase-money, as fixed by arbitration, having been paid into court:—Held, that the owners were entitled to have part of the fund paid out to them as absolutely entitled, and at the same time to have another part reinvested in the purchase of land, to be settled to somewhat different uses, at the expense of the company. *Jones Trust Estate, In re*, 39 L. J., Ch. 190; 18 W. R. 312.

Settled Land Act—Effect of.]—Lands belonging absolutely to a charity were taken by a public body, and the purchase-money paid into court under the Lands Clauses Act:—Held, that the purchase-money could be dealt with under the provisions of s. 32 of the Settled Land Act, 1882, as "money liable to be laid out in the purchase of land to be made subject to a settlement." *Byron's Charity, In re*, 53 L. J., Ch. 152; 23 Ch. D. 171; 48 L. T. 515; 31 W. R. 517.

Impressed with Character of Realty.]—Purchase-money paid into court by a railway company under s. 69 of the Lands Clauses Act, 1845, for land of which an infant is absolutely seised in fee, remains impressed with the character of real estate, and on the death of the infant descends to his heir-at-law. *Kelland* v. *Fulford*, 47 L. J., Ch. 94; 6 Ch. D. 491; 25 W. R. 606.

The word "settled," in s. 69, means simply "standing limited." *Ib.*

Reference as to Title.]—On a petition for the re-investment of 50*l.* paid into court under the Lands Clauses Act in land adjoining the settled estate, the court refused to dispense with the usual order of reference as to title, but gave leave to the parties to apply in chambers that the investigation of the title might be dispensed with. *Blomfield, In re*, 25 W. R. 37.

Land belonging to a vicarage was taken by a railway company, and the purchase-money paid into court to the account of the vicar. On a petition by the vicar stating an agreement to purchase land particularly mentioned in the agreement, and that the title had been approved of by a barrister, and that the title deeds had been examined and found correct, and praying for a conveyance and payment of the money out of court, without a reference to the Master, the court made the order. *East Dereham (Vicar), Ex parte*, 21 L. J., Ch. 677.

On petition for re-investment of purchase-money paid into court, and arising from settled

lands brought under legislative powers, the court, in the first instance, only approves of the propriety of the proposed investment, and reserves the directions as to the completion of the purchase until the certificate of conveyancing counsel is obtained approving of the title. *Martin's Estate, In re*, 22 L. J., Ch. 248; 17 Jur. 30; 1 W. R. 45.

—— **Death of Petitioner.**]—On a petition under the Lands Clauses Act to sanction an investment in land, an order was made approving the investment, and directing a reference as to title. Before the order was fully worked out the petitioner died. On the application of his executors, it was ordered that the proceedings should be revived for their benefit. *Youl, In re*, 42 L. J., Ch. 900; L. R. 16 Eq. 107.

Lunatic—Investment in Railway Stock.]—The purchase-money of a lunatic's land taken by a public body under the Lands Clauses Act, 1845, s. 69, was, under the circumstances, ordered to be invested in guaranteed railway stock; but the name of the public body was directed to be omitted from the title of the account, an investment of this nature being treated as equivalent to a re-investment in land. *Buckingham, In re*, 2 Ch. D. 690—C. A.

Paid to Tenant in Tail.]—Purchase-money, which ought to have been paid into court, was paid to the tenant in tail; on his petition, it was ordered to be invested in land. *Abergavenny (Earl), Ex parte*, 4 W. R. 315.

Sanction of Court.]—The court will not sanction a purchase of lands upon a surveyor's opinion as to their value. The facts themselves must be proved, and then the court will form its own conclusions. *Kinsey, In re*, 1 N. R. 303.

Reversion in Fee.]—Where leaseholds are taken by a railway company, and the purchase-money is paid into court under the Lands Clauses Act, the court will sanction the investment of such purchase-money in the purchase of a reversion in fee of other leaseholds. *Brasher's Trust, In re*, 6 W. R. 406.

Rights of Common.]—Every freeman of Bedford was entitled, so long as he was resident there, to turn out one head of stock annually upon certain commonable land. Non-resident freemen had no such right over the land, but might obtain such right by coming to reside in Bedford. A railway company took part of the land, and the compensation money paid for the extinction of commonable rights was paid into court. In a suit for ascertaining the rights of all parties to the money:—Held, that the money ought to be reinvested in land to be held on the same trusts as that sold; and that, in the meantime, the same ought to be invested in stock, and the dividends divided among such freemen as would have been entitled in each year to rights of common over the land. *Nash* v. *Coombs*, 37 L. J., Ch. 600; L. R. 6 Eq. 51; 16 W. R. 663.

Copyholds.]—Re-investment in the purchase of copyholds of inheritance under special circumstances allowed. *Oxford and Bletchley Junction Ry., Ex parte, Browne, In re*, 6 Railw. Cas. 733; 16 Jur. 158.

Although s. 69 of the Lands Clauses Act does not appear to authorise the investment of the purchase-money of a freehold estate on copyhold property, yet the court will, upon the report of the Master that such an investment is fit and proper, and for the benefit of the persons interested, sanction such an investment. *Cann's Estate, In re*, 19 L. J., Ch. 376; 15 Jur. 3.

Money paid into court by the Liverpool Dock Trustees in respect of leaseholds for years, taken by them under the powers of their act of parliament, ordered to be reinvested in the purchase of copyholds of inheritance. *Liverpool Dock Acts, In re*, 1 Sim. (N.S.) 202.

—— **Enfranchisement.**] — Upon a petition that money paid into court by a railway company upon the purchase of land might be applied for the purpose of enfranchising other property belonging to the vendor:—Held, that, under the Lands Clauses Act, an enfranchisement of copyholds was equivalent to reinvestment in other lands, and the court had power to direct such an application of the money, and the company must pay the costs incurred thereby. *Dixon* v. *Jackson*, 25 L. J., Ch. 588; 4 W. R. 450.

Money paid into court by a railway company, paid out and invested in the enfranchisement of copyholds under the 4 & 5 Vict., c. 35. *Ground's Estate, In re*, 1 W. R. 32.

There being two sets of trustees, one of freeholds and the other of copyholds, settled to the same trusts, the freeholds were sold to a company under the Lands Clauses Act:—Held, that the proceeds of that sale might be invested in procuring the enfranchisement of the copyholds. *Cheshunt College, In re*, 1 Jur. (N.S.) 995; 3 W. R. 638.

The court has jurisdiction to make such order without the previous consent of the charity commissioners to the application. *Ib.*

—— **Payment of Fine.**]—A railway company having taken copyholds, and paid the purchase-money into court, an order was made for reinvestment of the money upon other copyholds, and for payment by the company of the costs, charges, and expenses incurred of or relating to the purchase and the costs of the conveyances, and of the application for reinvestment and consequent thereon:—Held, that the company was not liable to pay the fine upon the admission to the copyholds. *Saurston (Vicar), Ex parte, Eastern Counties Ry., In re*, 27 L. J., Ch. 755; 4 Jur. (N.S.) 473; 6 W. R. 492.

Equity of Redemption.]—The court will not under the power conferred by the Lands Clauses Act, s. 69, invest money lodged in court under that act in the purchase of an equity of redemption. *Portadown, Dungannon, and Omagh Junction Ry., In re*, Ir. R. 10 Eq. 368.

Therefore, an application by a tenant for life of lands held under a church lease to invest the purchase-money of part of the settled lands taken by a railway company in payment of part of the purchase-money of the reversion bought from the commissioners under the Irish Church Act, 1869, subject to a mortgage for the residue was refused. *Ib.*

Subject to Existing Mortgages.]—The tenant for life of certain settled estates, part of which had been purchased in 1849 by a railway company under the Lands Clauses Consolidation Act, 1845, and which estates were subject to several

mortgages, some created previously and some subsequently to the date of such purchase, applied by petition to have the purchase-money, which had been paid into court, reinvested in land:—Held, that the court had jurisdiction under the act to order the purchase-money of the lands in question to be reinvested in lands to be conveyed to the uses of the settlement, and to be subject to the existing mortgages; and that all the incumbrancers were entitled to notice of such re-investment; and that the railway company was liable to the entire costs and expenses of and incidental to the same. *Eastern Counties Ry., In re, Peyton's Settlement, Ex parte*, 4 W. R. 380.

Leaseholds.]—Freehold and copyhold hereditaments were taken by a railway company, and the money paid into court:—Held, that the money could not be re-invested in leasehold property. *Macaulay, Ex parte*, 23 L. J., Ch. 815; 2 W. R. 667.

Upon the petition of the trustees of a freehold chapel taken by a railway company the purchase-money was ordered to be invested in the purchase of a leasehold chapel in the vicinity, there being a difficulty in obtaining a suitable freehold site for a new chapel, and the price agreed to be paid for the leasehold chapel being less than its actual value. *Rehoboth Chapel, In re*, 44 L. J., Ch. 375; L. R. 19 Eq. 180; 31 L. T. 571; 23 W. R. 405.

g. Buildings and Improvements.

Rectory-house.]—Money paid into court by a railway company in respect of glebe lands was ordered to be applied towards necessary additions and improvements of the rectory house; the fund to be paid out to the bishop's secretary, he undertaking to apply it. *Claypole (Rector), Ex parte*, 42 L. J., Ch. 776; L. R. 16 Eq. 574; 29 L. T. 51.

The purchase-money for glebe lands taken by a railway company may, with the consent of the bishop, be paid by the court to the rector for the building of a rectory-house. *Bradfield St. Claire (Rector), Ex parte*, 32 L. T. 248.

A rector made arrangements as to building a new rectory-house, which was estimated to cost 2,304*l.* That sum, less 140*l.*, having been obtained, but several hundred pounds being still unspent, on the application of the rector:—Held, that 80*l.*, which had been paid in under the Lands Clauses Act as the purchase-money of part of the glebe, might be appropriated towards the expenses still to be incurred in building. *Hartington (Rector), Ex parte*, 23 W. R. 484.

Purchase-money for glebe lands taken by a railway company allowed to be applied in rebuilding rectory. *Louth and East Coast Ry., In re, Grimoldby (Rector), Ex parte*, 2 Ch. D. 225; 24 W. R. 723.

Vicarage.]—Where a vicar entered into an agreement for the purchase of a house for a vicarage which, in its then present state, was unsuitable for such a purpose, the court sanctioned the agreement and the expenditure in making the house suitable for a vicarage of purchase-money of a portion of the churchyard, invested under a special act, on the ground that the arrangement was practically the purchase of a house suitable for a vicarage. *Nether Stowey Vicarage, In re* (L. R. 17 Eq. 156), distinguished. *Sewers Commissioners and St. Botolph, Aldgate (Vicar), Ex parte*, 63 L. J., Ch. 862; [1894] 3 Ch. 544; 8 R. 649.

—— **Under 42 Geo. 3, c. 116, s. 100.**]—By 42 Geo. 3, c. 116, s. 100, surplus stock in court arising from the sale of land for the redemption of land tax may be laid out in manors, messuages, lands, tenements, and hereditaments, to be settled and conveyed to like uses to those upon which the lands taken were settled. A petition by the vicar for the repayment to him out of the fund in court of money disbursed by him for repairs to the vicarage house, was dismissed as an unauthorised investment under the act, the decisions allowing such an investment under the Lands Clauses Act not being held binding on the court in a case under that act. *Nether Stowey (Vicarage), In re*, L. R. 17 Eq. 156; 29 L. T. 604; 22 W. R. 180.

Repair of Church.]—A petition was presented by the parson, churchwardens, and parishioners of a certain parish for payment out of court to them of 514*l.*, which had been paid in by the respondents, the commissioners of sewers, in respect of certain lands taken by them from the petitioners. The petitioners proposed to expend 1,000*l.* in rebuilding the north porch of the parish church, and they petitioned that the 514*l.* should be paid out to them upon their undertaking to apply that sum in rebuilding the porch. The petitioners had no power of sale, and the consent of the charity commissioners to the application had not been obtained. The respondents did not oppose the application:—Held, that the 514*l.* might be paid out to the petitioners on the chief clerk's certificate that at least that sum had been spent in the rebuilding. *St. Alphege (Parson), In re*, 55 L. T. 314.

—— **Queen Anne's Bounty.**]—Purchase-money for glebe lands taken by a railway company not allowed to be applied in repairing the chancel or in repayment of money borrowed from Queen Anne's Bounty. *Grimoldby (Rector), Ex parte, Louth and East Coast Ry., In re*, 2 Ch. D. 225; 24 W. R. 723.

Farm Buildings.]—When it is shewn to be beneficial, the court will, under the Lands Clauses Act s. 69, order the purchase-money of a portion of glebe land taken under the act to be laid out in the erection of farm buildings on the remainder. *Shipton-under-Wychwood (Rector), Ex parte*, 19 W. R. 549.

When it will be a permanent and beneficial improvement, the court will sanction the application of part of the purchase-money of glebe lands, taken by a railway company, in defraying part of the cost of erecting farm buildings on the remainder. *Gamston (Rector), Ex parte*, 1 Ch. D. 477; 33 L. T. 803; 24 W. R. 359.

On Settled Estate.]—Purchase-money of part of a settled estate paid in under the Lands Clauses Act ordered to be applied towards the cost of lateral additions to a house, part of the settled estate. *Speer, In re*, 3 Ch. D. 262; 24 W. R. 880.

The tenant for life being the proper person to keep the mansion house in repair, even though he was not accountable for dilapidations, expenditure on repairs of the mansion house ought not to be paid out of the fund in court. *Leigh's Estate, In re*, 40 L. J., Ch. 687; L. R. 6 Ch. 887; 25 L. T. 644; 19 W. R. 1105.

The erection of new buildings upon the estate is in substance the same thing as the purchase

of buildings upon other land, a fund in court may therefore be applied in paying the expense of such erection, but that it ought not to be so applied without the consent of the remaindermen. *Ib.*

Money which, under the provisions of a deed, will, or private estate act, is to be invested in the purchase of lands, as well as money so to be invested by virtue of the Lands Clauses Act, will in a proper case be ordered by the court to be employed in erecting new buildings on land already settled to the same uses. But the court will not sanction its being laid out in repairs, or in permanent improvements not placing new buildings on the land. *Drake* v. *Trefusis*, L. R. 10 Ch. 364; 33 L. T. 85; 23 W. R. 762.

A railway company having taken part of a settled estate, paid in the compensation money under the Lands Clauses Act, s. 69, and constructed their line, and the effect of such construction having been to divert business from certain trade buildings on another part of the estate, and to render them useless for trade purposes; also to expose to risk from fire a stack-yard and farm buildings, and render them uninsurable:—Held, that sufficient special circumstances had been shewn to enable the court to lay out part of the compensation money in taking down the trade buildings and erecting dwelling-houses on their site; and in removing the stack-yard, and roofing the farm buildings with slate or tile instead of thatch. *Johnson, In re*, L. R. 8 Eq. 348.

A railway having severed the arable lands from the farm buildings:—Held, that the compensation-money might be applied in the erection of new farm buildings. *Milward, Ex parte, Oxford, Worcester, and Wolverhampton Ry., In re*, 27 Beav. 571; 29 L. J., Ch. 245; 6 Jur. (N.S.) 478; 1 L. T. 153.

Where a small sum, the price of land, had been paid into court by a railway company, to be laid out in land to be settled to like uses, the court, upon the report of the master, allowed it to be laid out in new erections. *Shaw, Ex parte*, 4 Y. & Coll. 506; 10 L. J., Ex. Eq. 92. S. P., *Wight's Estates, In re*, 6 W. R. 718. *Wigan Glebe, In re*, 3 W. R. 41.

A railway company took land settled to uses, and paid the purchase-money into court under the Lands Clauses Act. Certain houses which were settled to the same uses were condemned by the commissioners acting under the Metropolitan Building Act, 1856, s. 74, and the houses were rebuilt by the tenant for life, more money being expended than the money paid in by the company. A petition was presented by the tenant for life under s. 69 of the Lands Clauses Act, for payment of the money paid in part payment of the expenses of rebuilding:—Held, that the case came within the spirit of s. 69, and the court made the order. *Davies' Estate, In re, Crystal Palace and West End Ry., In re*, 3 De G. & J. 144; 27 L. J., Ch. 712; 4 Jur. (N.S.) 1029; 6 W. R. 844.

Where an act of a company provided that the money paid into court should be applied in the redemption of the land tax, or in the discharge of incumbrances affecting the lands taken by the company, or other lands settled or to be settled to the same uses as directed by the testator, the court refused to make any order on a petition presented by all the parties interested in the fund, praying that a portion of the residue of it might be applied in the erection of a new farm-house and buildings on an estate which had been purchased with the proceeds of a portion of the fund. *Rudyerd, In re*, 2 Giff. 394; 6 Jur. (N.S.) 816; 3 L. T. 232.

Where a piece of land had been taken by a railway company, and the purchase-money paid into court, the court allowed the money to be laid out in building cottages on another part of the estate which was lying waste and unproductive; but in such a case no part of the money will be paid out till the buildings are completed. *Dummer, In re*, 2 De G. J. & S. 15; 34 L. J., Ch. 496; 11 Jur. (N.S.) 615; 12 L. T. 626; 13 W. R. 908.

Repairs to Copyhold House.]—Under a will A. was tenant for life of a copyhold house and two leasehold houses. The latter having been taken under the Lands Clauses Act, the purchase-money was paid into court under s. 69. The trustee of the will having entered into a contract for putting the copyhold house into permanent repair, and there being no trust funds in hand out of which the expense could be defrayed, the court, upon a petition for reinvestment presented by the tenant for life and the trustee, and without requiring service on the remaindermen, ordered the contract price of the repairs to be paid to the trustee out of the fund in court, and the remainder to be invested in consols and the dividends paid to the trustee. *Aldred's Estate, In re*, 51 L. J., Ch. 942; 21 Ch. D. 228; 46 L. T. 379; 30 W. R. 777.

Expenditure already Incurred.]—A tenant for life of settled estates petitioned for the application of purchase-money paid into court under a local government act, which incorporated the Lands Clauses Act, in reimbursing him for expenditure incurred in permanent improvements before the purchase was made or contemplated:—Held, that he had incurred the expenditure without expectation of having it repaid, and could not take advantage of the money which had unexpectedly come in. *Stock's Devised Estates, In re*, 42 L. T. 46.

In 1890 a rector rebuilt the rectory at a time when considerable repairs would otherwise have been necessary. In 1893 some of the glebe was acquired by the Manchester Ship Canal Co., and the purchase-money paid into court. Part of the expenses of rebuilding the rectory was still unpaid. On a petition by the rector:—Held, that the sum remaining due could not be paid out of the fund in court. *Newton Heath* (*Rector*), *Ex parte*, 44 W. R. 645.

A railway company took part of the glebe land belonging to a rectory. The patron of the living and the bishop agreed with the rector that the purchase-money, when paid by the company, should be applied in paying part of the expense of rebuilding the rectory house, which was in a ruinous condition, the remainder of the money required being borrowed from Queen Anne's Bounty. The company neglected for some years to pay the money, and in order to complete the rebuilding the rector advanced a sum equal to the purchase-money himself. The company having paid the purchase-money, the rector, the patron and the bishop petitioned that it might be paid to the rector to recoup his advance:—Held, that the court had no power under the Lands Clauses Act, 1845, s. 69, to direct such an application of the money. *Williams* v. *Aylesbury and Buckingham Ry.*, 43 L. J., Ch. 825; L. R. 9 Ch. 684; 31 L. T. 521.

On a petition by a tenant for life, for the reinvestment of purchase-money paid into court under the Lands Clauses Act, the court will not allow any of the fund to be applied in recouping the tenant for life what he has already expended, unless such expenditure was properly a charge on the estate. *Leigh's Estate, In re*, supra.

A railway company took lands belonging to parties for life and in remainder under a will, and paid the purchase-money into court. After contract and before payment in, buildings were erected on the remaining land, and all parties entitled petitioned for payment out to defray the expense of such erections. On an affidavit that a great benefit would accrue to the estate by expending in building instead of investing in the funds, an order for payment out was made. *Partington, In re*, 1 N. R. 177; 7 L. T. 522; 11 W. R. 160.

Part of a fund in court, the proceeds of sale of a portion of glebe land to a railway company, ordered to be paid to the rector towards recouping past outlay in the erection of certain buildings on a farm forming part of the glebe, but only on evidence being produced to shew that the buildings formed a permanent and valuable improvement. *Holywell - cum - Needingworth (Rector), Ex parte*, 27 W. R. 707.

Special Circumstances—Municipal Offices.]—An order for the application to building purposes of the purchase-money of land taken under the Lands Clauses Act will not be made except under special circumstances. *Liverpool Corporation, Ex parte*, 35 L. J., Ch. 655; L. R. 1 Ch. 596; 12 Jur. (N.S.) 720; 14 L. T. 785; 14 W. R. 906.

A corporation was authorised by statute to borrow money for the erection of municipal offices on the security of rates. Land belonging to it having been taken by a railway company, and the purchase-money paid into court, under 8 & 9 Vict. c. 18, s. 69, a petition by the corporation for the payment out of court of this fund to be applied in the erection of the municipal offices was refused. *Ib.*

Making Roads.]—The court has not jurisdiction on the application of a tenant for life of land taken by a public company, to pay him the purchase-money lodged in court, on an undertaking by him to lay it out in making roads on the property, for the purpose of improving it and increasing the value of the inheritance. *Belfast Water Commissioners, In re*, Ir. R. 5 Eq. 63.

A railway company agreed to pay a landowner, tenant for life, a sum of money for the benefit of him or other the owner for the time being, for indemnifying him from the expenses of making a new road, etc., and as a compensation for the annoyance which he or such other owner as aforesaid might sustain in consequence of the construction of the railway; and the company agreed to pay a further sum as the price of the land taken. Both sums were paid into court. The application of the tenant for life for the absolute payment to him of the first sum refused; the costs of the roads, &c., to be paid out of it, and the rest invested. *Marlborough's (Duke) Estates, In re*, 13 Jur. 738.

Drainage.]—A company having taken part of some glebe land the court allowed part of the purchase money to be invested in the drainage of the remaining glebe. *Queen Camel (Vicar), In re*, 8 L. T. 233; 11 W. R. 503.

Payment out of Small Sum.]—Where a sum of 34*l.* had been paid into court under the Lands Clauses Act, 1845, payment out was directed to a tenant for life, he undertaking to expend the same in lasting improvements. *Kells Union, In re, Smith, Ex parte*, 21 L. R., Ir. 346.

A railway company took land which was settled on A. for life, with remainders over. The purchase-money was paid into court. An agreement for investing this sum, with the exception of 30*l.* was approved. The 30*l.* was ordered to be paid to A., he undertaking to lay it out in lasting improvements. *Barrett, Ex parte*, 19 L. J., Ch. 415; 15 Jur. 3. S. P., *Hitchin's Estate, In re*, 1 W. R. 505.

Tenant for life allowed to receive a sum of 220*l.* paid into court in respect of a portion of the estate purchased by a railway company, upon her undertaking to apply the money towards payment of the expenses of building certain cottages upon the estate and to make up the deficiency (80*l.*) herself. *Wright's Devised Estates, In re*, 6 W. R. 718.

h. Payment Out to Persons Absolutely Entitled.

i. *In General.*

What is.]—A transfer from one account in court to another is payment out of court within the meaning of the act. *Melling* v. *Bird*, infra.

Who may Apply.]—Under a private act of parliament, money to be paid to certain parties upon petition to the court: Lord Chancellor refused to make an order to pay the money to persons deriving title from the original parties, and ordered them to file a bill. *King, Ex parte*, 2 Bro. C. C. 158.

Where an estate is directed to be sold, and the proceeds to be distributed, the persons entitled to receive the proceeds may petition for the payment out of money paid into court under the Lands Clauses Act as purchase-money for part of the estate. *Melling* v. *Bird*, 22 L. J., Ch. 599; 17 Jur. 155; 1 W. R. 219.

Order to Pay Direct.]—A railway company was ordered to pay money to vendors under a decree for specific performance; they paid the money into court instead. On the petition of the vendors, the money was paid out to them. *Galliers* v. *Metropolitan Ry.*, 40 L. J., Ch. 544; L. R. 11 Eq. 410; 19 W. R. 795.

Part of Sum.]—A railway company took, under its compulsory powers, land which was settled in such a way that a father and a son had at that time between them the absolute beneficial interest. The purchase-money, as fixed by arbitration, having been paid into court:—Held, that the owners were entitled to have part of the fund paid out to them as absolutely entitled, and at the same time to have another part reinvested in the purchase of land, to be settled to somewhat different uses, at the expense of the company. *Jones Trust Estate, In re*, 39 L. J., Ch. 190; 18 W. R. 312.

Pre-emption — Excess Price — Recouping Estate.]—A right of pre-emption given by will is not extinguished by reason of the land to which

such right relates having been purchased by a railway company, prior to the period of the right accruing, under the compulsory powers of an act of parliament passed after the death of the testator. A testator, by will, gave real estate to his wife for life, and after her death he directed his trustees to sell the same, and to divide the proceeds among his children; but as to a portion of such real estate, he gave to one of his sons a right of purchasing such portion at a specified sum. The testator having died, a railway company, during the life of his widow, and under the compulsory powers of an act of parliament passed after his death, purchased the portion of the real estate which the son had a right of purchasing, and paid a higher price for the same than the price at which the son had a right of purchasing it:—Held, that the son was entitled to the purchase-money paid by the company, on paying to the testator's personal estate the sum specified in his will. *Cant, In re*, 4 De G. & J. 503; 29 L. J., Ch. 119; 6 Jur. (N.S.) 183; 7 W. R. 624.

Money inapplicable to Statutory Purposes.]—The Metropolitan Board of Works in the exercise of compulsory powers purchased land of the Chelsea Waterworks Company, which was not superfluous land, and paid the purchase-money into court. On petition to pay the money out to the waterworks company:—Held, that the money was rightly paid into court; and, that inasmuch as the money could not be applied to any of the purposes mentioned in s. 69 of the Lands Clauses Act, 1845, the waterworks company was absolutely entitled to the money. *Chelsea Waterworks Co., In re*, 56 L. J., Ch. 640; 56 L. T. 421.

Attachment.]—Semble, the holder of a garnishee order has no claim to money paid into court under the Lands Clauses Act. *Howell* v. *Metropolitan District Ry.*, 51 L. J., Ch. 158; 19 Ch. D. 508; 45 L. T. 707; 30 W. R. 100.

Adverse Claimants—Claim of the Crown.]—A railway company, under the powers of its act, gave notice to a lord of the manor to take a piece of land on the seashore, which he claimed as part of the waste of his manor. The purchase-money was assessed by arbitration, but an adverse claim having been made by the Crown, the company paid the purchase-money into court under s. 76 of the Lands Clauses Act. The Crown filed an information against the lord of the manor claiming the land, together with other land, as part of the foreshore. The lord of the manor having filed a petition for payment of the purchase-money to him:—Held, that as the Crown could not be brought before the court under the Lands Clauses Act to contest the claim of the petitioner, the petition ought to stand over till the information had been heard. *Lowestoft Manor, In re, Reeve, Ex parte*, 52 L. J., Ch. 912; 24 Ch. D. 253; 49 L. T. 523; 32 W. R. 809—C. A.

Quære, as to the course which ought to have been pursued if the rival claimant had been a subject. *Ib.*

Tenant's Interest as long as Landlord's.]—A. agreed, in writing, to let to B. premises at a rent of 36*l.*, payable quarterly; and not to raise the rent or give B. notice to quit so long as he continued to pay the rent when due. A., who had only a leasehold interest to expire in 1881, had also agreed verbally with B. to let him remain in the premises for such term of years, not exceeding A.'s term therein, as B. might desire to continue tenant. A railway company contracted to purchase the interest of B. in the premises, which he described as "held for any term at tenant's option, but not beyond the term and interest of A., which term will expire in 1881." The company disputed B.'s title to the interest described, and paid the purchase-money into court:—Held, that the relation of landlord and tenant made B. a purchaser for valuable consideration to the extent of his lease; that the Statute of Frauds was no bar in equity to B.'s claim; that B. was not a mere tenant from year to year, but had a right to retain possession as long as his landlord's interest existed, and to enforce that right in equity; and that he was entitled to the purchase-money. *East London Ry., Ex parte, King, In re*, L. R. 16 Eq. 521; 29 L. T. 288; 21 W. R. 881.

ii. *Conversion and Reconversion.*

See CONVERSION AND RECONVERSION.

iii. *Corporate Trustees.*

Charity Property.]—A petition was presented by a company, as governors of a charity, for payment out of the sum of 1,000*l.* which had been paid into court to the account of the company, under the provisions of the Lands Clauses Act, 1845, in respect of land taken for the purposes of a railway. The land formed part of an estate belonging to the company, the rentals and profits whereof were applied for the purposes of the charity. The part of the estate which remained in the possession of the company was led by them on a building lease, and the company had, out of moneys in their hands representing income of the charity, expended 1,000*l.* in enabling the builder to improve the lands comprised in the building lease by buying up certain rights over roads claimed by a neighbouring landowner. This expenditure had been sanctioned by the charity commissioners, and they approved the present application, although they gave no express consent, because the moneys were under the control of the court:—Held, that the charity commissioners had practically authorised this outlay as capital expenditure; and that the company were entitled to have the money paid out, as being absolutely entitled thereto. *Haberdashers' Co., Ex parte*, 55 L. T. 758.

Purchase-money of charity property purchased by a railway company ordered to be paid to the trustees of the charity. *Tid St. Giles' Charity, Ex parte*, 17 W. R. 758.

A fund in court, paid in under the Lands Clauses Act, 1845, as the price of charity land, may be paid out to the trustees of the charity, as being persons absolutely entitled thereto. *Spurstowe's Charity, In re*, 43 L. J., Ch. 512; L. R. 18 Eq. 279; 30 L. T. 355; 22 W. R. 566.

The purchase-money for land, the property of a charity, taken under the provisions of the Lands Clauses Act, 1845, had been paid into court, and invested in government securities. A petition was now presented by the trustees of the charity for the transfer of the fund to the account of "The Official Trustees of Charitable Funds":—Held, that this must be considered

as a petition for payment of money out of court; and, therefore, that the parties taking the land must pay the costs of the petition. *Bristol Free Grammar School, In re*, 47 L. J., Ch. 317.

Land belonging to a charity was taken by a corporation under the Lands Clauses Act, and the purchase-money paid into court. The charity commissioners having approved a scheme for the reinvestment of the purchase-money in land, and directed that the money when paid out to the official trustee of charity funds should be applied in the proposed purchase, the trustees of the charity petitioned for the transfer of the fund in court to the official trustee, and that the costs, including the costs of reinvestment, might be paid by the corporation:—Held, that payment to the official trustee was payment to a person absolutely entitled, and the corporation were not liable to pay any further costs. *Bishop Monk's Horfield Trusts, In re*, 43 L. T. 793; 29 W. R. 462.

Church Trustees—Burial Ground.]—The fee-simple of a burial ground, since closed by order in council, was vested in the vicar and churchwardens of the parish, and the burial fees were directed to be received by the churchwardens, and by them handed over to a body styled "the church trustees." A portion of the burial ground having been required by a railway company for the purposes of their act, and the purchase-money having been directed to be invested and accumulated, the question was who was entitled to the fund and its accumulations:—Held, that the church trustees were entitled. *St. Pancras Burial Ground, In re*, 15 W. R. 150.

iv. *Tenant in Tail (Disentailing Deed).*

Rights.]—Under s. 71 of the Lands Clauses (Scotland) Act, a person who has an entailed estate can only take from a company such part of an agreed price for his own personal use as the Court of Session, or an independent third person, shall think reasonable. *Scottish North Eastern Ry.* v. *Stewart*, 3 Macq. H. L. 382; 5 Jur. (N.S.) 607; 7 W. R. 458.

Disentailing Deed—Execution of.]—A fund in court representing land taken by a railway company under its compulsory powers will not be paid out to a tenant in tail without a disentailing deed having been executed. *Butler, In re*, L. R. 16 Eq. 479.

When a fund paid into court under the Lands Clauses Act, 1845, is claimed on petition by a person who would have been the tenant in tail of the land represented by the fund, it is unnecessary for him to execute a disentailing deed as a condition of having the fund paid out to him. *Row, In re*, 43 L. J., Ch. 347; L. R. 17 Eq. 300; 29 L. T. 824. S. P., *Watson, In re*, 4 N. R. 528—L.JJ.

A fund in court representing land taken by a canal company, under the powers of its special act, will not be paid out to a tenant in tail without a disentailing deed having been executed. *Norcop, In re*, 31 L. T. 85.

A railway company having purchased settled land, the tenant for life conveyed to them under their act, and he and the tenant in tail applied to draw the purchase-money out of the court. No disentailing deed had been executed:—Held, that the money was to be considered as bound by the limitations affecting the land, and to be dealt with as subject to be invested in lands to be settled to the same uses as the sold lands, and that a disentailing deed was necessary to enable the parties to draw the money. *Great Southern and Western Ry., In re*, 9 Ir. Eq. R. 482.

The court will not pay out funds the produce of lands taken by a railway company under compulsory powers to a tenant in tail in possession, or to a tenant for life and tenant in tail in remainder, without the production of a disentailing deed duly enrolled. *Limerick and Ennis Ry., In re, Smyth, Ex parte*, 10 Ir. Eq. R. 66.

The court, without requiring a disentailing deed to be executed, will pay out to a tenant in tail in possession money lodged in court by a railway company for the purchase of lands. *Mounsell, Ex parte*, Ir. R. 2 Eq. 32.

A fund which represented the interest of a tenant in tail in remainder in land taken by a railway company ordered to be paid out of court to the tenant in tail in remainder with the consent of the tenant for life, without requiring a disentailing deed. *L. & N. W. Ry., Ex parte, Holden, In re*, 1 Hem. & M. 445; 10 Jur. (N.S.) 308.

Where there was a fund under 200*l.* in court, the proceeds of land, of which a petitioner, who had just attained twenty-one, was tenant in tail, the court, though no disentailing deed had been executed by the petitioner, made an order for the payment of the fund to him. *Sowry* v. *Sowry*, 6 Jur. (N.S.) 337; 8 W. R. 339.

A fund in court produced by a portion of land taken by a railway company will be paid to the tenant in tail, without his being required to execute a disentailing deed. *S. E. Ry., In re*, 30 Beav. 215; 30 L. J., Ch. 602; 7 Jur. (N.S.) 890; 9 W. R. 404.

Where a tenant in tail has become absolutely entitled to a share of a fund in court, it will in many cases be ordered to be paid out without requiring the execution of a disentailing deed. This practice does not depend only on the smallness of the fund. *Nottley* v. *Palmer*, 11 Jur. (N.S.) 968; 13 L. T. 647; 14 W. R. 170.

The court will order small sums of money, paid into court as the purchase-money of lands taken under the Lands Clauses Act, to be paid out to the tenant in tail of the lands without requiring a disentailing deed. *Watson, In re*, 10 Jur (N.S.) 1011.

Advances to.]—Case in which the court will order advances out of capital to be made to their mother for the maintenance of children, themselves entitled to the income, and as tenants in tail, to the capital. *Nottley* v. *Palmer*, supra.

v. *Persons having Limited Interests.*

Tenant for Life.]—Where it was probable that, after payment of a sum out of court which had been paid in by a railway company, the balance left would be less than 20*l.*, the court ordered the balance, if less than 20*l.*, to be paid to the tenant for life. *Egremont (Lord), In re*, 12 Jur. 618.

Where money has been paid into court in respect of lands taken by the company from persons under disability, and, with the exception of a small surplus, has been afterwards laid out in the purchase of lands to be settled to the same uses, if such surplus is under 20*l.*, the court will allow it to be paid to the tenant for

life, but not otherwise. *Bateman's Estate, In re*, 21 L. J., Ch. 691.

On a purchase by a railway company of lands from a tenant for life in possession, the court ordered part of the purchase-money to be paid to the tenant for life by way of compensation for the injury and inconvenience which he had sustained. *Collis, In re*, 14 L. T. 352.

On the death of the last cestui que vie of a renewable leasehold, the tenant for life, who had been in receipt of the whole income, and afterwards of the dividends of the compensation money paid by a railway company, was held entitled to the corpus of the compensation money, but without prejudice to any right of the remainderman to relief in respect of the non-renewal of the lease, according to the directions of the testator, under whose will they and the tenant for life were entitled. *Beaufoy's Estate, In re*, 1 Sm. & G. 20; 16 Jur. 1084.

By the Lands Clauses Act, s. 73, a tenant for life is forbidden to take for his own use money which may be contracted to be paid, either in consideration of his not opposing a bill, or for any special damage to be done to himself with reference to the severance of the estate; and it is for the Court of Chancery to determine what portion of such money is to be assigned to the tenant for life, in respect of his own personal grievance. But the tenant for life is still perfectly competent at law to enter into a contract for the whole estate, for the whole damage by severance, and for the withdrawal of opposition to a bill as the condition of the contract that may be entered into. *Taylor* v. *Chichester and Midhurst Ry.*, 39 L. J., Ex. 217; L. R. 4 H. L. 628; 23 L. T. 657.

A. was entitled as tenant for life to leasehold premises, where she carried on the business of a hotel-keeper, with remainder to B. By deed dated the 11th October, 1864, B., in consideration of 107*l.* advanced to him, assigned all his interest in the premises to C., with a proviso that, in case B. or any of his children, within three years after the accrual of B.'s title, should be desirous of repurchasing, C. would re-assign the premises on payment of the said sum of 107*l.* and interest at 6 per cent. The South City Market Company, being a public body, acting under the powers of their act, and the Lands Clauses Act, 1845, and the Railway Clauses Act, 1851, required these leasehold premises. The arbitrator awarded a sum of 1,251*l.*, of which sum 451*l.* was stated by the award to be for the purchase of the interest of A. and D. (in whom C.'s interest under the deed of the 11th October, 1864, was then vested) as lessees, and A. as occupier, and 800*l.* awarded to the same persons under the heading "Compensation for severance or other injury." A. and D. traversed the award, and a consent between the company and A. and D. (but to which the representatives of B., who was then deceased, were not parties), was made a rule of the Queen's Bench Division, by which the award was increased by a sum of 1,249*l.* of which sum 800*l.* was stated by the consent order to be for trade loss in respect of the property, and the consent order further directed that of the sum of 1,251*l.* lodged by the company, 901*l.* should be dealt with as representing the leasehold interest in the premises, and the residue, 350*l.*, together with the further sum of 1,249*l.*, payable by the company, should be paid to A. in respect of her trade disturbance in the premises. A. having claimed the whole of the 800*l.*, and 799*l.* increase thereon, under the consent order:—Held, that the sum of 800*l.* should (under the circumstances) be deemed part of the compensation for taking of the premises and not in respect of any personal grievance of A., and that A. (under the circumstances of the case) was entitled to the 799*l.* absolutely. *South City Market Co., In re, Bergin, Ex parte*, 13 L. R., Ir. 245.

A tenant for life can only claim that benefit from compensation money in respect of lands taken by a company, to which he is legally entitled, and any additional compensation money, though paid by the company in recognition of a right claimed by tenant for life, must, if such right be not sanctioned by law, enure for the benefit of the estate. *Wilson, In re*, 32 L. J., Ch. 191; 9 Jur. (N.S.) 1043; 7 L. T. 772; 11 W. R. 294.

A railway company agreed to pay a landowner, tenant for life, a sum of money for the benefit of him or other the owner for the time being, for indemnifying him from the expenses of making a new road, &c., and as a compensation for the annoyance which he or such other owner as aforesaid might sustain in consequence of the construction of the railway; and the company agreed to pay a further sum as the price of the land taken. Both sums were paid into court. The application of the tenant for life for the absolute payment to him of the first sum refused; the costs of the road, &c., to be paid out of it, and the rest invested. *Marlborough's (Duke) Estates, In re*, 13 Jur. 738.

—— **Minerals.**]—A tenant for life without impeachment of waste is not entitled to an apportioned part of the compensation money paid into court by a railway company under s. 69 of the Lands Clauses Act, 1845, in respect of unworked mines and minerals lying under or adjacent to a railway, constructed on land conveyed to the company by the tenant for life under s. 7 of the act, even though the bulk of the minerals could have been, in all probability, worked out during his life. *Robinson's Settlement Trusts, In re*, 60 L. J., Ch. 776; [1891] 3 Ch. 129; 65 L. T. 244; 39 W. R. 632.

Minerals were devised on trust for B. for life without impeachment of waste, with remainder on trust for the defendant for life, without impeachment of waste, with remainders over. The minerals were leased by the testator. A railway passed over a portion of the lands under which they lay, and after the death of B. the lessee gave the railway company notice of his desire to work the minerals lying under and adjoining a portion of the railway. The company gave a counter-notice that these minerals were required for the support of the railway, and ultimately paid compensation money, part of which was apportioned as paid in respect of the lessor's interest:—Held, that as the minerals in respect of which the compensation money had been paid were not of such extent that they could not possibly have been got during the life of the existing tenant for life, the defendant, as such tenant for life, was entitled to such apportioned part of the compensation money under s. 74 of the Lands Clauses Act, 1845. *Barrington, In re, Gamlen* v. *Lyon*, 56 L. J., Ch. 175; 33 Ch. D. 523; 55 L. T. 87; 35 W. R. 164.

Rector.]—A sum of money, part of a larger sum paid by a railway company for glebe land, ordered to be paid to the rector for the time being for his own use. *Little Sleeping (Rector), Ex parte, East Lincolnshire Ry., In re*, 5 Railw. Cas. 207.

Dowress.]—When land belonging to an infant, subject to his mother's right of dower, was taken by a railway company, and the purchase-money, as determined by two valuers, was paid into court :—Held, that the dowress was entitled to have the value of her right of dower, as determined by the valuers, paid to her out of the fund in court. *Hall's Estate, In re*, 39 L. J., Ch. 392 ; L. R. 9 Eq. 179.

Lord of Manor—Commonable Land.]—By an inclosure act commissioners were required to set out and allot unto the lord of the manor in which the waste grounds were situated in trust for the occupiers for the time being of certain cottages in lieu of their rights or pretended rights of cutting turves, so much of the waste grounds as they (the commissioners) should think proper for a turf common. A portion of this turf common so set out by the commissioners was taken by a railway company :—Held, that the lord of the manor had not been divested of his rights as legal owner of the land by the inclosure act, and that he was entitled to such portion of the purchase-money as represented the value of the soil of the land taken. *Att.-Gen.* v. *Meyrick*, 62 L. J., Ch. 313 ; [1893] A. C. 1 ; 1 R. 54 ; 68 L. T. 174 ; 57 J. P. 212—H. L. (E.)

vi. *Where Possessory Title.*

Adverse Possession.]—A party took possession in 1850 of a vacant piece of land and continued in uninterrupted possession of it until 1869, when it was taken by a railway company and the purchase-money paid into court under the Lands Clauses Act, 1845, s. 79. In 1871 he presented a petition for the payment out of court to him of the purchase-money, as being the person entitled to the land in respect of which the purchase-money had been paid into court :—Held, that his inchoate title to the land having been interrupted by the parliamentary rights of the company, he had no title to the purchase-money. *Hollingsworth, Ex parte*, 24 L. T. 347 ; 19 W. R. 580.

When the occupant of land taken by a railway company under the Lands Clauses Act had a possession which would have ripened into a title by adverse possession, but for the dealings with the company, the court allowed the purchase-money to be paid to such occupant. *Evans, In re*, 42 L. J., Ch. 357—L.JJ.

A person shewing title by adverse possession for twenty-six years after the expiration of a term for 192 years to land taken under the provisions of the Lands Clauses Act, 1845, will, in the absence of any claim by, or evidence of the existence of, the reversioner, be deemed to be the owner of the land, and entitled to the purchase-money under the Lands Clauses Act, 1845, s. 79. *Chamberlain, Ex parte*, 49 L. J., Ch. 354 ; 14 Ch. D. 323 ; 42 L. T. 358 ; 28 W. R. 565.

In 1865 a house in the possession of the plaintiff, who was the owner thereof for the residue of a long term of years expiring in 1878, was compulsorily taken by the defendants under the Lands Clauses Act. The plaintiff claimed compensation on the footing of being the absolute owner, it not being known who was the reversioner, and a sum representing the reversion was paid into court without prejudice to the plaintiff's claim. More than twelve years after the expiration of the term, application was made by a person claiming under the plaintiff for payment of the fund in court :—Held, that as the plaintiff never was in possession as owner of the reversion, the application failed. *Chamberlain, Ex parte* (14 Ch. D. 323) doubted. *Gedye* v. *Public Works Commissioners*, 60 L. J., Ch. 587 ; [1891] 2 Ch. 630 ; 65 L. T. 359 ; 39 W. R. 598—C. A.

A railway company agreed to purchase for 600*l.* the fee-simple of lands, of which W. was the true owner, from H., who was in possession of them. Afterwards, finding that H. had only a possessory title of nineteen and a half years, they paid the 600*l.* into court to the account of the party interested therein, took possession, and executed a deed-poll under s. 77 of the Lands Clauses Act, 1845, reciting their desire that the land should vest in them for all the estate of H., and purporting to vest in themselves the fee-simple of the lands. No claim was made on behalf of W. either to the land or to the purchase-money until after the expiration of twenty years from the time when H. had taken possession. Upon petition by persons claiming under H. for payment out to them of the 600*l.* in court :—Held, as against the representative of W., that they were entitled to the 600*l.*, as being the money which the company had contracted to pay for the purchase of H.'s interest in the lands. *Winder, Ex parte* and *In re*, 46 L. J., Ch. 572 ; 6 Ch. D. 696 ; 25 W. R. 768.

A railway company contracted to purchase lands of C., and paid the purchase-money into court under s. 69 of 8 & 9 Vict. c. 18. It afterwards appeared that C.'s title was derived under an indenture of mortgage, dated in 1814, he having been in possession ever since. C. petitioned for investment and payment of the dividends to him. The petition was granted, s. 112 not applying. *Cook, In re*, 8 L. T. 759 ; 11 W. R. 1015.

Money lodged in court under the Lands Clauses Act was paid out on a title based on continued possession by a tenant without payment of rent for fifteen years after the expiration of his own and the next superior interest. *Forde, Ex parte, Blackrock Commissioners, In re*, [1894] 1 Ir. R. 156.

—— **Service on Landowner—Lapse of Time.**]—In 1867 a railway company paid a deposit into court under s. 85 of the Lands Clauses Act, in respect of the interest of a tenant for life in certain settled lands required for their undertaking, and took possession of their lands. Shortly afterwards the company purchased the fee-simple, of the lands from the trustees of the settlement, and the conveyance to which the tenant for life was a party was duly executed. The money was left in court, and in 1884 was included in the return issued from the paymaster's office under the Rules of the Supreme Court Fund Rules, 1884, r. 101, of credits, which had not been dealt with for fifteen years. The tenant for life had died in 1883. In 1886 the company petitioned for the payment out of the fund without serving the representative of the landowner :—Held, that service on the landowner might be dispensed with, considering the lapse of time since the conveyance. *Lancashire and Yorkshire Ry., In re*, 55 L. T. 58.

vii. *Trustees.*

Under Power of Appointment.]—Land devised on trust for A. for life, with remainder, as she should appoint, was taken by a railway company

and the purchase-money paid into court. A., by will, appointed to two trustees on trusts for persons in succession. On petition by these trustees, the purchase-money was ordered to be paid out to them. *Illman's Will, In re*, 39 L. J., Ch. 760 ; 22 L. T. 836 ; 18 W. R. 962.

Trustees for Sale.]—When the purchase-moneys of property subject to a trust for sale for the benefit of infant cestuis que trustent and taken by a railway company, were paid into court by the company under the Lands Clauses Act, 1845, the court, upon a petition by the trustees for sale and the cestuis que trustent for payment out to the trustees for sale, declined to treat the trustees for sale as persons absolutely entitled within s. 69, and ordered the fund to be carried over to the separate account of the infants, directing the dividends to be paid to the trustees. *Reaston's Estate, In re*, 41 L. J., Ch. 832 ; L. R. 13 Eq. 564 ; 26 L. T. 148 ; 20 W. R. 355.

Land was vested in trustees to sell as soon as the youngest of a class of children attained twenty-one, and to divide the proceeds among such of the children as should be then living, and the issue of such of them as should be dead. Part of the land was taken under the Lands Clauses Act before the youngest child attained twenty-one, and the purchase-money was paid into court. After the youngest child attained twenty-one the trustees and some of the cestuis que trustent presented a petition asking that the fund might be paid out to the trustees, or in the alternative that the shares of those cestuis que trustent who were petitioners might be paid out, leaving the other shares in trust in the matter of the act. The court refused to order payment out to the trustees, but expressed its willingness to make an order according to the other alternative. The petitioners did not object to this, but the company insisted that the order ought to be for payment of the whole fund to the trustees :—Held, that as the petitioners did not object to the order proposed, the company could not complain of it. *Sowry, In re*, L. R. 8 Ch. 736 ; 29 L. T. 233 ; 21 W. R. 717.

Where lands settled in trust for a widow during her life or until her second marriage, in trust for sale, were purchased from the widow by a railway company under s. 7 of the Lands Clauses Act, 1845, the purchase-money which had been paid into court by the company under s. 69, was, on the petition of the widow, ordered to be paid out to the trustees of the settlement, they undertaking to hold the same upon the trusts of the settlement. *Evans' Settlement, In re*, 14 Ch. D. 511 ; 43 L. T. 172.

A fund in court, representing the purchase-money of leaseholds taken by a railway company under the Lands Clauses Act, ordered to be paid out to trustees having a power of sale, the cestui que trust being an infant. *Gooch, In re*, 3 Ch. D. 742.

Where purchase-money for land has been paid into court under the Lands Clauses Act, it may be ordered to be paid out to trustees of a settlement or will with a power of sale, as persons "becoming absolutely entitled" under s. 69. *Hobson's Trusts, In re*, 47 L. J., Ch. 310 ; 7 Ch. D. 708 ; 38 L. T. 365 ; 26 W. R. 470 —C. A.

A share of stock in court, which represented money paid into court by a railway company for the purchase of land taken under their statutory powers, had been assigned by the beneficial owner to trustees, on trust for sale and conversion, at the request in writing of herself during her life and afterwards at the discretion of the trustees, and to hold the proceeds on certain trusts :—Held, that, the settlor joining in the petition, and the company not objecting, the share might be transferred to the trustees as persons "becoming absolutely entitled" within the meaning of s. 69 of the Lands Clauses Act, 1845. *Ward's Estate, In re*, 54 L. J., Ch. 231 ; 28 Ch. D. 100 ; 33 W. R. 149.

Where purchase-moneys of settled lands taken by a railway company have been paid into court under the Lands Clauses Act, 1845, trustees for sale of such lands are not, either under the Lands Clauses Act, s. 69, or the Settled Land Act, s. 21, entitled as of right to payment out. Under the Settled Land Act the court has a discretion to order such payment. Whether it has such discretion under the Lands Clauses Act, quære. *Hobson's Trusts, In re* (7 Ch. D. 708), doubted. *Smith, In re, L. & N. W. Ry., Ex parte*, 58 L. J., Ch. 108 ; 40 Ch. D. 386 ; 60 L. T. 77 ; 37 W. R. 199—C. A.

Where a sum paid into the bank, under the Lands Clauses Act, was about to be reduced by an investment in land to less than 70*l*., the residue was ordered to be paid out to trustees nominated under the 71st section. *Kinsey, In re*, 1 N. R. 303.

Purchase-money of land taken by a company paid out without service on the cestuis que trustent ; the trustees for sale, after the death of a tenant for life, adopting the purchase. *East, In re*, 2 W. R. 111.

Trustees with a power of sale are "persons absolutely entitled" within the meaning of s. 69 of the Lands Clauses Act, 1845, and the purchase-money of lands vested in such trustees paid into court under that act may be paid out to them on petition. *Thomas's Settlement, In re*, 45 L. T. 746 ; 30 W. R. 244.

For Married Woman and Children.]—Where a railway company took real property vested in trustees for a married woman and her children, and paid the money into court, the court declined, under ss. 69 and 78 of the 8 & 9 Vict. c. 18, to direct the fund to be paid to the trustees. *Sharwood, In re*, 3 Giff. 218.

i. Petition or Summons.

i. *What Court and Transfer.*

To what Branch of Court.] — Lands were devised by A. and B. upon trusts almost identical. A railway company took part of A.'s lands, and an order for investment of the purchase-money was made by Stuart, V.-C. Subsequently the company took part of B.'s lands, and a similar order for investment was made by Wood, V.-C. One petition for payment out of both funds was presented to Wood, V.-C., who made the order, but as he entertained some doubt as to his jurisdiction, desired that the case should be mentioned to the Court of Appeal :—Held, that all subsequent orders in a matter should be made where the first order was made, and that in dealing with both funds, that in Wood, V.-C.'s jurisdiction should have been transferred to Stuart, V.-C., to whom the application for payment out should have been made. *Browse, In re*, 14 L. T. 37.

When two funds paid into court under the Lands Clauses Act have been dealt with by different branches of the court, and it is desired to deal with both funds at the same time, the court will give leave to present one petition in both matters in one branch of the court, without transferring either of the matters. *Arden (Lord), In re*, L. R. 10 Ch. 445; 24 W. R. 190.

The rule which requires applications to be made in the same branch of the court:—Held, not to apply to applications for the payment of dividends upon sums paid into court in the matter of a private act of parliament. *Bilston Curacy, In re*, 10 W. R. 516. S. P., *Hayter, Ex parte*, 10 W. R. 557.

ii. *Title and Form.*

How entitled.]—A petition presented under a local act of parliament, in which the Lands Clauses Act is incorporated, must be entitled "In the matter of the Lands Clauses Consolidation Act" (8 & 9 Vict. c. 18), as well as "In the matter of the local act." *Clarke, In re*, 10 L. T. 366.

The application of the purchase-money of land taken by a railway company to the redemption of land tax, is a reinvestment within the Lands Clauses Act, and the costs of it are chargeable on the company under s. 80; and the land being part of a charity estate, the petition must be sanctioned by the charity commissioners' certificate, and must be intituled in the matter of the statute of 52 Geo. 3. c. 101, must have the fiat of the attorney-general, and be signed by two individual petitioners, and not by a corporation and an individual. *L. B. & S. C. Ry., In re*, 18 Beav. 608.

A railway company agreed with the committee to purchase part of a lunatic's land. The purchase-money was ascertained under the Lands Clauses Act, s. 9, but had not been paid into court. A petition was presented by the committee and next of kin of the lunatic, praying for confirmation of the master's report affirming the sale, for liberty to the committee to convey, that the purchase-money should be invested in consols, and be carried to "the account of the committee and the company," and for payment of the dividends to the committee. The lords justices directed the petition to be entitled in the Lands Clauses Act, and in the Chancery Division of the High Court as well as in lunacy, and that the purchase-money when invested should be carried to "the account of the lunatic and of the company." Subject to these amendments the court made the order as prayed, holding that actual payment in, under, and to the account directed by s. 69, was not essential to the company's title. *Milnes, In re*, 1 Ch. D. 28; 24 W. R. 98.

Form and Contents.]—Upon petition for the investment of money paid in under a railway act, it was objected that the petition was made unnecessarily long by the introduction of certain clauses in the railway acts, which, being public acts, were sufficiently known to the court, and that the costs of such petition ought not to be allowed:—Held, that the introduction of the railway clauses was not unnecessary, and the petitioner was entitled to the costs. *Lilley's Trustees, In re*, 17 Sim. 110; 19 L. J., Ch. 329.

The consent of the charity commissioners is not required to a petition presented by the trustees of a charity for the reinvestment in land of the purchase-money paid into court in respect of land belonging to the charity, which has been taken compulsorily under the Lands Clauses Act, 1845. *Kyngeston's Charity, In re*, 30 W. R. 78.

Number of Petitions.] — Moneys paid into court by two companies under the Lands Clauses Act, ordered to be paid out on one petition, and the costs appropriated between the two companies. *Sheffield Corporation, Ex parte*, 21 Beav. 162.

Sealing Petition.]—When a company is joined as a co-petitioner, but the petition asks no payment to them, it need not bear the company's seal. *Edward VI. Almshouses, In re*, 37 L. J., Ch. 664; 19 L. T. 80; 16 W. R. 841.

Sealing Summons.]—A summons by a railway company for payment out of a sum of less than 1,000*l.* to their secretary, was directed to be sealed in analogy to the practice in case of petitions. *Maidstone and Ashford Ry., In re*, 53 L. J., Ch. 127; 25 Ch. D. 168; 49 L. T. 777; 32 W. R. 181.

iii. *Parties and Service.*

Person partly entitled.]—A party entitled to an aliquot share of purchase-money paid into court may on petition obtain payment of such share without notice to the other parties interested. *Midland Ry., In re*, 11 Jur. 1095.

Service on Company.]—A sum of money was paid into court by a railway company, and the dividends were ordered to be paid to Alexander H. and Frances Elizabeth H. The latter married; and a petition, rendered necessary by that event, was presented by Alexander H. and Frances Elizabeth and her husband for payment of the dividends, and was served on the company:—Held, that the service on the company was unnecessary, and that the costs must be paid by the petitioners. *Horden, Ex parte*, 2 De G. & Sm. 263; 12 Jur. 846.

Certain glebe lands belonging to the rectory of Kirkby Overblow having been taken by a railway company, and the money paid into court, a petition was presented by the rector for investment of the money:—Held, that it was not necessary to serve the company with notice of the petition. *Kirkby Overblow (Rector), Ex parte, Leeds and Thirsk Ry., In re*, 19 L. J., Ch. 329.

When the purchase-money of land taken under the Lands Clauses Act was paid into court in a cause to the credit of the account of the entailed estates of the testator:—Held, that such payment discharged the fund from the jurisdiction of the act, and that the company was improperly served with a petition for payment out. *Prescott* v. *Wood*, 37 L. J., Ch. 691.

Churchwardens and Overseers.] — Under 59 Geo. 3, c. 12, lands belonging to the parish are vested in the churchwardens and overseers of the parish, as a corporation. Therefore, where feoffees to charitable uses were empowered to

sell and convey their lands to the commissioners under the Improvement Act:—Held, that the petition for the investment of the purchase-money should be presented in the names of the churchwardens and overseers of the parish in which the charity was established. *Annesley, Ex parte*, 2 Y. & Coll. 350; 6 L. J., Ex. Eq. 81.

Semble, that churchwardens and overseers, having no corporate seal, have no power to execute a power of attorney, authorising a party to continue receiving the dividends of stock, notwithstanding fluctuations in the number and identity of the numbers of the corporation. *Ib.*

Freemen.]—In cases where the land belonging to a corporation is taken by a railway company, and the purchase-money is paid into the bank, the court will not allow any steps to be taken with reference to the final application of such purchase-money, unless it be satisfied that the freemen are represented. *Lincoln Corporation, Ex parte, Great Northern Ry., In re*, 6 Railw. Cas. 738.

Sect. 85.]—Where a railway company has paid the estimated value of a piece of land into court under s. 85 of the Lands Clauses Act, and afterwards concludes the purchase by contract, the court will not order the payment out to the company of the sum deposited, unless the vendor joins in the petition, or a copy of it is served upon him. *South Wales Ry., In re*, 6 Railw. Cas. 151.

Parties to Suit.]—Where the money in court is the subject also of a suit, all parties to the suit should be served with the petition for reinvestment. *Brandon* v. *Brandon*, 32 L. J., Ch. 20; 7 L. T. 499; 9 Jur. (N.S.) 11; 11 W. R. 53.

Incumbrances and Charges.]—Upon a petition for the payment out of court to an incumbrancer of compensation money paid into court by a company under s. 69 of the Lands Clauses Act, the incumbrancer is not a necessary party to be served with the petition, and is not entitled to have the costs of his appearance from the company. *Hadfield, Ex parte*, 29 Beav. 370; 30 L. J., Ch. 278; 7 Jur. (N.S.) 383; 9 W. R. 263.

Upon a petition for payment to a petitioner of the income of a fund arising from the sale of land to a railway company, he being in possession at the time of the sale as tenant for life, subject to mortgages created by himself, the court will make an order, without requiring the mortgagees to be served with the petition. But semble, such service could not have been dispensed with, in case the tenant for life had been out of possession at the date of the sale. *Hungerford's Trust, In re*, 3 Kay & J. 455.

Where a petition was presented for payment out of court of purchase-money paid in in respect of real estate purchased under the General Metropolitan Paving Act (57 Geo. 3, c. 29), service of the petition upon parties entitled to certain small rent-charges charged on the property purchased, but which were amply secured on other property not included in the purchase, was held to be unnecessary. *Mercers' Co., Ex parte*, 48 L. J., Ch. 384; 10 Ch. D. 481; 27 W. R. 424.

On a petition by tenant for life under the Lands Clauses Act for interim investment and payment of the dividends to him, it is unnecessary to serve persons having charges on the inheritance prior to the life estate. *Morris, In re*, 45 L. J., Ch. 63; L. R. 20 Eq. 470; 23 W. R. 851.

Remaindermen.]—A railway company had taken land which was settled on three successive tenants for life, with various remainders over, and had paid the money into court, which had been invested in consols: on the petition of the first tenant for life, without service of the petition on those in remainder, for the reinvestment of the money in the purchase of land, which had been approved of by the master:—Held, that the tenants for life in remainder need not appear. *Oxford and Bletchley Junction Ry., Ex parte, Brown, In re*, 6 Railw. Cas. 703; 16 Jur. 158.

When purchase-money has been paid in under the Lands Clauses Act, s. 74, in respect of lands let on lease at rack-rent, and settled to the use of a tenant for life, with remainder over, it is proper to make the remainderman a respondent to a petition by the tenant for life for investment and payment of dividends, although the interest of the proposed investment of the money will be less than the rent reserved by the lease. *Crane, In re*, L. R. 7 Eq. 322; 17 W. R. 316.

The petition of a tenant for life under the Lands Clauses Act, 1845, for reinvestment in the purchase of land of the proceeds of settled property taken by a railway company, need not be served upon any person entitled in remainder. *Staples, Ex parte*, 1 De G. M. & G. 294; 21 L. J., Ch. 251.

Upon a petition, presented by a tenant for life, for the reinvestment in land of compensation money paid for lands taken by a railway company, the remaindermen and trustees, if they approve, ought to join in the petition or abstain from appearing at the hearing. *Wilson* v. *Foster, Lancashire and Yorkshire Ry., In re*, 26 Beav. 398; 28 L. J., Ch. 410; 5 Jur. (N.S.) 113; 7 W. R. 172.

When a petition is presented by a tenant for life for the reinvestment of purchase-money in any other kind of investment than lands, the remainderman ought to be served. *Leigh, In re*, 40 L. J., Ch. 687; L. R. 6 Ch. 887; 24 L. T. 467; 19 W. R. 1105.

In a petition for the investment in consols of a fund paid into court under the Lands Clauses Act, and payment of the dividends to the person for the time being entitled thereto, it is necessary and sufficient that the tenant of the immediate freehold should appear. *Finch, In re*, 14 L. T. 394; 14 W. R. 472.

Trustees—Cestui que Trust.]—On applications by trustees who are "absolutely entitled" for payment out of court, it is not necessary to serve the cestui que trust. *Thomas's Settlement, In re*, 45 L. T. 746; 30 W. R. 244.

iv. *Evidence in Support.*

Affidavit of Title.]—Where a tenant for life of lands sold by him, under a railway act, to the company, presents a petition for the investment of the purchase-money and payment of the dividends, the usual affidavit that he believes his title to be good, and that he is not aware of any other claims, will not be dispensed with, although the petitioner is aged and infirm, and although

the company may have contracted with him, accepted his title, and consented to the prayer of the petition. *Hollick, Ex parte*, 4 Railw. Cas. 498; 16 L. J., Ch. 71.

As a general rule, the court requires in all petitions, under acts of parliament for local improvements, &c., for payment of money out of court, that the parties applying shall, by affidavit, shortly verify their title, and state that to their knowledge and belief no other person has any title to, or claims any interest in, the estate. *Shears, Ex parte, Fleet Market Improvement Act, In re*, 2 Y. & J. 493.

Where, by a railway act, it was provided that parties in possession of lands taken by the company were to be deemed lawfully entitled until the contrary shown to the satisfaction of the court, and that where the party could not make out a good title, the company should pay the purchase-money into court, subject to the disposition of the court:—Held, that the party, on his own affidavit of his title, was entitled to an order for the payment of money to him for his absolute use. *Grainge, Ex parte, G. W. Ry., In re*, 3 Y. & Coll. 62; 2 Jur. 640.

The affidavit of no title in any other person required by the Consolidated Orders XXXIV. r. 3, in support of petitions under acts of parliament for the interim investment of purchase-money and payment of dividends to the persons entitled thereto was, in the case of a petition under the Lands Clauses Act, 1845, s. 70, by a large public corporation, dispensed with. *Magdalen College, Oxford, In re*, 42 L. T. 822.

On an application by tenant for life for payment to her of dividends on the purchase-money of land taken by railway company, her affidavit as to title dispensed with. *Smith, In re*, 14 W. R. 949.

—— **By whom made.**]—When the trustees of a charity petitioned for the investment and payment of dividends of a fund in court under the Lands Clauses Act, the affidavit of no incumbrances was accepted as sufficient, though made by their clerk and not by the petitioners themselves. *Edward the Sixth's Almshouses, In re*, 37 L. J., Ch. 664; 19 L. T. 80; 16 W. R. 841.

When a tenant for life was too infirm to make an affidavit of title on a petition for payment to him of dividends of purchase-money paid into court by a railway company, an affidavit made by his solicitor was held sufficient. *Halsey, In re*, 22 L. T. 11.

The affidavit of the managing clerk of the petitioner's solicitor was, under the circumstances of the case, held sufficient to verify the petitioner's title. *St. Benet's, In re*, 12 L. T. 762.

Proof of Deeds.]—On payment out of court of railway purchase-money for land belonging to a tenant in tail, a disentailing deed being executed, although such deed applied to all the estates, of which a very small portion had been taken by the company, the deed must be made an exhibit, and an affidavit attesting the execution of it is not sufficient. *Field, In re*, 8 L. T. 722; 11 W. R. 927.

In ex parte cases a deed must, generally speaking, be proved by the attesting witnesses. *Reay's Estate, In re*, 1 Jur. (N.S.) 222; 3 Eq. R. 512; 3 W. R. 312.

On an unopposed petition for payment out of court of purchase-money paid in by a railway company, proof of the handwriting of the attesting witnesses to a deed affecting the petitioner's title is sufficient evidence of the execution of the deed. *Mair, In re*, 42 L. J., Ch. 882; 28 L. T. 760; 21 W. R. 749.

v. *References for Inquiry.*

Temporary Investment—Jurisdiction.]—Form of order of reference as to temporary investment on a proposed real security of money paid into court upon the purchase of land by a railway company. On the master reporting against the proposed investment, and that no investment on real security would be for the benefit of the parties:—Held, that it was competent to the master so to report, and the court declined to order the investment to be made. *Franklyn's Settlement, In re*, 1 De G. & Sm. 528; 5 Railw. Cas. 206; 17 L. J., Ch. 166; 12 Jur. 642.

Form of Reference.]—Where under private acts, &c., the court has jurisdiction to proceed in a summary way by petition, it is not usual on directing a reference to ascertain the parties entitled, to direct the production of deeds and documents, and to examine the parties. *London Dock Co., In re*, 11 Beav. 78; 17 L. J., Ch. 111; 12 Jur. 405.

One such reference having been made, the court refused with costs an application of a second claimant, for a second order containing special directions. *Ib.*

A railway company took some settled land, and paid the purchase-money into court. A reference to the master, on the petition of the tenant for life, to inquire as to the propriety of a proposed purchase of land to be settled to the same uses and the title to it, and a direction that if he should approve of the purchase and title he should settle the conveyance, and that the money should be paid to the vendors, were comprised in one order. *Metherell, Ex parte*, 20 L. J., Ch. 629; 16 Jur. 72.

Where a sum of money is in court to be invested in land, the court will order a reference as to a proposed investment, but will refuse to make any prospective order as to any other investment in the event of those proposed being rejected. *Pumfrey, Ex parte, Oxford, Worcester, and Wolverhampton Ry., In re*, 4 Railw. Cas. 490.

In what Cases.]—On application made by the churchwardens and overseers of a parish to have a sum of money which had been paid into court by a railway company for the purchase of certain buildings and land, paid out to them for the purpose of buying other land, and erecting other buildings in substitution of those taken by the company, the court refused to make a summary order, and directed a reference to the master. *Bicester Churchwardens, Ex parte, Buckinghamshire Ry., In re*, 5 Railw. Cas. 205.

The court will, where necessary, refer it to chambers to inquire into a proper fund for the investment of moneys paid into court under the Lands Clauses Act. *Dunraven, In re*, 5 L. T. 523; 10 W. R. 56.

On a petition for the reinvestment of 50*l.* paid into court under the Lands Clauses Act in land adjoining the settled estate, the court refused to dispense with the usual order of reference as to title, but gave leave to the parties to apply in chambers that the investigation of

the title might be dispensed with. *Blomfield, In re*, 25 W. R. 37.

Death pending Reference.]—On a petition under the Lands Clauses Act to sanction an investment in land, an order was made approving the investment. and directing a reference as to title. Before the order was fully worked out the petitioner died. On the application of his executors, it was ordered that the proceedings should be revived for their benefit. *Youl, In re*, 42 L. J., Ch. 900.

vi. *Payment out—Petition or Summons.*

Permanent Investment.]—In applications for payment out of court and investment under the Settled Land Act, 1882, of funds in court representing the purchase-money of lands taken under the provisions of the Lands Clauses Act, 1845, the court has a discretion under the Rules of the Supreme Court, 1883, Ord. LXX. r. 1, and, where an application by petition is cheaper and more expeditious than by summons, will not disallow the costs of a petition, although the proceeding falls within the Rules of the Supreme Court, 1883, Ord. LV. r. 2, sub-r. 7, as business to be transacted in chambers. In such cases, however, the option of proceeding by petition or summons is at the applicant's risk. *Bethlehem and Bridewell Hospitals, In re*, 54 L. J., Ch. 1143; 30 Ch. D. 541; 53 L. T. 558; 34 W. R. 148.

Alteration of Buildings.]—Upon an application by the sole surviving trustee under a will that 1,330*l.*, part of a sum of 2,100*l.* in the Bank of England, being the purchase-money and compensation for lands vested in him and taken by the Bradford Corporation under the Lands Clauses Act, 1845, and the Bradford Water, &c., Act, 1881, might be paid to the applicant, he undertaking to apply it in converting a dwelling-house and two shops into three shops, and that the balance, 770*l.*, might be invested in 3 per cent. annuities:—Held, that the application did not come within the meaning of Ord. LV. r. 2, sub-r. 7, of the Rules of Court, 1883, and might be made by petition. *Hargreave's Trust, In re, Bradford Corporation, Ex parte*, 58 L. T. 367.

Additional Buildings.]—Upon an application by the master and fellows of a college that certain funds in court amounting to about 7,000*l.*, and representing the purchase-moneys of lands belonging to the college, and taken by a railway company under the Lands Clauses Act, 1845, might be paid to the applicants, they undertaking to apply it in building two residences as an addition to the college:—Held, that the application was not an "application for interim and permanent investment, and for payment of dividends" within the terms of Ord. LV. r. 2, sub-r. 7, of the Rules of Court, 1883, and might be made by petition. *Jesus College, Cambridge, Ex parte*, 50 L. T. 583.

Apportionment of Dividends.]—An order had been obtained on petition for payment to a tenant for life of dividends of a sum of stock representing purchase-money paid into court by a company which had taken land in settlement. The tenant for life died, and the guardian of an infant tenant in tail entered into receipt of the rents and profits. At the death of the tenant for life two dividends and a proportionate part of a third had not been received by him:—Held, that the order for the payment to the executors of the tenant for life of the dividends and apportioned part of the dividend might have been obtained by summons; but that the order for the payment of the other apportioned part of the dividend, and for future payment of dividends to the guardian of the infant tenant in tail, could properly be made only on petition, of which the company must pay the costs. *Joliffe's Estate, In re*, L. R. 9 Eq. 668; 23 L. T. 303. See *Stafford's Charity, In re*, 57 L. T. 846.

Construction of Will involved.] — Where money has been paid into court under the provisions of the Lands Clauses Act, 1845, and the ascertainment of the persons entitled involves the construction of a will, the application must be by petition and not by summons. *Hicks, In re, North Eastern Ry., Ex parte*, 63 L. J., Ch. 568; 8 R. 319; 70 L. T. 529.

Originating Summons.]—A public body paying in money under the act must pay the costs of an originating summons for payment out issued with its concurrence, although there is no jurisdiction to deal with the matter on a summons. *Ib.*

Amount not exceeding £1,000.]—An application for payment out of court to a person absolutely entitled of a sum of cash not exceeding 1,000*l.* paid in under the Lands Clauses Act, 1845, is rightly made by summons, not by petition. *Madgwick, In re*, 53 L. J., Ch. 333; 25 Ch. D. 371; 49 L. T. 560; 32 W. R. 512.

Rule 2, sub-r. 7, of Ord. LV. of the Rules of the Supreme Court, 1883, though it affects the jurisdiction, and not merely the procedure of the court, is not ultra vires, being in accordance with the power conferred by 18 & 19 Vict. c. 136, s. 16, and in fact intended to be made under the powers of that act, as well as under those conferred by the judicature acts. *London Corporation, Ex parte*, 53 L. J., Ch. 6; 25 Ch. D. 384; 49 L. T. 437; 32 W. R. 87.

An application for payment out of court of money paid in under the Lands Clauses Act, 1845, must be by summons, and not by petition. *Calton's Will, In re*, 53 L. J., Ch. 329; 25 Ch. D. 240; 49 L. T. 566; 32 W. R. 167.

The general words of Ord. LV. r. 2, sub-r. 2, not being cut down by sub-r. 7 of the same rule, applications for payment out of sums not exceeding 1,000*l.*, paid in under the Lands Clauses Act, must now be made by summons in chambers and not by petition. *Maidstone and Ashford Ry., In re*, 53 L. J., Ch. 127; 25 Ch. D. 168; 49 L. T. 777; 32 W. R. 181.

—— **Where Judgment or Order.**]—Application was made by summons for payment out of court of a sum not exceeding 1,000*l.*, liberated by the death of an annuitant. Orders of court had been made from time to time directing payment to the present applicant of part of the same funds already released by the death of another annuitant, and also of the surplus interest, after satisfying the remaining annuities:—Held, that there had been an order declaring his rights within Ord. LV. r. 2, sub-r. 1, and that the application was properly made by summons, and not by petition. *Brandram, In re*, 53 L. J., Ch. 331; 25 Ch. D. 366; 49 L. T. 558; 32 W. R. 180.

There is no distinction between applications for payment or transfer to a person and applica-

tions for transfer to the credit of a cause in regard to Ord. LV. r. 2, sub-r. 1; and such applications should be made by summons in chambers and not by petition where there has been a judgment or order declaring the rights of the parties, though the sum exceeds 1,000*l*. *Lancashire and Yorkshire Ry., In re, Slater* v. *Slater*, 64 L. J., Ch. 688; 72 L. T. 627.

Where such an application was made by petition instead of by summons the court ordered the railway company, who were liable under the Lands Clauses Act, to pay the costs of the application, to pay the costs of the petitioners and respondents according to the act, such costs not to be greater than those properly incurred on a summons adjourned to a judge in chambers and attended by counsel. *Ib.*

—— **Some smaller Sums.**]—On petition for the transfer to the official trustee of charity funds of three sums of stock then in court respectively amounting to 1,244*l*., 44*l*., and 36*l*., and representing the purchase-money of lands of a charity taken by three railway companies under their statutory powers:—Held, that the two companies whose purchase-moneys were represented by the smaller sums of stock must be ordered to pay only such costs as would have been incurred if the application had been by summons. *Att.-Gen.* v. *St. John's Hospital, Bath*, 62 L. J., Ch. 707; [1893] 3 Ch. 151; 3 R. 661; 69 L. T. 178; 42 W. R. 172.

Supplemental Petition.]—In August, 1893, an order was made on the petition of persons interested under a settlement, approving the investment of certain moneys paid into court, for land compulsorily taken by the Metropolitan Board of Works in constructing sewers necessary for developing the land taken as a building estate. The estimated cost of the proposed works was 3,968*l*. When specifications and detailed plans were prepared, it was found necessary to alter the line of the proposed sewer, and tenders having been obtained for the work, as altered, the lowest tender was 4,343*l*., 375*l*. above the estimate on which the former order was made. The petitioners now presented a supplemental petition, asking that the construction of the altered sewer might be approved as an investment, and the moneys raised out of the funds in court. No objection was made to the order, but the London County Council objected to pay the costs of both petitions, on the ground that the second petition was only made necessary by the blunder of the petitioners, and that the investment of the additional sum required, being only 375*l*., might have been obtained on summons under Rules of the Supreme Court, Ord. LV. r. 2 (7):—Held, that, as the application was in effect to vary an order made on petition, it could not properly be made by summons, and the council must pay the costs of both petitions. *Sanders, In re*, 70 L. T. 755.

j. Costs.

i. *Jurisdiction of Court.*

No Provision in Special Act as to Costs.]—Sect. 5 of the Judicature Act, 1890, confers a jurisdiction which did not previously exist, and gives the court a discretion as to the costs of payment out of court of money in a case where the special act, under which the money is paid in, is silent as to them. *Mills' Estate, In re* (34 Ch. D. 24), superseded. *Fisher, In re*, 63 L. J., Ch. 235; [1894] 1 Ch. 450; 7 R. 97; 70 L. T. 62; 42 W. R. 241—C. A.

The court has power, by virtue of the general discretionary powers conferred by the Judicature Act, Ord. LV., to order that the costs of a petition for the payment out of the court, to a person absolutely entitled, of a fund paid into court by a company in respect of lands taken under the compulsory powers of a special act, be paid by the company, although the special act is prior to the Lands Clauses Act, 1845, and contains no provision as to such costs. *Lee and Hemingway, In re*, 24 Ch. D. 669; 49 L. T. 155; 32 W. R. 226.

Incorporation of Lands Clauses Act with Special Acts.] — Commissioners were incorporated by 3 & 4 Vict. c. 87 (1840), for the purpose of taking lands and carrying out thereon certain public works, and by 9 & 10 Vict. c. 34 (1846), powers to construct a new street were conferred upon such commissioners, and it was enacted that all and singular the enactments and provisions of the act of 1840 should extend to the new improvements as if they had been authorised by the former act. Neither of these acts contained any provision for payment by the commissioners of the costs of applications for payment out of purchase-moneys in court in respect of lands taken under the powers of the acts. On petition for payment out of court of purchase-money of lands taken by the commissioners:—Held (following *Cherry's Settled Estates, In re* (4 De G. F. & J. 332)), that the Lands Clauses Act, 1845, could not be treated as incorporated with the special acts (3 & 4 Vict. c. 87, and 9 & 10 Vict. c. 34), so as to make the commissioners liable to pay the costs of the petition for payment out. Dictum of Lord Esher, M.R., in *Wood's Estate, In re* (31 Ch. D. 607, 617, 618), disapproved. *Mills' Estate, In re*, 56 L. J., Ch. 60; 34 Ch. D. 24; 55 L. T. 465; 35 W. R. 65; 51 J. P. 151—C. A.

The Judicature Acts and Rules of Supreme Court, 1883, Ord. LXV. r. 1, do not enable the court or a judge to order costs to be paid by persons who before the acts came into operation could not have been ordered to pay them; the effect and intention of the acts and orders being not to give any new jurisdiction to award costs, but only to regulate the mode in which costs are to be dealt with in cases where the court antecedently had jurisdiction, either original or statutory, to award costs. *Foster* v. *G. W. Ry.* (8 Q. B. D. 515) followed. *Mercers' Co., Ex parte* (10 Ch. D. 481), questioned. *Ib.*

The act 18 & 19 Vict. c. 95, empowered the commissioners of works and public buildings, whom it incorporated for the purpose, to take land compulsorily for the purpose of building public offices. Sect. 9 provided that certain sections (including s. 49) of a previous act (3 & 4 Vict. c. 87), which had empowered the commissioners to execute other works, should be deemed to be repeated in the later act with the alterations necessary to make the same applicable to its purposes. Sect. 11 provided that any purchase-money payable into the bank should be paid to the account of the accountant-general of the Court of Chancery, and should be applied under the directions of that court in like manner as moneys were by the earlier act directed to be applied under the directions of the Court of Exchequer, "with such power to the Court of Chancery with regard to costs" as by the earlier

act were vested in the Court of Exchequer. Sect. 49 of the earlier act provided that, when purchase-money was required to be paid into the bank in the name of the accountant-general of the Court of Exchequer, and to be reinvested in land, it should be lawful for the court to order the expenses of all purchases from time to time to be made under the act to be paid by the commissioners. This act contained no other provision as to costs :—Held, that the effects of these enactments was to introduce the incorporated sections of the earlier act into the later act, just as if they had been enacted in it for the first time, and that consequently, the later act, with those sections in it, must be treated as having been passed after the Lands Clauses Act, 1845. Therefore the provisions of s. 80 of the Lands Clauses Act were, by virtue of s. 1 of that act, incorporated with the act of 18 & 19 Vict. c. 95, and the court has power to order the commissioners to pay the costs of an application for the payment out of purchase-money to the persons who had become absolutely entitled to the land in respect of which the money had been paid in. *Cherry's Settled Estates, In re* (4 De G. F. & J. 332) disapproved. *Wood's Estate, In re*, 55 L. J., Ch. 488 ; 31 Ch. D. 607 ; 54 L. T. 145 ; 34 W. R. 375—C. A.

A private charity incorporated by royal charter, and having, under a subsequent special act, power to take land compulsorily, is not an "undertaking or work of a public nature" within the meaning of s. 1 of the Lands Clauses Act, 1845 ; and, therefore, in the absence of express provision, s. 80 of the last-named act (as to costs) is not incorporated with the charity's special act. *Sion College, In re, London Corporation, Ex parte*, 57 L. T. 743—C. A.

A public improvements act referred back to and incorporated an earlier public improvements act, which in its turn referred back to and incorporated a third. Each of the three acts was passed after the Lands Clauses Act, and in none of them was there any provision for the payment of costs by the promoters, except in the case of moneys paid into court in the cases of persons under disability :—Held, that the provisions contained in s. 80 of the Lands Clauses Act, as to the payment by the promoters of the costs of sales and conveyances must be considered as incorporated in the latter act, there being nothing in them to vary or except such provisions. *Westminster Estate (Parish of St. Sepulchre), In re*, 4 De G. J. & S. 232 ; 3 N. R. 594 ; 33 L. J., Ch. 372 ; 10 Jur. (N.S.) 298 ; 9 L. T. 819 ; 12 W. R. 499. See *Metropolitan District Ry.* v. *Sharpe*, 50 L. J., Q. B. 14 ; 5 App. Cas. 425 ; 43 L. T. 130 ; 28 W. R. 617 ; 44 J. P. 716—H. L. (E.)

Lands are purchased by a railway company and the money paid into court, and invested under an act passed previously to the passing of the Lands Clauses Act, after the passing of which the company is amalgamated with others, which amalgamation acts incorporated the Lands Clauses Act. On a petition for payment out of court of the purchase-money to the party entitled, and for payment of the costs of such petition by the company :—Held, that the company was not bound to pay the costs. *Neachell's Trust, In re*, 3 W. R. 634.

Special Agreement.]—The act of 6 & 7 Vict. c. 76, does not apply where there is a special agreement as to costs between the parties. *G. W. Ry., Ex parte, Rhodes, In re*, 3 Railw. Cas. 516 ; 8 Jur. 1109.

To Company.]—It is unusual to give costs to a company taking land compulsorily, if it proceeds to enforce the contract otherwise than by the means provided by the act. But costs will be given to a company proceeding by bill for specific performance, instead of under the compulsory power in the Lands Clauses Act, if the landowner, by his conduct, has rendered it doubtful whether the proceeding under the act could satisfy all the impediments interposed. *Regent's Canal Co.* v. *Ware*, 26 L. J., Ch. 566 ; 3 Jur. (N.S.) 924 ; 5 W. R. 617.

Express Power in Act.]—An express power contained in an act of parliament to award certain specified costs does not exclude the inherent jurisdiction of the Court of Chancery over the costs of proceedings authorised by the act. *Spitalfields Schools, In re*, L. R. 10 Eq. 671 ; 22 L. T. 569 ; 18 W. R. 799. S. P., *Clark* v. *Johnson*, 22 L. T. 570 ; 18 W. R. 800.

Where an act giving compulsory powers to purchase, specifically provides for payment of the costs of reinvestment, the court will not exercise its general power of directing payment of costs. *Acker, In re*, 11 W. R. 182.

The Court of Chancery (adopting the practice of the Court of Exchequer) gave costs in the case of lands compulsorily taken under an act of parliament, beyond those expressly authorised by the act, and contrary to the usual practice of the Court of Chancery in such cases. *Robertson, In re*, 23 Beav. 433.

Transfer from Exchequer.]—Under the compulsory powers of an act, a public body purchased part of a settled estate, and paid the purchase-money into the Court of Exchequer. The act provided that money so paid in should be reinvested in the purchase of land, and that the public body should pay the expenses of all purchases to be made in pursuance of the act :—Held, that although it was a matter transferred from the Court of Exchequer, the Court of Chancery had no power to order the public body to pay the costs of a petition for the payment of the fund to persons who had become absolutely entitled to it. *Harrison's Estate, In re*, 40 L. J., Ch. 77 ; L. R. 10 Eq. 532 ; 18 W. R. 1065.

Purchase-money had been paid into the Court of Exchequer by a company incorporated under an act prior to the Lands Clauses Act, which provided that the court should have power to order the costs of all purchases, together with the necessary costs of obtaining such order, to be paid by the company. The costs of a petition praying for the payment of the dividends of the investments of the purchase-money to a tenant for life had been ordered by the Court of Exchequer to be paid by the company :—Held, that the Court of Chancery had no power to order the costs of a petition for transfer of the fund and payment out of the dividends to a person beneficially entitled, to be paid by the company. *Williams, In re*, L. R. 12 Eq. 488.

Form of Order.]—The Lands Clauses Act, 1845, s. 80, only authorises the court to make an order on the company to pay costs, not an order to pay them out of any particular fund. *Neath and Brecon Ry., Ex parte*, 43 L. J., Ch. 277 ; L. R. 9 Ch. 263 ; 30 L. T. 3 ; 22 W. R. 242.

Transfer to Account—Form of Entry.]—After fund which represents purchase-money paid by

a railway company has been invested and transferred to an account not entitled in the matter of the railway company, the liability of the company to pay costs ceases in respect of any subsequent investment or petition for payment of the fund. *Fisher* v. *Fisher*, 43 L. J., Ch. 262; L. R. 17 Eq. 340; 29 L. T. 720; 22 W. R. 638.

A company cannot be ordered to pay the costs of reinvestment where the money stands to the credit of a cause only and not to the matter of the act. *Brown* v. *Fenwick*, 35 L. J., Ch. 241; 13 L. T. 787; 14 W. R. 257.

Where a fund, representing the price of houses taken for the purpose of a public undertaking, had been transferred to the credit of an administration suit "ex parte the undertakers' account of estates devised by the will," not specifying the special act or the Lands Clauses Act:—Held, that the undertakers were liable to pay costs of reinvestment. *Drake* v. *Greaves*, 56 L. J., Ch. 133; 33 Ch. D. 609; 55 L. T. 353; 34 W. R. 757.

ii. *Companies acting under several Acts of Parliament.*

Incorporation of Lands Clauses Act.]—Money had been paid into court and invested in consols under the provisions of a railway act passed in 1833, which contained no provisions as to the payment of costs by the company, except in the case of a reinvestment of the money in land. By a subsequent act the company was amalgamated with other companies. This act repealed the original acts, but revived them for some purposes, and enacted that, subject to the provisions thereinbefore contained, the Lands Clauses Act should be incorporated with that act:—Held, that the court had jurisdiction to make the company pay the costs of the payment of the money out of court to the parties beneficially entitled. *Ellison's Estate, In re*, 25 L. J., Ch. 379; 2 Jur. (N.S.) 293; 4 W. R. 306—L.JJ.

As the amalgamation act adopted the provisions of the original repealed act, the original act was an act "incorporated with the special act" within the meaning of s. 80 of the Lands Clauses Act. *Ib.*

Where a railway company, under an act dated 1833, took lands in 1835, and paid the money into court, and afterwards became amalgamated by an act in which the Lands Clauses Act was incorporated:—Held, that the rights of the landowner to costs are governed by the act of 1833, and not by the Lands Clauses Act. *Holden's Estate, In re*, 1 Jur. (N.S.) 995; 3 W. R. 644.

Lands were taken and the purchase-money paid into the bank, and subsequently the company was amalgamated with another, and the amalgamation act repealed the former act, and incorporated with it the Lands Clauses Act; but there was a saving clause, providing that everything done, suffered or confirmed, before the passing of the amalgamation act should be valid as if the repeal had not happened, and the amalgamated companies should be treated as one. On a petition for reinvestment in land of the money so paid in under the former act:—Held, that the costs were payable by the company under such former act. *St. Katherine's Dock Co., In re*, 14 W. R. 978.

A public improvements act referred back to and incorporated an earlier public improvements act, which in its turn referred back to and incorporated a third. Each of the three acts was passed after the Lands Clauses Act, and in none of them was there any provision for the payment of costs by the promoters except in the case of moneys paid into court in the cases of persons under disability:—Held, that the provisions contained in s. 80 of the Lands Clauses Act, as to the payment by the promoters of the costs of sales and conveyances, must be considered as incorporated in the latter act, there being nothing in them to vary or except such provisions. *Westminster Estate* (*Parish of St. Sepulchre*), *In re*, 4 De G. J. & S. 232; 33 L. J., Ch. 372; 10 Jur. (N.S.) 298; 9 L. T. 819; 12 W. R. 499.

By an act of parliament, the London Dock Company were empowered to purchase lands for the purposes of the act, and in certain cases the purchase-moneys were to be reinvested in the purchase of other lands, and the expenses of the reinvestment were to be paid by the dock company. In a subsequent part of the same act, the lords of the treasury were empowered to purchase certain legal quays, within a given time, but no express directions were given as to the reinvestment of the purchase-moneys, or as to the payment of the expenses. By a subsequent act, not relating to the dock company, the time given to the lords of the treasury for purchasing the legal quays was extended, and it was enacted that all the powers, provisions, regulations, directions, clauses, matters, and things in the former act should extend to the subsequent act:—Held, that the clauses in the former act as to the reinvesting of the purchase-moneys, and the payment of the expenses of such reinvestment, were applicable, mutatis mutandis, to the subsequent act. *Treasury* (*Lords*), *In re*, 7 Sim. 154. Affirmed, 1 Myl. & C. 676.

iii. *Of Conveyances to Company and Deducing Title.*

Generally.]—Upon the construction of the Metropolitan Improvement Act, 3 & 4 Vict. c. 87, s. 49, authorising the court to order the expenses of all purchases to be made in pursuance of the act to be paid by the commissioners of woods and forests, the court declined to make an order for payment, either by the commissioners or out of the corpus of the compensation-money paid in under the act, of the costs occasioned to a tenant for life of settled estates purchased under the act, by making out her title or otherwise, in consequence of the land being taken. *Strachan's Estate, In re*, 9 Hare, 184; 20 L. J., Ch. 511; 15 Jur. 505.

The court will, under the 5 & 6 Will. 4, c. 69, order the guardians or overseers to pay the costs incurred in completing purchases under the Poor Law Act. *Albemarle* (*Earl*), *Ex parte, Guiltcross Union, In re*, 7 L. J., Ex. Eq. 63; 2 Jur. 406.

The court has no power, under the Lands Clauses Act, to order payment of the costs of deducing the title, and of the conveyance of lands to a railway company. *Bath* (*Marquis*), *Ex parte, Wilts, Somerset and Weymouth Ry., In re*, 4 Railw. Cas. 567.

A petition, under the Trustee Act, 1850, stated that A. had mortgaged lands to B. in fee; that B. had died, having by his will devised his lands to infants, and appointed C. his executor; that a contract had been entered into by C. with a railway company for a sale of a part of the lands at a certain price, and that, for the purpose of

carrying out the contract, it was necessary to get in the legal estate. The petition prayed that the legal estate might be vested in C., and that the railway company might pay the costs of the petition. The railway company appeared at the hearing, but objected to pay the costs:—Held, that the court had no jurisdiction to make any order either in favour of, or against, the company. *Rees' Devisees, In re*, 21 L. J., Ch. 687.

Land having been taken by a railway company from the transferee of a deceased mortgagee whose heir-at-law could not be discovered:—Held, that the company were bound to pay the costs of a petition by the vendor, for the appointment of a person to convey to the company in the place of the heir-at-law of the deceased mortgagee. *Nash's Estate, In re*, 4 W. R. 111.

When difficulties have arisen as to the title, the company having taken possession and used the land, the costs of a motion to pay the purchase-money into court directed to be costs in the cause. *Williams* v. *Llanelly Ry.*, 19 L. T. 310.

Where the act by which a railway company was incorporated directed the costs of every "contract, sale and conveyance," to be paid by the company, the vendors were held to be entitled to the costs of making out their title, and that although, by a later act, the vendor's costs of deducing their title were expressly provided for. *Addey's Charity, Ex parte, London and Greenwich Ry., In re*, 3 Railw. Cas. 119; 3 Hare, 22; 12 L. J., Ch. 513.

Death of Vendor—Infant Heir—Costs of Suit.]—A. agreed to sell land to a railway company, but died before he had executed the conveyance, leaving an infant heir. The company then instituted a suit in order to obtain a conveyance from the infant:—Held, that, although the company were bound by their act to pay the expenses of the conveyance of land taken by them, yet, as A. had occasioned the suit by suffering the land to descend to an infant, the costs of the suit, and of having the conveyance settled by the master, must be paid out of the purchase-money. *Midland Counties Ry.* v. *Westcomb*, 11 Sim. 57; 2 Railw. Cas. 211; 9 L. J., Ch. 324.

Where the company had contracted for the purchase of land, but the vendor died before execution of the conveyance, leaving an infant heir; in a suit by the company, for a specific performance from the heir:—Held, that the vendor having occasioned the suit by allowing the land to descend to an infant, the costs ought to be paid out of the purchase-money, although by the act the company were subject to the costs of conveying land taken by them. *Midland Counties Ry.* v. *Caldecott*, 3 Railw. Cas. 394.

Lands of Lunatic.]—The costs of the heir-at-law of a lunatic, attending the master upon a reference regarding the taking of a portion of the lunatic's land by a railway company, ordered to be paid by the company. *Walker, In re*, 20 L. J., Ch. 474; 15 Jur. 161.

Where the committees of a lunatic's estate under the powers of the Lands Clauses Act, contract with a railway company for the sale of a piece of his land, the sanction of the Lord Chancellor must be first obtained, and the costs of the application and of the consequent reference to the master are costs within s. 80 of the same act, and must be borne by the company. *Taylor and York and North Midland Ry., In re*, 6 Railw. Cas. 741; 1 Mac. & G. 210; 1 H. & Tw. 432.

Trustee Acts.]—A railway company entered into a contract for the purchase of a portion of a copyhold property, which they required for the purposes of their undertaking. The legal right to admittance was outstanding in the infant heir of a deceased trustee, and, to enable the vendors to complete their contract, a petition was presented, under statute 1 Will. 4, c. 60, for the appointment of a person to be admitted in the place of the infant, which was ordered accordingly, and a surrender was made by him to the company:—Held, that the company were not bound, under the provisions of the Lands Clauses Act, s. 82, to pay the costs of the petition presented under the Trustee Act. *South Wales Ry., In re*, 14 Beav. 418; 20 L. J., Ch. 534; 15 Jur. 1155.

A landowner having contracted in writing for the sale of a piece of land to a railway company, died, having devised all his real estate in strict settlement:—Held, that the costs of the suit instituted for the purpose of procuring a conveyance to the company under 1 Will. 4, c. 60, were to be defrayed out of the purchase-money. *Eastern Counties Ry.* v. *Tufnell*, 3 Railw. Cas. 133.

The costs of sale and application, under the New London Bridge Acts, allowed, on the petition of one of two trustees, the other being abroad, and refusing to act in a trust for sale under a marriage settlement, he being considered under these acts an "incapacitated person." *Tatham, Ex parte, London Bridge Acts, In re*, 3 Y. & Coll. 67; 7 L. J., Ex. Eq. 64; 2 Jur. 440.

Trustees for Purposes of Settled Land Acts.]—By deed of resettlement made in 1881 estates were limited (subject to charges created by a deed of settlement of 1850) to the use of H. for life, with remainder over. Both deeds contained powers of sale, but the trustees were not the same persons. Portions of one of the estates were taken by a railway company, under compulsory powers which incorporated the Lands Clauses Consolidation Act, 1845, and the purchase-money was paid into court. For the purpose of having it paid out, H. applied in the matter of that estate to have W. and L., the trustees of the deed of 1881, appointed trustees for the purposes of the Settled Land Act, 1882, of the compound settlement consisting of the said two deeds, and an order was made accordingly. On an application by H. for payment out of court of the purchase-money to W. and L.:—Held, that the railway company ought not to be ordered to pay the costs of obtaining the order appointing W. and L. trustees for the purposes of the Settled Land Act. *Waterford and Limerick Ry., In re, Harlech, Ex parte*, [1896] 1 Ir. R. 507.

Conveyance including Agreement as to Coals.]—Where a railway company purchased land from a colliery company, and part of the agreement was that the railway should carry the vendor's coals at a fixed price:—Held, that the costs of the instrument carrying into effect such agreement were not charges incurred in the conveyance of the land to the company, and were not payable by the company, under 8 & 9 Vict. c. 18, s. 82. *Lietch, In re*, 16 L. T. 729; 15 W. R. 1055.

Administration obtained to make Legal Title.]—A corporation contracted, under an act with which the Lands Clauses Act was incorporated, with the persons beneficially entitled, for the purchase of leasehold property. The executors of the testator, under whose will the property was settled, had died, and there was no legal personal representative of the testator. The corporation required administration de bonis non to the testator to be taken out, for the purpose of perfecting the title to the property:—Held, that the corporation must pay the costs of obtaining such administration. *Liverpool Improvement Act, In re*, 37 L. J., Ch. 376; L. R. 5 Eq. 282; 16 W. R. 667.

A. had for more than twelve years been in possession of premises held under a lease for life and a term of years. The premises were taken by a company under the powers conferred by an act with which the Lands Clauses Act was incorporated. The company required the administration should be taken out to B., the assignee of the lease, through whom A. claimed. C. accordingly took out administration to B., and conveyed her interest as administratrix in the premises to A.:—Held, that under s. 82 of the Lands Clauses Act, the costs of this conveyance should be borne by the company. *Dublin City Market Co., In re*, 25 L. R., Ir. 265.

Money was paid in court by a railway company, under the Lands Clauses Consolidation Act, 1845, in respect of leasehold premises. Persons claiming under the marriage settlement of their father, then deceased, applied for payment, but the court decided that other children, then dead, and of whom there were no personal representatives, had taken vested interests, and declined to pay out the fund until administration had been taken out to their estates. One of the applicants thereupon took out administration to the deceased children, and obtained payment of the fund:—Held, that the company should pay the costs of obtaining these administrations. *Kelly, Ex parte, Dublin Junction Railways, In re*, 31 L. R., Ir. 137.

Leasehold premises belonging to J. R. were taken by a railway company under their compulsory powers. J. R., who was then dead, had bequeathed the premises to his wife and six children "share and share alike, the share of any individual dying to be equally divided amongst the survivors." No claim was made on behalf of the legatees, for several years, until E. R., the surviving legatee, lodged an abstract of title with the company. The company, not being satisfied with the title, lodged the purchase-money and interest in court. E. R. applied for payment out of the fund. The court held that the legatees were tenants in common of the property, and directed payment to E. R. of her share, and the shares of the six deceased legatees to be placed to separate credits, and ordered the company to pay E. R. the costs of and incident to the application, order and proceedings thereunder, and all costs, charges and expenses properly payable under the Lands Clauses Act. E. R. then took out administration to each of the deceased legatees, and obtained payment of their shares. The taxing-master declined to allow the costs of taking out these administrations, as not being covered by the order:—Held, that the costs were properly payable by the company, and that the order should be amended by inserting a declaration to that effect. *Rorke, Ex parte, Midland Great Western Ry., In re*, [1894] 1 Ir. R. 146.

A testator bequeathed leasehold property to one for life and subject thereto to his children. A railway company took the property under compulsory powers, and obtained a conveyance from the tenant for life, and paid the purchase-money into court. The dividends were, with the assent of the executors of the testator, ordered to be paid to the tenant for life. The executors and all the original legatees died after the payment into court. On the death of the tenant for life an order was made for the distribution of the fund:—Held, that the company must pay the costs of obtaining letters of administration to the estates of the deceased beneficiaries, but not the costs of letters of administration de bonis non to the estate of the testator obtained prior to the proceedings which resulted in the order for distribution. *Midland Great Western Ry., In re, Rorke, Ex parte* ([1894] 1 Ir. R. 146), and *Dublin Junction Railways, In re, Kelly, Ex parte* (31 L. R., Ir. 137), followed. *Lloyd and North London Ry., In re*, 65 L. J., Ch. 626; [1896] 2 Ch. 397; 74 L. T. 548; 44 W. R. 522.

Conveyance.]—Costs incurred before the conveyancing counsel are provided for by ss. 82 and 83, and being liable to taxation, a proper bill of them should be delivered to the company. *Spooner's Estate, In re*, 1 Kay & J. 220.

Although it be necessary, if any of the parties interested be infants, that the conveyance should be settled by the master, yet the court will sometimes peruse the conveyance, in order to save the expense of a reference. *Eastern Counties Ry. v. Tufnell*, 3 Railw. Cas. 133.

Taxation of Costs.] — A railway company cannot, under s. 83 of the Lands Clauses Act, tax the costs of conveyance after payment by them of the costs. *Somerville, Ex parte, S. E. Ry., In re*, 52 L. J., Ch. 438; 23 Ch. D. 167; 48 L. T. 416; 31 W. R. 518.

iv. *When Payable out of Fund in Court.*

Trustees.]—Trustees for sale of lands in settlement, which lands are afterwards sold under the provisions of the London Bridge Act (10 Geo. 4, c. 136), are entitled to their costs out of the corpus of the fund arising from the sale. *Layfield, Ex parte*, 1 Y. & Coll. 79.

Devisees of lands in trust for charitable purposes, having sold part of those lands under the provisions of the London Bridge Acts, were held not entitled to their costs out of the fund arising from the sale; although the will creating the trust directed that the estate should defray the expenses of defending the trust property. *Thorogood, Ex parte, London Bridge Acts, In re*, 1 Y. & Coll. 588; 5 L. J., Ex. Eq. 97.

Tenant for Life.]—Tenant for life of lands sold under the provisions of the London Bridge Act, 10 Geo. 4, c. 136, is not entitled to his costs out of the fund arising from the sale. *Pasmore, Ex parte, London Bridge Acts, In re*, 1 Y. & Coll. 75; 4 L. J., Ex. Eq. 17.

Lands in settlement being required by a railway company, in whose act the Lands Clauses Act, 1845, was incorporated, the company offered 2,200*l.* as the price of such lands. The tenant for life, acting under advice, refused this amount, on the ground of its inadequacy, and the matter was referred to arbitration. The arbitrators, not agreeing, the umpire awarded 2,107*l.*, which was

less than the company had offered. Upon a petition by the tenant for life, the court ordered that his costs, as between solicitor and client, incident to the arbitration, should be paid out of the purchase-money. *Aubrey's Estate, In re*, 17 Jur. 874.

Costs of Suit.]—A railway company, being desirous of taking land under s. 85 of the Lands Clauses Act, 1845, paid into court the amount at which the land was valued by the surveyor, and also gave the owner of the land the bond prescribed by that section. Subsequently, the amount at which the land was valued by the jury was paid by the promoters, and the bond returned to them; they now petitioned to have the money returned which they paid into court. The owner of the land opposed this petition, on the ground that the petitioners had not yet paid the costs of investigating the title of the conveyance, of the inquiry before the jury, and of a suit by the owner in another branch of the court for an injunction, which the promoters had rendered necessary:—Held, that the costs of the suit were not costs provided for by the act, and that they should be disposed of by that branch of the court to which the suit was attached; and that, as to the other costs, the court had not discretion, under s. 80 of the Lands Clauses Act, to order them to be paid out of the fund in court, the remedy as to those costs being otherwise and fully provided for by the act. *G. N. Ry., Ex parte*, 17 L. J., Ch. 314; 12 Jur. 885.

A. agreed to sell land to a railway company, but died before he had executed the conveyance, leaving an infant heir. The company then instituted a suit, in order to obtain a conveyance from the infant:—Held, that although the company were bound by their act to pay the expenses of the conveyance of land taken by them, yet, as A. had occasioned the suit by suffering the land to descend to an infant, the costs of the suit and of having the conveyance settled by the master must be paid out of the purchase-money. *Midland Counties Ry.* v. *Westcomb*, 11 Sim. 57; 9 L. J., Ch. 324.

Company Insolvent.]—When glebe lands have been taken by a railway company, and the purchase-money paid into court, and an order had been made, on the petition of the rector, for its investment, and for payment of the dividends to him for his life, and for payment by the company of his costs, the company having since become insolvent, leaving part of the costs unpaid:—Held, that part of the fund in court might be sold for payment to the solicitors of the rector of the amount of costs remaining due. *Great Yeldham Glebe Lands, In re, Colne Valley and Halstead Ry., In re*, L. R. 9 Eq. 68; 21 L. T. 481; 18 W. R. 84.

What Costs.]—Upon the purchase of a piece of land by a railway company, belonging to the rectory of Bredicot, for 200*l.*, a new purchase was found for 179*l.* 10*s.* The petition asked that the surplus, 20*l.* 10*s.*, might be paid to the rector, in liquidation of extra costs beyond those allowed by the act; but this part of the prayer was refused. *Bredicot (Rector), Ex parte*, 5 Railw. Cas. 209; 17 L. J., Ch. 414.

A railway company, having power to take compulsorily portions of an estate, served notices to treat for them. It afterwards abandoned part of its undertaking, including the land comprised in some of the notices, but took the rest and paid the purchase-money into court, the estate in question being the subject of a testamentary settlement. Before the abandonment, certain costs, charges and expenses had been incurred by the tenant for life under the settlement, and certain other costs were subsequently incurred in an unsuccessful attempt to obtain compensation for not going on with the notice to treat in respect to the abandoned portions:—Held, on a petition by the tenant for life for investment of the fund in court, that these costs, charges and expenses might properly be paid out of the fund before investment. *Strathmore, In re*, L. R. 18 Eq. 338.

A tenant for life opposed the passing of a canal bill, but only obtained the insertion of some clauses for the protection of the estate. The Lands Clauses Act was incorporated with the act when passed. After its passing the company took part of the settled estate and paid the money into court. In the proceedings for ascertaining the value of the land taken, the tenant for life had incurred costs beyond what the company was liable to pay, and he presented a petition for payment of these costs and of the costs of opposing the bill out of the fund:—Held, that the petitioner was entitled to be paid out of the fund all costs properly incurred by him in relation to the purchase since the passing of the act, but not any costs of opposing the bill in parliament. *Berkeley (Earl), In re*, 44 L. J., Ch. 3; L. R. 10 Ch. 56; 31 L. T. 531; 23 W. R. 195.

Mortgaged Land.]—Where lands are compulsorily taken by a railway company, the court has jurisdiction to order payment of the mortgage debts and costs out of the deposit paid in by the company, without reference to the fact that that deposit covered other lands of the same mortgagor not subject to the mortgage. *Martin* v. *L. C. & D. Ry.*, 13 L. T. 355; 14 W. R. 24.

When Award less than Offer.]—A perpetual curate refused a sum of money offered by a corporation as the value of glebe lands taken for the purposes of a borough improvement act, and required the amount to be settled by arbitration. The arbitrators awarded a sum less than had been offered. The costs of the perpetual curate incidental to the arbitration were ordered to be paid out of the purchase-money. *Whitworth Perpetual Curate, Ex parte*, 24 L. T. 126. S. P., *Aubrey's Estate, In re*, 17 Jur. 874; 1 W. R. 464.

v. *Where Land subject to a Pending Suit.*

Payment by Company.]—Where devisees in trust of a testator, whose estate is in the course of administration in a suit, sell to a railway company, under the Lands Clauses Act, 1845, the company pays the costs of a petition for transferring the purchase-money, from the account of the railway act, to that of the suit. *Dinning* v. *Henderson*, 2 De G. & Sm. 485.

The court has no jurisdiction to make a railway company pay the costs of a petition for reinvestment of purchase-money for land taken by them, where such money stands to the credit of a cause only, and not to the matter of the act. *Brown* v. *Fenwick*, 35 L. J., Ch. 241; 13 L. T. 787; 14 W. R. 257.

Where land is taken by a railway company under the compulsory powers of the 8 & 9 Vict. c. 18, and the purchase-money is paid into court

all the costs occasioned thereby must be paid by the company, although some of such costs may have been occasioned by the existence of a suit of which the land taken was the subject. *Haynes* v. *Barton*, 1 Dr. & Sm. 483; 30 L. J., Ch. 804; 7 Jur. (N.S.) 699; 4 L. T. 764; 9 W. R. 777.

Money has been paid into court under the Lands Clauses Act in respect of land purchased by a railway company. The tenant for life, who is plaintiff in a suit instituted for the purpose of raising certain legacies and charges upon the estate by sale of a portion thereof, petitions that the money be transferred to the credit of the cause to meet pro tanto the charges:—Held, that the company were bound to pay the costs of the petition only, and not the costs of the defendants to the suit interested in the charges who had been served and appeared upon the petition. *Picton's Estate, In re*, 3 W. R. 327.

A vendor seised in fee simple, free from incumbrances save as to a small portion of the land in question, which portion, with other property of the vendor, was in mortgage to the trustees of the will of a testator whose estate was being administered in the Court of Chancery, agreed with a railway company to sell them the whole of the land in fee simple. The agreement was silent as to the existence of the mortgage:—Held, that the company was not bound to pay the costs incurred by obtaining an order in the administration suit sanctioning the concurrence of the trustees in the conveyance to the company, but that such costs were properly payable by the vendor. *Phillips, Ex parte, L. & S. W. Ry., In re*, 3 De G. J. & S. 341; 32 L. J., Ch. 102; 7 L. T. 452; 11 W. R. 54.

A railway company took lands, the subject of an administration suit, and in which infants and married women were interested, and a reference was made to the master in the cause, to ascertain what course was the most beneficial for the parties under disability. The company was directed to pay all the costs, charges and expenses of the petition, and reference. *Picard* v. *Mitchell*, 12 Beav. 486.

A railway company took settled land and paid the purchase-money into the bank, under the Lands Clauses Act, s. 69. The land being the subject of an administration suit by the remainderman against the tenant for life and executor, the plaintiff petitioned that the purchase-money so paid in might be carried over to the credit of the suit and invested in trust therein, and served the defendant and the company. The court, however, ordered investment in the matter of the company's act and not of the suit, and payment of the dividends to the tenant for life, making the company pay only the ordinary costs of a common petition for investment, and dismissed the rest of the petition, with costs. *Nash* v. *Nash*, 37 L. J., Ch. 927; 19 L. T. 256; 16 W. R. 1105.

—— **What Parties.**]—Remaindermen who are not parties to a suit, but who have been served with a copy of a decree in it, and have obtained leave to attend the proceedings thereunder, are in exactly the same position as if they had been originally made parties to the suit. *Paterson* v. *Paterson*, 10 L. T. 183.

Where, therefore, a railway company purchased land and paid money into court in respect of it, and a petition was subsequently presented for the investment of the money in consols and payment of the dividends to the receiver in the cause:—Held, that the company must pay the costs of remaindermen who were in the above-stated position, and who had been served with and appeared upon the petition; as well as the costs of all other parties so appearing. *Ib.*

Land devised in trust for sale in an administration suit, is taken by a railway company, and the purchase-money paid into court under the Lands Clauses Act. Upon a petition by a mortgagee of the land, entitled to one-tenth of the proceeds of sale, for transfer of the fund in court from the account of the company to the credit of the cause:—Held, that it was a payment out within the meaning of the act, but that the company was not liable to pay the costs of the parties to the suit appearing separately, inasmuch as they should have been made co-petitioners. The trustees and the petitioners were entitled, however, to appear and have their costs against the company, but the costs of the other parties must be costs in the cause. *Melling* v. *Bird*, 1 W. R. 219. S. P., *Patten* v. *Gatty*, 22 L. J., Ch. 599; 17 Jur. 155; 1 W. R. 219.

Parties to certain pending suits petitioned to have a sum of money which had been paid into court by a railway company, invested in trust in the suits, and also to have the dividends invested and accumulated. Several of the parties to the suit appeared by their counsel to consent:—Held, that the railway company was bound to pay the costs of all. *Hull and Selby Ry., In re*, 5 Railw. Cas. 458.

Where a suit has been instituted to establish the right of a person claiming a sum in court, the proceeds of land taken by a railway company, the court will, on application for payment of the fund, order the costs of the person entitled, but not those of the other parties to the suit, to be paid by the company. *Hore's Estate, and South Devon Ry., In re*, 5 Railw. Cas. 592.

Property, the subject of a suit, being interfered with by a public company, the compensation was paid into court. Upon a petition to transfer the fund into the cause, and to accumulate the dividends, the parties to the suit were served:—Held, that the company was only bound to pay the costs of the petitioner and the costs of serving the respondents, but not the costs of their appearance. *Sidney* v. *Wilmer*, 31 Beav. 338.

A company took land the subject of an administration suit. Several proceedings were taken, and applications made in the suit, with reference to the sale to the company, to which applications and proceedings the company were no parties. On an application to transfer the money, the produce of the purchase, to the credit of the cause:—Held, that the company was bound to pay the costs, charges, and the expenses of all the parties to the suit of and incident to all these proceedings and applications, and also of and incident to the application for the transfer of the fund. *Henniker* v. *Chafy*, 28 Beav. 621; 7 Jur. (N.S.) 87.

A petition, presented by a tenant for life, for payment of the income of a fund paid into court under the Lands Clauses Act, and which fund was the subject of an administration suit, was served on the trustees:—Held, that the company must pay the trustees' costs. *Henniker* v. *Chafy*, 35 Beav. 124; 11 Jur. (N.S.) 919.

Where land taken by a railway company is the subject-matter of a suit, and the parties to such suit are necessarily served with a petition for confirmation of the conditional contract and investment of the purchase-money, and such

parties appear, the company must bear the expenses of their service and appearance. Any party served with a petition is entitled to appear and have his costs. *Haynes* v. *Barton*, 35 L. J., Ch. 233; L. R. 1 Eq. 422; 13 L. T. 787; 14 W. R. 257.

Where there is an existing suit, in which parties in the same interest have always appeared by separate counsel, the court will not, upon an application for the payment out of purchase-money, refuse to order the railway company to pay the costs of the separate appearance of such parties, merely because they are very numerous. *Brandon* v. *Brandon*, 2 Dr. & Sm. 305; 34 L. J., Ch. 333; 11 Jur. (N.S.) 30; 11 L. T. 658; 13 W. R. 251.

A sum of money was paid into court by a railway company for the purchase of land, to the account of the company. There was a suit subsisting, which rendered it necessary to present a petition in the matter of the company's act and in the cause. The court held, that the company must only pay the costs occasioned by the petition being presented in the matter of the act; and the costs of the parties in the cause were to be costs in the cause. *Hore* v. *Smith*, 14 Jur. 55.

Land which was vested in a sole trustee, and which was the subject-matter of an action, was taken by the Metropolitan Board of Works under their compulsory powers, the purchase-money was paid into court, and the land conveyed by the trustee to the board. Afterwards, a petition was presented by the beneficiaries for the transfer of the purchase-money to the credit of the action, and served on the trustee, who appeared and asked for his costs:—Held, that the trustee was entitled to appear, and that the board must pay his costs. *English's Trusts, In re*, 57 L. J., Ch. 1048; 39 Ch. D. 556; 60 L. T. 44; 37 W. R. 191.

vi. *Apportionment of Rents.*

Costs when Payable by Company.]—A railway company paid a deposit into court, and took compulsory possession of some land required for the purposes of their act. The land was subject to agreements for building leases, and it became necessary to apportion the rents:—Held, that the costs of apportioning the rents were payable by the company; and an order was made for payment out of the money in court. *Flower, In re*, 36 L. J., Ch. 193; L. R. 1 Ch. 599; 12 Jur. (N.S.) 872; 15 L. T. 258; 14 W. R. 1016.

Where there is a bargain between a ground landlord of houses let at a gross ground-rent, and a railway company, which has taken some of the houses, for the payment of compensation at so many years' purchase on the rents of the houses taken, the costs of apportioning the ground-rents between the houses taken and those left are not payable by the company under the Lands Clauses Act, s. 82. *Buck, Ex parte, Hampstead Junction Ry., In re*, 1 Hem. & M. 519; 33 L. J., Ch. 79; 9 Jur. (N.S.) 1172; 9 L. T. 374; 12 W. R. 100.

vii. "*Adverse Litigation.*"

Additional Application.]—Where a tenant for life might, but for disputes between himself and his incumbrancers, have obtained an order for payment of dividends to himself of a fund in court on a former occasion, he will not be allowed as against the company the costs of an additional application relating to the dividends. *Joliffe, In re*, 3 Jur. (N.S.) 633.

What are Costs incurred by Adverse Litigation.]—Where a sum of money has been paid into court by a railway company under s. 76 of the Lands Clauses Act, as representing the value of the interest claimed by the occupier of lands taken, and the claimant, on petitioning for payment out to him, can only show a title to a less valuable interest, and has brought before the court the parties who are necessary to discuss with him the question, the costs of his so doing are costs occasioned by adverse litigation, and do not fall upon the company. *Cooper, Ex parte, North London Ry., In re*, 3 Drew. & Sm. 312; 34 L. J., Ch. 373; 11 Jur. (N.S.) 103; 11 L. T. 661; 13 W. R. 364.

In 1847 the London and North Western Railway Company took lands of the plaintiffs for the purpose of their act, and paid the purchase-money into court. In 1853, the plaintiffs having found suitable lands for reinvestment, contracted for the purchase thereof, but while the examination of title was pending, the vendor died intestate, leaving an infant heir. A bill being thus rendered necessary against the heir, and also a second petition, intituled in the cause, on the question of costs:—Held, that the costs of the suit being adverse litigation within s. 80 of the Lands Clauses Act, the company were not bound to pay them; and as between the plaintiffs and the defendant no order was made as to costs. The railway company were, however, ordered to pay the costs of all the other proceedings and of the second petition, which was necessary. *Armitage* v. *Askham*, 1 Jur. (N.S.) 227; 3 W. R. 331.

Upon a petition for the reinvestment in land of money paid into court under the Lands Clauses Act, and vested in stock and for payment to the petitioner, the tenant for life of the lands taken by the company, of the dividends of the fund in court, the company must pay the costs of incumbrancers on the interest of the petitioner who had been served at their suggestion, and appear but not to oppose, and who have never made any claim upon the company or the fund in court, such costs not coming within the exception of costs of adverse litigation in s. 80 of the statute. *Hungerford, In re*, 1 Kay & J. 413; 1 Jur. (N.S.) 845.

H., by will, gave his personalty to his wife, and all his real estate by description for the maintenance of herself and his three children, until his son G. attained twenty-one, when he gave him certain portions of the property charged with an allowance to his (testator's) wife; to his son H., when twenty-one, certain portions on the same condition; and to his daughter E., at twenty-one, certain portions; as to some to the wife for life, and at her decease to the daughter absolutely. If G. died without issue, then H. to possess the property; and if H. died before G. without issue, then G. to have H.'s property. If E. died without issue, her property to be equally divided between her brothers or the survivor; but if she survived them and they left no issue, then she to have all the property. But if the wife survived all the children, to her for life; remainder to his (the testator's) nephews and nieces equally. If there should be an after-born child which survived G. and H., they leaving no issue, the whole to such child; and if such child died without issue, to the wife for life, as if there had been only three children. Testator left four

children, one after-born, and nephews and nieces. G. died an infant and unmarried; and on petition by H. to have certain money paid into court by a railway company, paid out to him, ordered accordingly; and held, that the wife took a life estate until eldest son attained twenty-one, and that there were three estates tail successively, and H. was now tenant in tail. The after-born child presented a counter-petition, which was dismissed with costs as against the company; but the costs of the daughter and H. appearing separately:—Held, not costs occasioned by adverse claimants. *Hinks's Estate, In re*, 2 W. R. 108.

Where lands have been taken compulsorily, and the purchase-money paid into court, and before payment out of court it becomes necessary to file a bill for the administration of the landowner's estate of which the fund forms a part, such suit not being occasioned by adverse claims, the company must pay the costs of all the defendants who had been served with the petition for transfer of the fund to the credit of the cause. But semble that it was not necessary to serve any of them, the object of the petition not being to obtain the payment of any money out of court. *Eden* v. *Thomson*, 2 Hem. & M. 6; 10 L. T. 522; 12 W. R. 789.

Where a company has, in virtue of two different acts of parliament, taken two pieces of land held under the same title, with knowledge that the title is disputed, and taken a conveyance from both disputants, it must pay the costs of two petitions for investment of the purchase-money, and the costs of appearance of the disputant who is named as respondent to the petitions are not costs occasioned by litigation between adverse claimants within the meaning of the act. *Butterfield, In re*, 9 W. R. 805.

A railway company took land belonging to a devisee for life, with a reversion to the testator's heirs, and paid the purchase-money into court:—Held, that they must pay the costs of two petitions by two co-heirs who claimed the fund on the death of the tenant for life, and also the costs of investigating the title of other persons who claim to be heirs, in answer to the advertisements issued by order of the court, except such costs as were occasioned by affidavits of the petitioners in opposition to such claim, which were "occasioned by adverse litigation," within s. 80 of the Lands Clauses Act. *Spooner's Estate, In re*, 1 Kay & J. 220.

A contest between the tenant for life and remainderman as to how much of the fund belonged to one of them and how much to the other:—Held, to be a litigation between adverse claimants within s. 80; but this decision was disapproved of by Jessel, M.R. *Askew* v. *Woodhead*, 49 L. J., Ch. 320; 14 Ch. D. 27; 41 L. T. 670; 28 W. R. 874.

A petition was presented for the transfer to the petitioner of a sum of money lodged in court by a railway company under the Lands Clauses Act, 1845, and several claimants to the sum appeared. The court, having decided that the petitioner was entitled to the whole sum, ordered the railway company to pay the costs of the petition and of the proceedings thereunder, except such costs as were occasioned by the litigation between the adverse claimants; and further ordered the unsuccessful claimants to pay to the petitioner such costs as the master should find to have been occasioned by their adverse claims. *Great Southern and Western Ry., Ex parte*, Ir. R. 11 Eq. 497.

Costs of determining the construction of a doubtful devise are not costs of adverse litigation within the meaning of s. 80 of the Lands Clauses Act. *Gregson, In re*, 2 Hem. & M. 504. *See* 34 L. J., Ch. 41; 10 Jur. (N.S.) 1138; 11 L. T. 460; 13 W. R. 193—L.JJ.

Form of Order.]—In orders under the Lands Clauses Act, directing a company to pay costs, the omission of the words, "except such costs (if any) as are occasioned by litigation between adverse claimants," ought not to be ordered except in very clear cases. *Cant, In re*, 1 De G. F. & J. 153; 29 L. J., Ch. 119; 6 Jur. (N.S.) 183; 1 L. T. 254; 8 W. R. 105.

The words "such as are occasioned by litigation between adverse claimants," in s. 80, refer to "costs," and not to the next antecedent proceedings. *Ib.*

Land devised by a will was taken by a railway company, and the money paid into court. Adverse claims to it arising under the will, the devisees appeared by separate counsel on a petition for payment of it out of court, and argued the question arising between them:—Held, that the case was not one where the words of exception could properly be omitted from the order. *Ib.*

Abandonment of Claim.]—A company took land to which there were adverse claimants, and at the request of one, and without any objection by the other, paid the purchase-money into court. One claimant afterwards abandoned his claim without litigation:—Held, that the company would neither pay nor receive the costs incurred by the payment into court. *English, In re*, 11 Jur. (N.S.) 434; 12 L. T. 561; 13 W. R. 932.

A railway company required to take a piece of land to which adverse claims were set up. The company paid the purchase-money into court. One of the claimants withdrew his claim:—Held, that the railway company was the real cause of the costs being incurred, and must pay them. *Norfolk's (Duke) Estates, In re*, 31 L. T. 79; 22 W. R. 817.

Costs of Ascertaining Parties Entitled.]—Where it is doubtful under a will whether good title to premises taken by a company can be made out, and there is no wilful default or delay on the part of the owner of the premises, the court being called upon to put a construction upon such a will, the company, on the application of the owner to obtain out of court the purchase-money agreed to be paid for the land, was ordered to pay the costs according to their act. *Woodburn, In re*, 13 L. T. 237.

A railway company is liable to pay expenses incurred in ascertaining the parties entitled to the purchase-money of lands taken by the company and paid into court. *Singleton, In re*, 9 Jur. (N.S.) 941; 8 L. T. 630; 11 W. R. 871. S. P., *Tookey's Trust, In re*, 1 Drew. 264; 21 L. J., Ch. 402; 16 Jur. 708. *Noake's Will, In re*, 28 W. R. 762.

The owner of an estate after having devised it to an infant agreed, under compulsion, to sell a portion of it to a railway company. The owner having died before the completion of the purchase without having altered his will:—Held, that his executors, and not the devisee, were entitled to the purchase-money and to the compensation for severance; and, secondly, that

the railway company was bound to pay the costs of the infant devisee. *Manchester and Southport Ry., In re*, 19 Beav. 365.

Upon a petition for payment out of court to the trustees of a will of a fund representing the purchase-money paid by a railway company for some property settled in the will, the costs of a mortgagee of the tenant for life, who appeared on the petition, ordered to be paid by the company. *Brook, In re*, 10 L. T. 860 ; 12 W. R. 1128.

Property which was in the possession of a mortgagee was taken by the London School Board, and the purchase-money paid into court pursuant to the Lands Clauses Act 1845. The mortgagor's trustee in liquidation presented a petition asking for an inquiry as to what was due on the mortgage, for payment to the mortgagee of what should be so found due, and for payment of the residue of the purchase-money to himself :—Held, that the board must pay the costs of the inquiry. *Bareham, In re*, 17 Ch. D. 329 ; 29 W. R. 525—C. A.

Under the 5 & 6 Vict. c. 62, the Commissioners of Woods and Forests are bound to pay the costs of a reference to ascertain the rights of parties to the purchase-money of premises purchased under the act, as expenses incidental to the purchase. *Woods and Forests Commissioners, In re*, 7 Ir. Eq. R. 487.

J. L. "gave and bequeathed unto his niece C. B. and his nephew J. T. all his houses situate at W., each to have one half, to be share and share alike ; and what debts he should owe at his decease they should pay, both of them a like share of the same ; all the above premises he gave, devised, and bequeathed unto his niece C. B. and his nephew J. T., each to enjoy one half during their lives, and at their decease the said premises to go to their children." J. L. died in 1786. J. T. died in 1804, without children and intestate, leaving C. B. his heiress-at-law, and the heiress-at-law of J. L. C. B. had thirteen children, six of whom survived her. Part of the premises was taken by the commissioners under the Whitby Improvement Act, and the purchase-money paid into court. C. B. devised all her estate, right, title, and interest in and to the premises and the purchase-money unto her daughter J. B. :—Held, that C. B. and J. T. each took an estate for life in a moiety of the property ; that upon the decease of C. B. and J. T., their children took their parents' moieties respectively as joint tenants in fee ; but that as J. T. had no children, C. B. took his moiety as his heiress-at-law, and that that moiety passed to her devisee. Held, also, that all the costs of the petition were to be paid by the Commissioners of the Whitby Improvement Act. *Laverick's Estate, In re*, 18 Jur. 304 ; 2 W. R. 113.

—— **One set of Costs.**]—A railway company agreed with trustees for the purchase of lands. The trustees' title depended on the construction of a will, and the company objected thereto and paid the purchase-money into court. The question of construction having been argued by the parties interested on a petition for investment and payment of dividends :—Held, that the company was bound to pay only one set of costs. *Styan, Ex parte*, 1 Johns. 387.

On a petition by a widow for payment out of court of a sum which represented realty which had been taken by a company, on which petition the heir appeared and opposed, one set of costs was allowed. *Yates, Ex parte*, 17 W. R. 872.

viii. "*Wilful Refusal or Neglect.*"

What Amounts to.]—As to what amounts to a "wilful refusal" within s. 80 of the Lands Clauses Act. *Windsor, Staines and South Western Ry., In re*, 12 Beav. 522.

A railway company, being unable to come to terms with the owner of the fee, proceeded to summon a jury ; the landowner, being advised that notice had not been properly served on him, did not appear before it, and the damages were assessed in his absence, and the amount paid into court. It was subsequently decided that the notice had been regularly served. On the landowner applying for payment of the money out of court, the company was ordered to pay the costs of the application. *Railston, Ex parte*, 15 Jur. 1028.

The owner of land, who was entitled to receive the purchase-money under an award, refused to receive it, on the ground that he thought the award invalid ; thereupon the promoters paid the purchase-money into court. The owner subsequently obtained a rule to show cause why the award should not be set aside ; this rule was, upon mature argument, discharged :—Held, that the "wilful refusal," mentioned in s. 80, meant a refusal without reason ; and that here, as there was a bonâ fide and not a mere captious question to be decided, the case was not within the exception, and the owner was entitled to his costs. *Bradshaw, Ex parte, East and West India Docks, In re*, 16 Sim. 174 ; 5 Railw. Cas. 432 ; 17 L. J., Ch. 454 ; 12 Jur. 888. And see *S. C.* at law, 17 L. J., Q. B. 362.

Where a vendor is unable to convey a clear title by reason of his not having paid off incumbrances of a larger amount than the land proposed to be taken, that is not a wilful refusal or neglect to convey within s. 80, so as to deprive him of his costs. *Divers, In re*, 1 Jur. (N.S.) 995.

Local commissioners gave notice, under their act, that they would require a particular piece of land. The owner took counsel's opinion as to the right of the commissioners. The opinion was, that the question was doubtful, and that a court of law would probably decide against the right ; the owner thereupon refused to give up the land. The purchase-money was then paid into court, under the Lands Clauses Act, but, subsequently, the owner of the land executed the conveyance :—Held, upon petition for payment of the money out of court, that this was not such a case of "wilful refusal," under s. 80, as that the owner of the land could be required to pay the costs occasioned by his refusal. *Dashwood, Ex parte, Ryde Commissioners, In re*, 26 L. J., Ch. 299 ; 3 Jur. (N.S.) 103 ; 5 W. R. 125.

A railway company, requiring land for the purposes of their railway, gave the usual notices. The amount of the value of the land had been ascertained by arbitration. The company tendered this amount to the landholder, who refused to receive it without having his costs paid him at the same time :—Held, that the vendor, on his wilful refusal to accept the amount, was not entitled to his costs. *Turner, In re*, 5 L. T. 524 ; 10 W. R. 128.

The costs incurred by the company for calling in the sheriff to give possession to be paid by vendor. *Ib.*

When a railway company had paid into court the sum awarded by the arbitrator as the price

of lands taken by them, the landowners having refused to accept the same, though the petition for payment out of court omitted to state the reason of such refusal, the court took judicial notice, from its own recollection, of the petitioner having instituted a suit, which, though unsuccessful, was not frivolous, to set aside the award, and therefore ordered the company to pay the costs of the petition. *Lawson, Ex parte, Metropolitan District Ry., In re*, 17 W. R. 186.

Where a mortgagor neglected or failed to procure the concurrence of the incumbrancers in a petition for the investment of purchase-money paid into court by a railway company, the court held that such neglect or failure was no ground for relieving the company from the payment of costs. *Nash, In re*, 25 L. J., Ch. 20 ; 1 Jur. (N.S.) 1082 ; 4 W. R. 28.

Upon the compulsory purchase of land, under an act incorporating the Lands Clauses Act, 1845, and the Railways Act (Ireland), 1851, the purchasers lodged in court the compensation awarded, inasmuch as the owner had failed to deliver a statement of title within the time prescribed by the statutory notices published :—Held, that the owner must be regarded as having wilfully neglected to make title within the meaning of the exception in s. 80 of the Lands Clauses Act, and that he should therefore bear his own costs of drawing the money out of court. *Dowling, Ex parte, Dublin Corporation, In re*, 7 L. R., Ir. 173.

Where a fund in court exceeding 500*l.* in value and representing the purchase-moneys of settled lands taken by a railway company, with accumulated interest, had not been dealt with for upwards of fifteen years, and it had become necessary under the Chancery Funds Rules, 1874, r. 91, and the Chancery Funds Amended Orders, 1874, Ord. XIV. to serve the official solicitor with the petition for the payment out of the fund :—Held, that such costs having been occasioned by the default of the tenant for life, were properly payable out of the portion of the fund which came to his estate. *Clarke's Estate, In re*, 52 L. J., Ch. 88 ; 21 Ch. D. 776.

ix. *Repayment of Deposit.*

Appearance.]—The court will, under special circumstances, allow a party appearing to consent to a petition under the Lands Clauses Act, s. 85, his costs of appearance, though it is not the usual practice so to do where a party appears merely to consent. *Tottenham and Hampstead Junction Ry., In re*, 14 W. R. 669.

Injunction by Landowner.]—A railway company served a notice to treat, and gave the usual bond, and made the deposit required by s. 85 of the Lands Clauses Act. The landowner filed a bill to restrain the company from entering, but a motion for injunction stood over by arrangement, and no further steps were taken. Ultimately, the company abandoned the purchase with the concurrence of the owner :—Held, on a petition for a re-transfer of the deposit to the company, and for the cancelling of the bond, that the owner was not entitled to have the costs of the suit out of the deposit. But, semble, he would have been so entitled if the purchase had been abandoned by reason of the inability of the company to complete. *Birmingham, Wolverhampton and Dudley Ry., Ex parte*, 1 Hem. & M. 772 ; 3 N. R. 290.

x. *Interim Investment.*

Under Special Acts.] — Under the original London and Birmingham Railway Company's Act, 3 & 4 Will. 4, c. 36, the Court of Chancery had power to order the company to pay all the expenses attending the reinvestment in the purchase of land of all money paid into the Bank of England, under that act to be applied in the purchase of other lands, together with the necessary costs and charges of obtaining such order ; but there was no power under that act for the court to order the company to pay the costs and expenses of an interim investment in government securities. The company purchased land from Eton College prior to the year 1845, and the purchase-money was paid into the Bank of England, under the act, in the month of May, 1846. In 1845 the Lands Clauses Act passed, by s. 18 of which it was enacted "that in all classes of moneys deposited in the bank under the provisions of this or the special act, or an act incorporated therewith except," &c., "it shall be lawful for the Court of Chancery in England or the Court of Exchequer in Ireland to order the costs of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters of the undertaking." Amongst such matters were included the costs of investment in government securities, and the costs of obtaining the proper orders. In July, 1846, an act of parliament was passed, the 9 & 10 Vict. c. 204, by which the London and Birmingham Railway Company, the Grand Junction Railway Company, and the Manchester and Birmingham Railway Company, were all dissolved, as separate companies, and incorporated into one called the London and North Western Railway Company, into which the Lands Clauses Act was incorporated :—Held, upon the petition of Eton College for the interim investment of the purchase-money in government securities, and upon the construction of the several acts of parliament, that the court had power to order the company to pay the costs attending such investment, and of obtaining the order therefor. *Eton College, Ex parte*, 20 L. J., Ch. 1 ; 15 Jur. 45.

Costs in consequence of the purchase, under a railway act :—Held, not to carry the costs of the interim investment in the funds. *Hirst, In re*, 4 Y. & Coll. 468.

Where a statute did not contain any express provision as to the costs of an interim investment in stock of compensation-money paid into court under the act, the court had not jurisdiction to order the costs of an application for such an interim investment to be borne by the parties who had paid the money into court. *Crober, Ex parte*, 13 Jur. 481.

Where, by a railway act, it was enacted that the moneys paid into court by the company, for lands purchased by them, should, by order made upon the petition of the party interested, be invested in the purchase of other lands, to be settled to the like uses ; and, in the meantime, should, by an order similarly obtained, be invested in the funds ; and it was further enacted that the court might order the expenses of such purchases, and the investment of the purchase-money in land, "or other disposition of the same," to be paid by the company :—Held, that the company were liable to pay the expenses of the interim investment of the money in the funds. *Onslow, Ex parte, London and*

Southampton Ry., In re, 1 Y. & Coll. 553; 5 L. J., Ex. Eq. 85.

Where an act of parliament, establishing a railway company, directs that the money to be paid for lands to be purchased by the company shall be paid into the bank, until the same shall, upon petition, be applied in the purchase of other lands; and in the meantime, until such purchase can be made, shall, upon application to the court, be invested in the funds; and that the expenses and costs attending such purchase shall be paid by the company:—Held, that under the latter clause, a party applying to have the money invested in the funds is not entitled to the costs of the application. *Taylor, Ex parte*, 1 Y. & Coll. 229; 4 L. J., Ex. Eq. 33.

The Liverpool and Manchester Railway Act did not provide for the payment by the company of the costs of the interim investment of purchase-money:—Held, that the court had no power to order the costs of that investment, subsequent railway acts having put a statutory construction on the former acts by the insertion of a section to the effect that the company are to bear the costs of such interim investment. *Cooke, Ex parte, Liverpool and Manchester Ry., In re*, 3 Railw. Cas. 135; 7 Jur. 639.

Upon petition for the investment in the funds of a sum of money paid for the purchase of lands, under the Birmingham Railway Act, the court refused to order the company to pay the costs. *Worcester College, Oxford, Ex parte*, 5 Railw. Cas. 147; 17 L. J., Ch. 193.

Where a railway act directs the expense of all purchases to be borne by the company, this will include the expense of the intermediate investment of the money in the funds, as well as the ultimate investment in lands to be settled to the same uses. *Durham (Bishop), Ex parte*, 3 Y. & Coll. 690; 9 L. J., Ex. Eq. 14. And see *Ely (Bishop), Ex parte*, 3 Y. & Coll. 691, n.

An act enabling a public body to take lands compulsorily directed that in cases of disability the purchase-money should be paid into court, and laid out in the purchase of other hereditaments, and that in the meantime it should be vested in consols and the dividends paid to the persons entitled; the act authorised the court to order the expenses of all purchases from time to time to be made in pursuance of the act to be paid by the public body:—Held, that the costs of the interim investment in consols, and of the order to pay the dividends to the tenant for life, must be borne by the fund and not by the public body. *Gould, In re*, 24 Beav. 442.

Semble, that the court has jurisdiction under 57 Geo. 3, c. 29 (General Metropolitan Paving Act), ss. 84 and 89, to order payment by a district board of works of the expenses of the investment in consols of the purchase-money of lands taken by agreement by the board in pursuance of the statute, and of the costs of the petition for investment. *Merceron, In re*, 47 L. J., Ch. 114; 7 Ch. D. 184; 38 L. T. 15; 26 W. R. 8.

Apportionment not ordered.]—A dean and chapter and their lessee for twenty-one years, under covenant not to assign without their leave, entered into a joint contract for sale of part of the demised premises to a railway company, at an aggregate price. On the completion of the purchase and the conveyance of the property to the company, they paid the amount into court, under the Lands Clauses Act, 1845, s. 69. The court declined, upon the petition of the lessee, to apportion the purchase-money. By consent the money was ordered to be invested, and the dividends to be paid to the lessee for his term or until further order:—Held, that the company were not entitled to their costs and expenses upon such petition. *Ward, Ex parte*, 2 De G. & Sm. 4; 5 Railw. Cas. 398; 17 L. J., Ch. 249; 12 Jur. 322.

Vexatious Proceedings.]—Under the act of parliament, giving power to the Trinity House to purchase lighthouses, this court is authorised, by express words, to order the corporation to pay the costs of the interim investments in the funds, and other consequential costs on purchases from infants, and other incapacitated persons; but no such words are used with reference to purchases under doubtful titles. Where, therefore, an incapacitated person, together with the trustees of the settlement under which he took his interest (which trustees had a power of sale), contracted to sell a lighthouse to the corporation, and the corporation, being doubtful as to the title of the vendors, paid the purchase-money into court, under a clause contained in the act for that purpose, the court, taking into consideration that the objection as to title was not trivial, and that the purchase was made by the Trinity House for public objects, declined to give the vendors the costs of the interim investment in the funds, and the other usual consequential costs. *Angell, Ex parte, Trinity House, In re*, 4 Y. & Coll. 496.

The purchase-money for settled lands taken by a railway was paid into court; and after a contract had been entered into for laying it out in land, a petition was presented for its temporary investment in the funds:—Held, that the proceeding was not vexatious, and that the company ought to pay the costs. *Liverpool, &c., Ry., In re*, 17 Beav. 392.

Order for Taxation and Payment.]—The common order for taxation and payment of costs by a company, upon a petition for investment of money paid into court and payment of dividends, will not be varied in a case where periodic sales of the corpus are also ordered. *Edmunds, Ex parte, L., C. & D. Ry., In re*, 35 L. J., Ch. 538; 14 L. T. 243; 14 W. R. 507.

Appearance of Parties.]—Money was paid into court by a railway company in certain suits, and, a petition being presented for investment and accumulations, several parties to the suit appeared by separate counsel to consent:—Held, that the railway company was bound to pay the costs of all. *Hull and Selby Ry., In re*, 5 Railw. Cas. 458.

Where one of several persons entitled to purchase-money under the Lands Clauses Act petitions under the act, and serves the other persons, it is not of course that the company should pay the costs of such respondents. *Melling* v. *Bird*, 22 L. J., Ch. 599; 17 Jur. 155; 1 W. R. 219.

On a petition for the transfer of purchase-money paid into court by the ecclesiastical commissioners, the court ordered the costs of all parties to be paid by the commissioners. *Clark* v. *Johnson*, 22 L. T. 570; 18 W. R. 800.

In a petition for the investment in consols of a fund paid into court under the Lands Clauses Act, and payment of the dividends to the person for the time being entitled thereto, it is necessary and sufficient that the tenant of the immediate

freehold should appear. *Finch, In re*, 14 L. T. 394; 14 W. R. 472.

Therefore where the land was subject to a lease for ninety-nine years, if the lessee should so long live:—Held, that the company must pay the costs both of the lessee and the trustees in whom the freehold was vested, but not of any of the parties entitled in remainder. *Ib.*

Railway companies under the provisions of their acts, with which the 8 & 9 Vict. c. 18, was incorporated, took for their purposes lands which were the subject of a private act of parliament, under the powers of which it was found that the purchase could only be effected. The costs of a petition by the tenant for life and others, for an interim investment of the purchase-moneys, in accordance with the provisions of the private act, were ordered to be paid by the respondents. *Shuttleworth, Ex parte* and *In re*, 4 Giff. 87; 8 Jur. (N.S.) 1090; 7 L. T. 266.

When a tenant for life petitions for interim investment of purchase-money of the settled estate paid into court under the Lands Clauses Act, the company need not pay the costs of serving or giving notice to the trustees. *Dowling's Trusts, In re*, 45 L. J., Ch. 568; 24 W. R. 729.

—— **Of Mortgagees.**]—On a petition by the tenant for life of a fund paid into court by a railway company, praying for the investment of the fund and payment of the dividends to the petitioner; certain persons entitled to a charge on the real estate in respect of which the fund was paid, being served with the petition and appearing, the court refused to direct the railway company to pay their costs. *Webster, In re*, 2 Sm. & G. (App.), vi.

A railway company took lands which were vested in one for life, with remainder over, and were subject to a mortgage in fee and to mortgages of the life estate:—Held, that the company must pay the costs of the mortgagees who had been served with, and appeared upon, a petition for the investment of the fund and the application of the income. *Brook's Will, In re*, 30 Beav. 233; 31 L. J., Ch. 456; 5 L. T. 388; 10 W. R. 35.

To a petition by a tenant for life of settled estates, for the investment of the purchase-money of part of the estates which had been purchased by a railway company under their act, and for payment of the dividends to the petitioner, or if the incumbrancers upon his life interest should not consent thereto, then to a receiver who had been appointed to receive the rents of the estates for the benefit of the incumbrancers, the incumbrancers and their receiver were made respondents, and, having been served with the petition, appeared at the hearing thereof:—Held, that the costs of the incumbrancers and of the receiver were to be borne by the company. *Nash, In re*, 25 L. J., Ch. 20; 1 Jur. (N.S.) 1082; 4 W. R. 28.

When a tenant for life petitions for the interim investment of purchase-moneys paid in by a railway company under the Lands Clauses Act, and for the payment to him of the dividends thereon when invested, it is not necessary for him to serve persons having charges on the inheritance prior to the life estate, and the costs of such parties, if served, will not be allowed as against the company. *Morris, In re, Settled Estates, In re*, 45 L. J., Ch. 63; L. R. 20 Eq. 470; 23 W. R. 851.

Of Investment on Mortgage.]—Upon an order for an interim investment on real security of purchase-money paid into court, the costs of the interim investment must be paid by the company, but not the costs of any subsequent investment in land. *Flemon's Trusts, In re*, 40 L. J., Ch. 86; L. R. 10 Eq. 612.

The purchase-money of land taken by a railway company for the purposes of their act was, on petition, directed to be invested in a mortgage of real estate; and the company was also ordered to pay the costs of all parties thereto and to the petition. *Reading* v. *Hamilton*, 5 L. T. 628.

Upon an application under the Lands Clauses Act, for the reinvestment on real security of compensation money which had already been invested in consols at the expense of the city of London corporation:—Held, that the investment was proper, and that the corporation must pay the costs; but that, in regard to future costs, it must be considered a permanent investment. *Wilkinson, In re*, 37 L. J., Ch. 384; 18 L. T. 17; 16 W. R. 537.

Compensation money was invested in consols and an application was afterwards made to reinvest it on a mortgage security:—Held, that the company must pay the costs, but that, in regard to future costs, it must be considered as a permanent security. *Lomax, In re*, 34 Beav. 294.

Where purchase-money had been paid into court under the Lands Clauses Act and invested in consols, upon an application for its reinvestment on mortgage security:—Held, that such reinvestment could not be treated as a permanent investment, and that the company must pay the costs without any conditions as to the costs of any future permanent investment. *Blyth's Trusts, In re*, L. R. 16 Eq. 468; 28 L. T. 890; 21 W. R. 819.

Purchase-money for lands taken by a railway company having been paid into court, the tenant for life of the estate petitioned that the money might be reinvested on mortgage:—Held, that the mortgage could not be considered a permanent investment, and a direction that the company should not be required to pay the costs of a future permanent investment refused. *Sewart, In re*, L. R. 18 Eq. 278; 30 L. T. 355; 22 W. R. 625.

xi. *Payment of Dividends.*

Interim Investment.]—Costs of a petition for payment of dividends on interim investment must be paid by the company, although the petition was rendered necessary by a defective order on a former petition, such order having been made in the presence of the company. *Goe's Estate, In re*, 3 W. R. 119.

Under Special Acts.]—Upon the construction of a railway act:—Held, that the costs given by the act in relation to the payment of certain dividends, had reference to the costs of obtaining the order for payment, and not to the costs of the payment itself. *Athorpe, Ex parte, Hull and Selby Ry., In re*, 3 Y. & Coll. 396.

Upon the construction of s. 157 of the Manchester and Leeds Railway Act (7 Will. 4, c. cxi.):—Held, that the costs of the payment of the dividends to accrue in respect of a sum, the produce of lands taken by the railway company and ordered to be invested, were not to be borne by the company. *Mitchell* v. *Newell*, 3 Railw. Cas. 515.

Purchase of Charity Lands—Official Trustee.]—A scheme for the regulation of a certain charity contained provisions that the legal estate in the lands belonging to the charity, and all terms, estates, and interest therein, should be vested in the "Official Trustee of Charity Lands" and his successors, in trust for the charity, with the intent that such lands might be managed and administered by the trustees of the charity subject to and in conformity with the provisions of the scheme; and that all stock in the public funds and other securities should be transferred to and vest in the "Official Trustees of Charitable Funds," by whom the dividends and income arising therefrom should be from time to time paid to the local trustees or their order. The Metropolitan Board of Works took the lands of the charity under their statutory powers, and paid the purchase-money into court. The trustees then presented a petition that the fund in court might be invested in consols, and when so invested carried over to the account of the official trustees of charitable funds, and that the dividends might be paid to the treasurer for the time being of the charity. The title to the lands sold had been approved by the purchasers, but the conveyance to the Metropolitan Board of Works had not yet been executed. Therefore, the legal estate remained vested in the official trustee of charity lands under the scheme. The official trustees of charity lands and charity funds were served with the petition, and a question arose whether their costs should be paid by the Metropolitan Board of Works. Another question was, whether the application should have been by petition or by summons:—Held, that an order ought to be made for an interim investment and payments of dividends as asked; and that, having regard to the provisions of the scheme, the petitioners were justified in proceeding by petition, and were also justified in serving the official trustees. *Stafford's Charity, In re*, 57 L. T. 846.

Change of Order Required—Marriage.]—The purchase-money of a leasehold interest purchased by a railway company was paid into court to an account "*Ex parte* the company, the account of the two lessees," and the dividends were ordered to be paid to one lessee and the executrix of the other. The executrix married:—Held, that on a petition for payment of the dividends to the husband and the other lessee, it was unnecessary to serve the company, and that the petitioners, having served them, must pay their costs. *Hordern, Ex parte, Grand Junction Ry., In re*, 2 De G. & Sm. 263; 12 Jur. 846.

—— **Death.**]—Purchase-money for lands belonging to wardens and overseers having been invested, and an order made for payment of the dividends to the vestry clerk, who had since died, a petition was presented for payment of the dividends to the churchwardens and overseers for the time being:—Held, that the costs of both petitions must be borne by the purchasers. *Royal Exchange Act, In re*, 14 Jur. 28.

An order made under the 8 & 9 Vict. c. 18, directed the dividends of stock, arising from the investment of the purchase-money of land belonging to a perpetual curacy taken by a railway company, to be paid to the incumbent of a parish for the time being, but only provided for the payment of the costs of the then incumbent of the application on which the order was made. A subsequent incumbent executed a power authorising an attorney to receive the dividends for him under the order, and filed affidavits showing himself to be the incumbent. On the company declining to pay his costs thus incurred he applied in chambers for an order for their taxation and payment, which was ordered accordingly:—Held, that the order was rightly made. *Guilden Sutton (Incumbent), Ex parte*, 8 De G. M. & G. 380; 2 Jur. (N.S.) 793; 4 W. R. 582.

Where the purchase-money of land taken by a railway company has been paid into court to their credit, and subsequently invested in stock in trust for B., who dies, bequeathing it to C. for life; the court, on a petition by B.'s executors, in directing payment of the dividends to C., ordered the costs of the petitioners to be paid by the company. *Lye, In re*, 13 L. T. 664.

A railway company having taken lands, and paid the money into court, the dividends were received by a tenant for life, and upon her death her husband re-settled the property, and presented a petition for payment of the dividends to himself:—Held, that the company was not liable to pay the costs of the petition. *Pick, In re*, 31 L. J., Ch. 495; 10 W. R. 365.

Lands which were limited to A. for life, remainder to B. in fee, were taken by a company under the powers of their act, and the purchase-money was paid into court, and subsequently invested in consols. The company's act did not authorise the payment of any costs other than those of the reinvestment of the purchase-money. A. died without having received any of the dividends, and his residuary legatee bequeathed all her residuary personal estate to C., who prayed for payment to himself of the fund and the dividends. The legal personal representative of A. not being before the court, the application to pay to B. the dividends accrued during the life of A. was refused, and the court ordered them to be paid to A.'s personal representative. An application that the costs of the petition might be paid by the company was also refused. *Ackers' Trusts, In re*, 9 Jur. (N.S.) 224; 7 L. T. 535; 11 W. R. 182.

When the purchase-money of settled lands taken by a local board was paid into court and invested, and the dividends, on the petition of the trustees of the settlement, ordered to be paid to them by name, or one of them, and both the trustees died, the court, on the petition of the new trustees for payment of the dividends to them, declined to order the local board to pay the costs of the second petition. *Pryor, In re*, 35 L. T. 202.

—— **Change of Charity Trustees.**]—A public company having taken lands belonging to a charity, and paid the purchase-money into court under the Lands Clauses Consolidation Act, the usual order was made for investment and payment of the income of the fund to the trustees of the charity, or any two or more of them. Afterwards, the charity having been practically superseded by the school board, a new scheme was sanctioned, whereby the charity was recast, and new governors were substituted for the old trustees. The new governors then petitioned for payment out of part of the corpus towards the expenses of the new scheme, and for payment of the income of the remaining fund to the petitioners, or any two or more of them. The company contended that they were not liable to pay the costs of a petition caused by a devolution

of title subsequent to the taking of the land :—Held, that the change of interest having been caused, not by the act of the trustees, but by the reconstitution of the charity (an incident to which all charities were liable), the company were bound to pay the costs of the petition. *Shakespeare Walk School, In re*, 48 L. J., Ch. 677 ; 12 Ch. D. 178 ; 28 W. R. 148.

The dividends arising from the purchase-money of lands purchased by a railway company from the trustees of a school had been ordered to be paid to the then trustees ; subsequently new trustees were appointed. On a petition for payment of the dividends to the new trustees, no order was made upon the company for payment of costs. *Audenshaw School, In re*, 1 N. R. 255.

Application by Tenant for Life.]—Tenant for life of lands sold under the provisions of the London Bridge Act (10 Geo. 4, c. 136), is not entitled to his costs out of the fund arising from the sale. *Pasmore, Ex parte, London Bridge Act, In re*, 1 Y. & Coll. 75 ; 4 L. J., Ex. Eq. 17.

The costs of a tenant for life, on his petition for payment of the income of a fund paid into court, must be paid out of the income, and those of the trustees out of the corpus. It is not necessary, upon such an application, to serve the remainderman. *Whitling, In re*, 9 W. R. 830.

Where a petition is presented by a tenant for life for payment of the dividends on a fund paid into court, the costs are payable out of income, and not out of the corpus. *Marner's Trusts, In re*, 36 L. J., Ch. 58 ; L. R. 3 Eq. 432 ; 12 Jur. (N.S.) 959 ; 15 L. T. 237 ; 15 W. R. 99.

Where a tenant for life mortgages his life interest in the purchase-money of land compulsorily taken by a railway company, and he and the mortgagee concur in a sale of his interest, the costs of an application for payment of the dividends to the purchaser, during the life of the tenant for life, are not chargeable against the company. *Byron's Trusts, In re*, 5 Jur. (N.S.) 261 ; 7 W. R. 367.

Where a tenant for life of a fund in court obtained an order for payment of the dividends, but no provision was made as to the cost of the application, the court, after a lapse of two years, allowed the order to be amended by adding a direction that the costs should be payed out of the corpus of the fund. *Tanner, In re*, 14 L. T. 589.

Where a tenant for life might, but for disputes between himself and his incumbrancers, have obtained an order for payment of dividends to himself of a fund in court on a former occasion, he will not be allowed as against the company the costs of an additional application relating to the dividends. *Joliffe, In re*, 3 Jur. (N.S.) 633.

A person bequeathed leaseholds held of an ecclesiastical corporation, giving certain life interests with remainder over. He directed his trustees, two years or sooner before the time for renewal, to bring a sufficient part of the rents into a fund to keep the estates always renewed. It was the practice to renew the leases every fourteen years, but it was not obligatory on the corporation to do so ; they ceased to do so about 1866. Previously to that, notice had been given by a railway company to take the property. The purchases were completed and the price paid into court, and invested in consols. The investment gave a diminished income :—Held, that the tenants for life were only entitled to the income of the fund. No costs allowed to or against the railway company. *Wood, In re*, 40 L. J., Ch. 59 ; L. R. 10 Eq. 572 ; 23 L. T., 430.

The dividends of money in court were ordered to be paid to the tenant for life, on his death the remainderman petitioned for the transfer of the fund, and for payment of the last dividend to him :—Held, that the executors of the tenant for life took no part of the last half year's dividend, and that their costs should be paid by the petitioner and not by the company. *Longworth's Estate, In re*, 1 Kay & J. 1 ; 23 L. J., Ch. 104 ; 2 W. R. 124.

Where lands settled in the same manner have been purchased by different railway companies, and the purchase moneys paid into court and invested, and the tenant for life afterwards dies, the orders directing payment of the dividends of the several funds to the person next entitled may all be obtained upon the same petition ; and the railway companies will not in future be required to pay the costs of more than one petition. *Broke's (Lord) Estate, In re*, 1 N. R. 568.

xii. *Discharge of Debts and Incumbrances.*

Under Special Act.]—Where, under the provisions of a railway act, lands are purchased of corporations, tenants for life, &c., the costs of an application to the court to have the purchase-money applied in the discharge of incumbrances will be directed to be paid by the company, although the act only makes an express provision for such costs in cases where the money is to be laid out in the purchase of lands to be settled to the like uses. *Trafford, Ex parte, Liverpool and Manchester Ry., In re*, 2 Y. & Coll. 522.

On the construction of a railway act :—Held, that the cost of paying off an incumbrance on land purchased by the company out of the purchase-money in court were not to be paid by the company. *Hardwicke (Earl), Ex parte, Eastern Counties Ry., In re*, 5 Railw. Cas. 210 ; 17 L. J., Ch. 422 ; 12 Jur. 508.

A piece of land, part of certain trust estates, was taken by a railway company, and the purchase-money deposited in court ; other part of the same estates was subject to a mortgage. The tenant for life presented a petition praying that the money might be applied to pay off the mortgage, and that the residue might be invested :—Held, that the railway company were not, under s. 151 of their act, liable for the costs of the mortgagees. *Yeates, Ex parte, Lancaster and Carlisle Ry., In re*, 8 Railw. Cas. 370 ; 12 Jur. 279.

Lands Clauses Act.]—The costs of discharging an incumbrance must be paid by the owners of the estate. *Sheffield Corporation, Ex parte*, 21 Beav. 162 ; 25 L. J., Ch. 587 ; 2 Jur. (N.S.) 31 ; 4 W. R. 70.

Incumbrance on other Parts of Estate.]—Under s. 80 of the Lands Clauses Act, the promoters are not liable to pay the costs incurred by the application of their purchase-money in paying off an incumbrance on other parts of the estate of the owner. *Ib.*

When under the provisions of local acts, which authorised the taking of land and the application

of the purchase-money in the purchase of other land, or in the case of the parties interested being under disability towards the discharge of incumbrances on land settled to the same uses as that taken, and provided for the payment by the parties taking the land of the costs of a reinvestment in land :—Held, that when a petition for payment out of court of money paid in under the act asked to have it applied towards paying off incumbrances on other land settled to the same uses, there was no liability to pay the costs of the petitioners. *Stanley of Alderley (Lord), In re*, L. R. 14 Eq. 227 ; 26 L. T. 822.

A company purchasing lands is not liable, under s. 80 of the Lands Clauses Act, to pay the costs incurred by the application of the purchase-money in discharging an incumbrance on other lands of the vendors. *Sheffield Town Trustees, Ex parte, Sheffield Water Works Co., In re*, 8 W. R. 602.

Semble, the court has jurisdiction to order a company to pay the costs of a petition to apply purchase-money in court in discharge of incumbrances on lands other than those compulsorily taken, but settled to similar uses. *Dublin, Wicklow and Wexford Ry., In re*, 25 L. R., Ir. 175.

Mortgagee—Form of Order.]—Mortgaged property, the subject of a foreclosure action, was purchased by a public body under their statutory powers, and the sum which had been assessed for compensation was paid into court :—Held, that the mortgagee was only entitled to the ordinary inquiry whether anything and what was due to him for any and what costs, charges, and expenses properly incurred by him in respect of his mortgage security, and that he was not entitled to an express direction for the allowance of his extra costs (beyond those allowed on taxation between himself and the public body) of the inquiry to assess the compensation. *Rees* v. *Metropolitan Board of Works*, 49 L. J., Ch. 620 ; 14 Ch. D. 372 ; 42 L. T. 685 ; 28 W. R. 614.

Of what Parties—Service.]—R. C. obtained an agreement for a lease of some warehouses and premises, which was deposited with his solicitor, who subsequently agreed to advance 300*l.* to R. C. for the repairs of the premises, upon his signing a memorandum charging them with that amount, and with all further advances, not exceeding 500*l.* The premises were afterwards taken by the corporation of London by virtue of an act of parliament, for making public improvements ; and in consequence of questions between R. C. and his solicitor respecting the amount due upon the security, and also in consequence of notice of a judgment debt due by R. C., the purchase-money was paid into court ; and upon a petition by R. C., asking for an account, and that 500*l.* might be set apart to answer what should be found due from him to his solicitor, and that the surplus, after payment of the judgment debt, might be paid to R. C. :—Held, that the amount of debt between R. C. and his solicitor must be ascertained by the master ; that the corporation need not attend, but that it must pay the costs of this petition, but not of the affidavits made relating to the claims of the parties. *Collins, Ex parte*, 19 L. J., Ch. 244.

A railway company purchased certain land which was devised to the petitioner for life, and then to his children. The tenant for life had mortgaged his life estate, and the mortgagees were made parties to the conveyance to the company. The purchase-money was paid into court. The tenant for life now presented a petition for its investment. The mortgagees were served, and asked for their costs :—Held, that such costs must be paid by the mortgagor, and not by the railway company. *Smith, Ex parte, Lancashire and Yorkshire Ry., In re*, 6 Railw. Cas. 150 ; 19 L. J., Ch. 56.

A petition was presented by the lessee of certain property compulsorily taken by a railway company for payment out of court of a fund representing his compensation under an award made in November, 1884. At the date of the award rent was due to the lessor, who had the usual right of re-entry in default of payment. At the date of payment of the fund into court the railway company had not completed the purchase of the lessor's interest. Subsequently to the purchase of his interest the lessor gave notice to the railway company of his claim to have his unpaid rent paid out of the fund in court claimed by the lessee. Accordingly he received notice of the presentation of the petition from the railway company, and appeared at the hearing, although not served nor made a formal respondent to the petition. His claim was settled by the petitioners, but the question arose as to whether or not the railway company should pay his costs :—Held, that the right of re-entry was an incumbrance on the leasehold interest, and therefore on the fund in court, and notice having been given to the railway company by the lessor, he was rightly before the court for their protection, and they must pay his costs. *London Street, Greenwich, and L., C. & D. Ry., In re*, 57 L. T. 673.

Where a tenant for life of settled estates, part of which had, under the provisions of the Lands Clauses Act, been purchased in 1849 by a railway company, and which estates were subject to several incumbrances created previously and subsequently to the date of such purchase, presented a petition to have the purchase-money, which had been paid into court, reinvested in land :—Held, that the costs of the reinvestment, and the expenses incurred in serving the mortgagees, must be borne by the company. *Peyton's Settlement, Ex parte, Eastern Counties Ry., In re*, 2 Jur. (N.S.) 1013 ; 4 W. R. 380. S. P., *Hungerford, In re*, 1 Kay & J. 413 ; 1 Jur. (N.S.) 845.

Upon a petition for payment out of court to an incumbrancer of compensation money paid into court under the 8 & 9 Vict. c. 18, the incumbrancer is not a necessary party to be served with the petition, and his costs must be paid by the owner of the estate. *Hadfield, In re*, 29 Beav. 370 ; 30 L. J., Ch. 278 ; 7 Jur. (N.S.) 383 ; 9 W. R. 263.

The costs of mortgagees appearing and consenting to accept payment of their security out of the purchase-money of lands subject to their mortgage, ordered to be paid by the company. *Waterford, Dungarvan and Lismore Ry., In re*, 11 Ir. Eq. R. 321.

Where two estates, settled upon different trusts, were jointly charged with certain incumbrances, and such incumbrances were, by arrangement between the two tenants for life, paid off by them out of their private moneys in certain proportions, and part of one of such estates was taken by a railway company for the purposes of their act, and the purchase-money paid into court : —Held, upon petition by the tenant for life of the land taken by the company, for payment to him out of the fund in court of the amount of the

incumbrance paid off by him, and for the investment of the residue of the fund, that the company was liable for the costs of the appearance of the persons interested in remainder expectant on the life estate of such tenant for life. *Furness Ry., In re, Romney, In re*, 3 N. R. 287.

Upon an application by a tenant for life to pay to a mortgagee the amount of compensation money which was in court:—Held, that the company was not bound to pay the mortgagee's costs of appearing. *Hatfield, In re*, 32 Beav. 252.

A railway company took lands which stood limited to a tenant for life, with remainder subject to a charge of 20,000*l.* to four sisters as tenants in common in tail, and paid the purchase-money into court under 8 & 9 Vict. c. 18. A petition was presented for payment out of court to the owner of the charge, in part satisfaction thereof; and upon the petition, the tenants in common in tail, and other parties having charges, appeared separately:—Held, that the company was liable to pay the costs of all parties. *Braye (Baroness), In re*, 32 L. J., Ch. 432; 9 Jur. (N.S.) 454; 11 W. R. 333.

Where land is purchased of a party seised in fee, by a railway company, and the money paid into court, and he dies leaving his real estates charged with legacies, upon the usual petition for payment out of court the costs of the legatees must be paid by the petitioners. *Oxford and Rugby Ry., Ex parte, Turner, In re*, 2 W. R. 441.

On a petition by a tenant for life for the investment of money paid into court by a railway company, the incumbrancer of the life estate being served, is entitled to his costs of appearance against the company. *Smith, In re*, 13 L. T. 626; 14 W. R. 218.

Where mortgagees of a life interest in land appeared separately, on a petition by the mortgagor, for the investment of the purchase-money which had been paid into court by a railway company for the land taken by them, their costs were ordered to be paid by the mortgagor. *Thomas, In re*, 10 Jur. (N.S.) 307; 10 L. T. 127; 12 W. R. 546.

A railway company took, under its compulsory powers, land which was settled in such a way that a father and a son had at that time between them the absolute beneficial interest. The purchase-money, as fixed by arbitration having been paid into court, on a petition asking that part of the fund should be applied in paying off a mortgage created after the payment into court:—Held, that the petitioners must pay the costs of the mortgagee's appearance. *Jones' Trust Estate, In re*, 39 L. J., Ch. 190; 18 W. R. 312.

After payment into court by a company of the purchase-money of land belonging to a tenant for life and remaindermen, some of the latter mortgaged their reversionary interests in the fund. Upon the death of the tenant for life, the owners of the fund and their incumbrancers presented a petition for payment of the fund out of court:—Held, that the company were not liable to pay the costs incurred by the mortgagees in proving their incumbrances. *G. W. Ry., Ex parte, Gough's Trusts, In re*, 53 L. J., Ch. 200; 24 Ch. D. 569; 49 L. T. 494; 32 W. R. 147.

Amount of Mortgagee's Costs—Affidavit of Service.]—Where purchase-money has been paid into court under the Lands Clauses Act, 1845, or the Artizans' and Labourers' Dwellings Improvement Act, 1875, and a petition is presented for payment out either to or with the consent of incumbrancers, the only costs which the company or local authority (as the case may be) can be required to pay, in addition to the petitioner's costs, are the sum of 42*s.* for the incumbrancers' costs, and a further sum sufficient to cover the costs of an affidavit of service of the petition upon the incumbrancers. *Halstead United Charities, In re* (L. R. 20 Eq. 48), followed. *Artizans' and Labourers' Dwellings Improvement Act, In re*, 14 Ch. D. 624; 43 L. T. 84.

When a petition is presented simply for the investment in land of money paid into court under the Lands Clauses Act, and there are mortgages or annuities charged upon the estate, the proper course is to serve the mortgagees or annuitants with a copy of the petition and 40*s.* costs, with an intimation that if they appear they will be liable to pay their own costs. *Gore-Langton's Settled Estates, In re*, 44 L. J., Ch. 405; L. R. 10 Ch. 328; 32 L. T. 785; 23 W. R. 842.

The rule that where incumbrancers are parties to a petition for the reinvestment in land of money paid into court under the Lands Clauses Act, 40*s.* costs ought to be tendered to such parties at the time of service of the petition in order to discourage unnecessary appearances, applies to the case of payment out of court of such moneys to persons entitled subject to incumbrances; but the petitioners will be entitled to add to their costs of the petition, in addition to the 40*s.*, a sum sufficient to pay the costs of an affidavit of service. *Halstead United Charities, In re*, L. R. 20 Eq. 48.

Land in settlement having been taken compulsorily by a public body under the Lands Clauses Act, 1845, and the purchase-money paid into court, a reversioner mortgaged his reversionary interest in the fund. After the death of the tenant for life a petition was presented for the payment of the money out of court, and the mortgagee was served:—Held, that the public body must pay the costs of the mortgagee's appearance, those costs being limited to 42*s.*, and that they must also pay the costs of serving the mortgagee with the petition. *Gough's Trusts, In re* (24 Ch. D. 569), dissented from. *Jones' Trust Estate, In re* (39 L. J., Ch. 190), not followed. *Olive's Estate, In re*, 59 L. J., Ch. 360; 44 Ch. D. 316; 62 L. T. 626; 38 W. R. 459.

Where mortgaged land has been purchased by a local authority under the Lands Clauses Act, 1845, and the purchase-money has been paid into court, and a petition to which the mortgagees consent, is presented for payment out of the purchase-money, the amount of the mortgagees' costs to be paid by the local authority will be thirty shillings, and the cost of an affidavit of service of the petition. *Halstead United Charities, In re* (L. R. 20 Eq. 48), and *Artizans' Dwellings Act, In re* (14 Ch. D. 624), followed. *Ruck's Trusts, In re*, 13 R. 637.

After Order for Payment of Dividends.]—Where an order has been made on a petition presented by a tenant for life for payment out to him of dividends of purchase-money of lands compulsorily taken, the costs of which have been borne by a railway company, and the tenant for life subsequently seeks to have the purchase-money applied in discharge of incumbrances, the court will not order the company to bear the

costs of the latter application, except those of advertisements, where advertisements were dispensed with on the prior application. *Dublin, Wicklow, and Wexford Ry., In re*, 25 L. R., Ir. 175.

xiii. *Redemption of Land Tax.*

How Payable.]—Where an act of parliament enabled a railway company to purchase lands of corporations, tenants for life, &c., and directed that the purchase-money should be applied in the redemption of the land tax upon other parts of the property unsold:—Held, that the costs of an application to the court under such an act of parliament, to have the purchase-money applied in the redemption of the land tax, will be allowed out of the purchase-money, although the act only makes an express provision for such costs in cases where the money is to be laid out in the purchase of lands, to be settled to the like uses. *Northwick, Ex parte*, 1 Y. & Coll. 166.

The cost of investing money, paid in by a railway company as the price of land taken under their act, in redemption of the land tax on other parts of the same property:—Held, payable by the company, although not mentioned specifically in s. 80 of the Lands Clauses Act. *Beddoes, Ex parte*, 2 Sm. & G. 466; 24 L. J., Ch. 175; 3 Eq. R. 137.

The costs of the application of the purchase-money of lands taken by a railway company in the redemption of land tax are payable by the company. *Bethlem Hospital, In re*, 44 L. J., Ch. 406; L. R. 19 Eq. 457; 23 W. R. 644.

The application of the purchase-money of land taken by a railway company to the redemption of land tax, is a re-investment within s. 80 of the Lands Clauses Act, and the costs of it are chargeable on the company. *L. B. & S. C. Ry., In re*, 18 Beav. 608.

A company purchased lands under a private act of parliament, which provided that the company should pay the costs of investment of purchase-money in "lands, tenements, and hereditaments":—Held, that the costs of reinvestment in the redemption of land tax must be paid by the company. *St. Katharine's Hospital, In re*, 17 Ch. D. 378; 44 L. T. 52; 29 W. R. 495.

xiv. *Purchase of other Lands.*

(a) In General.

Under Special Acts.]—The court will, under the words, "reasonable costs, charges and expenses," in 2 & 3 Vict. c. 61, s. 29, award all necessary costs incurred by parties in obtaining payment out of court of the purchase-money of lands required for the purposes of the commission, or of having it invested upon trusts similar to those to which the lands so required were subject. *Shannon Commissioners, In re*, Fl. & K. 13; 3 Ir. Eq. R. 355.

The court will not, under the 1 & 2 Vict. c. 56, order the poor law commissioners to pay the costs relating to the repurchase of lands to be settled to the same uses as those to which the lands sold were subject. *Mountsandford (Lord), In re*, Fl. & K. 368.

See as to costs of reinvestment of money paid into court. *London Bridge Improvement Act, In re*, 11 Jur. 958.

Where tenants for life obtained an act of parliament enabling them to sell to a company, the first tenant in fact being an infant, the act having directed the purchaser, according to the proposal, to bear all the expenses of obtaining the act, and of completing the title and conveyance to him, and all other expenses of the vendor, in consequence of the sale, or arising in respect thereof:—Held, that he was not liable to the expenses of investing the purchase-money in the manner prescribed by the act. *London Bridge Acts, In re*, 13 Sim. 180.

Lands settled to similar Uses.]—An estate stood limited to B. for life, with remainder to his first and other sons successively in tail, remainder to B. in fee. B. made his will, devising all his real estate in strict settlement. After the date of B.'s will, a company purchased from him part of the estate under the powers of the Lands Clauses Act, and paid the purchase-money into court. B. died without issue:—Held, that the company must pay the costs of investing the purchase-money in real estate, to be settled to the uses of the will. *De Beauvoir, In re*, 2 De G. F. & J. 5; 29 L. J., Ch. 567; 6 Jur. (N.S.) 593; 2 L. T. 364; 8 W. R. 425.

A railway company took, under its compulsory powers, land which was settled in such a way that a father and a son had at that time between them the absolute beneficial interest. The purchase-money as fixed by arbitration having been paid into court:—Held, that the owners were entitled to have part of the fund reinvested in the purchase of land, to be settled to somewhat different uses, at the expense of the company. *Jones' Trust Estate, In re*, 39 L. J., Ch. 190; 18 W. R. 312.

Construction where Statute Doubtful.]—When land is taken compulsorily by a public body, and a question arises as to costs incurred relating to the reinvestment of the purchase-money of such land, the purchaser or person in whose favour such reinvestment is to be made ought to have the benefit of the doubt. *Jones's Settled Estates, In re*, 4 Jur. (N.S.) 581; 6 W. R. 614.

After Interim Investment.]—Land, which was devised to trustees upon certain trusts, was taken by a company under their compulsory powers, and the purchase-money paid into court and invested in consols. Upon an application by the trustees for permission to reinvest the money in the purchase of property to be settled upon the trusts of the will:—Held, that the company must pay the costs of such reinvestment. *Dodd's Estate, In re*, 24 L. T. 542; 19 W. R. 741.

What Costs included.]—When money paid into court under the Lands Clauses Act is sought to be reinvested in land upon a contract which throws upon the purchaser costs of the purchase which in an open contract would be borne by the vendor, the costs directed to be paid by the company will be limited to those which in an open contract would be purchaser's costs. *Christ's Hospital, Ex parte*, L. R. 20 Eq. 605.

Costs of a purchase of land ordinarily borne by the vendor, but thrown by special stipulation upon the purchaser, were held under the circumstances not to be costs of reinvestment payable by promoters according to the Lands Clauses Act, 1845. *Temple Church Lands, In re*, 47 L. J., Ch. 160; 26 W. R. 259.

The commissioners of sewers for the purposes of their act took lands belonging to a charity, and provided other lands in substitution:—Held,

that the charity was entitled to its costs of the inrolment, under the Statute of Mortmain, of the conveyance of the substituted lands. Semble, the conveyance would be void unless inrolled. *Christ's Hospital, Ex parte*, 4 N. R. 14.

The bishop of London having sold property to divers corporate bodies they paid the purchase-money into court. The bishop, being desirous of reinvesting the money in the purchase of leasehold interests granted out of other lands of the see, petitioned for payment of the money out of court, praying that the costs of reinvestment, and the costs of obtaining the sanction of the commissioners acting under the 14 & 15 Vict. c. 104, might be paid by the several corporate bodies, the purchasers:—Held, that the costs of the reinvestment must be paid by them in equal shares, and not ratably, but the costs of obtaining such consent could not be allowed. *London (Bishop), Ex parte*, 2 De G. F. & J. 14; 29 L. J., Ch. 575; 6 Jur. (N.S.) 640; 8 W. R. 465, 714.

Railway purchase-money being paid into court under the Lands Clauses Act, charity lands are contracted for as an investment, the usual reference is made, and a petition under Sir Samuel Romilly's Act being necessary, the owner of the money agrees with the charity trustees to pay those costs, and, on a petition to confirm the purchase, asks for such costs against the company:—Held, that he was not entitled. *Alsager (Incumbent), Ex parte, North Staffordshire Ry., In re*, 2 Eq. Rep. 327; 2 W. R. 324.

The costs of settling a new scheme for a voluntary school, occasioned by the compulsory purchase of the site of such school by a public body, held to be too remote to be "costs incurred in consequence of the taking of land," regard being had to the propinquity of board schools, and the general circumstances of the neighbourhood, which would probably soon have led, in any case, to a reconstitution of the charity. *St. Paul's Schools, Finsbury, In re*, 52 L. J., Ch. 454; 48 L. T. 412; 31 W. R. 424.

A purchase was completed under the powers of an act of parliament which authorised a corporation to purchase property compulsorily. The vendors being under disabilities the purchase-money of their property was paid into court, under the provisions of the act whereby the court was authorised to order all the reasonable costs, charges, and expenses attending the reinvestment of the purchase-moneys in the purchase of lands to be settled to the same uses as the property purchased, together with the costs, charges, and expenses of obtaining the proper orders, and of the other proceedings for such purposes, to be paid by the corporation. A contract was entered into for the investment of part of the fund in court in the purchase of certain property free from incumbrances. The title, on investigation, proved to be subject to numerous incumbrances, and the purchasers' counsel advised that the vendors should procure all the incumbrances to be conveyed to the vendors, so as to shorten the conveyance. The draft reconveyances, eight in number, were submitted to the purchasers' solicitors, and settled by their counsel:—Held, that the corporation could not be charged with the costs thereby incurred, unless they were incurred with the express consent of the corporation. *Jones* v. *Lewis*, 1 De G. & Sm. 245; 11 Jur. 511.

Freeholds—Leaseholds.]—When all parties interested were sui juris, a railway company was ordered to pay the costs of investing the purchase-money of a leasehold in a freehold estate. *Parker, In re*, 41 L. J., Ch. 473; L. R. 13 Eq. 495; 26 L. T. 12; 20 W. R. 289.

The dean and canons of Manchester presented a petition to have moneys which had been paid into court by several railway companies and other public bodies for lands taken from them, reinvested in the purchase of leasehold interests in other lands, of which they were reversioners in fee:—Held, that the companies and other public bodies must pay the costs of reinvestment in the same way as if the purchase had been of freeholds. *Manchester (Dean), Ex parte*, 28 L. T. 184.

Funds not in same Court.]—Where a fund standing to an account in one vice-chancellor's court was required to make up the purchase-money for a purchase authorised in a suit in another vice-chancellor's court, the vice-chancellor in whose court the fund is standing can authorise payment thereof to the vendor upon his executing the conveyance, but can make no order as to payment of any part of the costs of the conveyance. *Bagot, In re*, 14 L. T. 159; 14 W. R. 471.

Appearance of Parties.]—A purchaser who has paid into court the price of land taken under the powers of a compulsory statute, is not entitled to the costs of appearing upon a petition by the vendor to have the money invested. *Exeter Corporation, Ex parte*, 8 Jur. 653.

By a railway act a company was empowered to take lands belonging to a vicarage; and it was declared that the purchase-money should be paid into court, and that, on a petition by the vicar and patron, and with the consent of the ordinary of the diocese, it might be laid out in the purchase of other lands. A purchase was made accordingly:—Held, that the bishop was entitled to be paid by the company, not only the costs of his attendance in the master's office, but also of his appearances on the petitions to the court for a reference and confirmation of the master's report. *Creech St. Michael (Vicar), Ex parte*, 21 L. J., Ch. 677.

Upon a petition for reinvestment in land of money paid into court under the 8 & 9 Vict. c. 18, s. 80, as the purchase-money of lands in strict settlement, the company will not be ordered to pay the costs of any person except the petitioner, but the costs of other persons who are properly served with the petition must come out of the fund. *Legge, In re*, 8 W. R. 559.

On a petition for the reinvestment of the purchase-money of lands taken by a company in other lands, the petitioners (the parties entitled to the moneys) had served the vendors of the property in which it was proposed that the reinvestment should be made. These second vendors, appearing on the petition, were ordered to have their costs as against the petitioners, but the petitioners were not to have such costs over again against the company. *Dylar's Estate, In re*, 1 Jur. (N.S.) 975.

(b) Several Applications.

No Limit unless Applications Vexatious.]—Where purchase-money of land taken by a railway company is in court to be invested in the purchase of other land, the court will allow

all costs, charges, and expenses, according to the act, of as many investments as may be necessary to consume the whole purchase-money. *Bouverie, Ex parte, London and Birmingham Ry., In re*, 4 Railw. Cas. 229.

The corporation of the Trinity House were empowered by the act 6 & 7 Will. 4, c. 79, to purchase lighthouses; and the act directed that all the reasonable costs, charges, and expenses of reinvesting the purchase-money should be borne by the corporation:—Held, that in the absence of any proof of an attempt to throw expenses upon the corporation by an improper exercise of the power of reinvestment, that there was no limit to the number of separate investments, for the costs of which the corporation were liable. *Jones* v. *Lewis*, 2 Macn. & G. 163; 2 H. & Tw. 406; 19 L. J., Ch. 539; 14 Jur. 873. And see *S. C.*, 1 De G. & Sm. 245; 11 Jur. 511.

The costs of a second reinvestment of part of 2,880*l.*, the purchase-moneys paid into court by a railway company, ordered to be paid by them where nothing vexatious appeared in the adoption of that mode of reinvestment by piecemeal. *Woolley's Estate, In re*, 17 Jur. 850; 1 W. R. 407, 465.

Where purchase-money has been paid into court, the court will order the company to pay the expenses rightly but not capriciously incurred of more than one reinvestment. *Brandon* v. *Brandon*, 2 Dr. & Sm. 162; 32 L. J., Ch. 20; 9 Jur. (N.S.) 11; 7 L. T. 499; 11 W. R. 53.

A company having taken land which was the subject of a suit, and paid the money into court, the parties obtained an order for reinvesting a large portion of the money in land. They afterwards applied by petition for a small portion of the remaining fund to be invested, and they served all the parties to the suit:—Held, that the court considering this purchase to be for the benefit of the parties, and neither capricious nor unnecessary, the railway company must pay the costs. *Ib.*

The corporation of London was empowered by acts for rebuilding London Bridge to purchase and pull down property belonging to the Fishmongers' Company: the purchase-money to be invested and applied in purchase of other property upon petition by the Fishmongers' Company, and the reasonable costs of such investments to be paid by the corporation out of the moneys to be applied for the purposes of the acts:—Held, that unless the petitioners were shewn to be exercising their power of applying for a reinvestment vexatiously and unnecessarily, the corporation must pay the costs of each separate reinvestment, however numerous they might be. *Fishmongers' Co., Ex parte*, 7 L. T. 668; 11 W. R. 81.

Where the purchase-money amounted to 125,000*l.*, the court did not consider six applications for investment, still leaving 38,440*l.* uninvested, to be unreasonable. *St. Katharine's Hospital, In re*, 17 Ch. D. 378; 44 L. T. 52; 29 W. R. 495.

Benefit of Parties Interested.]—A railway company was ordered to pay the costs of a second reinvestment in land, the purchase being, in the opinion of the court, for the benefit of the parties interested. *Hereford, Hay, and Brecon Ry., In re*, 11 L. T. 335; 13 W. R. 134.

Sect. 80 of the Lands Clauses Act contemplates not one application in respect of several reinvestments, but several applications, and where it was shewn to be for the benefit of the parties the court ordered a company to pay the costs of a third reinvestment in a very small purchase. *St. Bartholomew's Hospital, In re*, 4 Drew. 425.

When the purchase-money of lands taken by a railway company is invested in other lands sold in a suit in this court, a second petition, intituled in the cause, becomes necessary, and the company must bear the expense of both petitions. *Carpmael* v. *Profitt*, 17 Jur. 875.

A railway company took lands forming part of the subject-matter of a suit, and paid the money into court under the Lands Clauses Act. A large portion of this money was reinvested on petition in the usual manner. The trustees proposed to purchase a small property which they considered very advantageous for the estate, and petitioned to have the purchase-money, amounting to only a small portion of the residue, paid out of court, and also that the company might bear the costs:—Held, that the costs must be borne by the company, the court considering it to be for the benefit of the cestui que trust to have the fund invested in more than one purchase. *Brandon* v. *Brandon*, 2 Dr. & Sm. 162; 32 L. J., Ch. 20; 9 Jur. (N.S.) 11; 7 L. T. 499; 11 W. R. 53.

Special Acts.]—A railway company, under their act, took part of the glebe of a rectory. Part of the purchase-money was invested in other land. The rector bought a small additional piece of land for 6*l.*, and petitioned that that sum might be paid out of the balance of 20*l.* 9*s* 5*d.* remaining in court, and the remainder be paid to him. On making the order, the court directed the company to pay the costs of the second investment. *Loughton (Rector), Ex parte*, 5 Railw. Cas. 591; 14 Jur. 102.

Costs of a third reinvestment of purchase-money granted to the vendor, the entire purchase-money being very large. *St. Katharine's Dock Co., In re*, 8 Jur. 456.

Where the purchase-money of lands taken by the London and Birmingham Railway Company has been paid into court, pursuant to 3 & 4 Will. 4, c. 36, s. 39, the court will give the parties entitled thereto the costs of two reinvestments of the money in land made pursuant to s. 42 of the above-mentioned act. *Boxmoor Waste Lands, Ex parte, Birmingham Ry., In re*, 3 Railw. Cas. 513; 8 Jur. 307.

Where, by a railway act, a power was reserved to the court to order the reasonable expenses of reinvesting a sum of money in the bank, the produce of land purchased by the company, to be paid by the company, the court will order the costs of two applications for reinvestments of parts of the same sum to be paid by the company. Semble, the costs of any further application must be borne by the parties applying. *Eton College, Ex parte, London and Birmingham Ry., In re*, 3 Railw. Cas. 271; 6 Jur. 908.

(c) Attempted Purchases.

Payable by Company.]—Costs of all parties of an abortive bonâ fide attempt by trustees to reinvest part of the moneys, to be paid by the company. *Woolley's Estate, In re*, 17 Jur. 850; 1 W. R. 407, 465.

The costs of an abortive attempt to reinvest in land money the produce of sale to a railway company, are not costs which, under s. 80 of the Lands Clauses Act ought to be paid by the com-

pany. *Copley, Ex parte*, 4 Jur. (N.S.) 297. *See cases*, infra.

Where there had been, under an order in 1839, an abortive attempt by a tenant for life to reinvest money which had been paid into court for land taken by a railway company, the court ordered the master to tax and certify the costs of the tenant for life incidental to the order of 1839, according to the railway company's act. *M'Donald, In re, London and Blackwall Ry., In re*, 6 Jur. (N.S.) 865; 2 L. T. 168.

Where a railway company purchased land, and paid the purchase-money into court, and contracts for the purchase of land were subsequently entered into by the beneficiaries, for the purpose of investment, which were afterwards rescinded, though the master reported that the purchases were proper and the title good, the railway company was ordered to pay all the costs of the proceedings relating to the abortive attempts to invest the purchase-money, of a disentailing deed, and of the petition. *Vaudrey, Ex parte, North Staffordshire Ry., In re*, 3 Giff. 224; 30 L. J., Ch. 885; 7 Jur. (N.S.) 753; 4 L. T. 735.

Where lands have been taken by a railway company, and the price paid into court, and the court has afterwards sanctioned the investment of the fund in a particular purchase, but the purchase has not been completed, owing to a defect in the vendor's title: yet the company is bound to pay the costs of this attempted purchase, as incident to the reinvestment of the fund. *Holywell (Rector), Ex parte, Wisbeach, St. Ives, and Cambridge Ry., In re*, 2 Dr. & Sm. 463; 35 L. J., Ch. 28; 11 Jur. (N.S.) 579; 12 L. T. 726; 13 W. R. 960.

When the court had approved of a proposed purchase for the reinvestment of a fund representing land taken by a railway company which proved abortive, the title being defective:—Held, that the company must bear the costs of such proposed purchase. *Carney's Trusts, In re*, 26 L. T. 308; 20 W. R. 407.

Non-approval by Court.]—A petition for the investment of money paid into court by a company was made by the tenant for life, but the investment was not approved of by the court. The company received their costs out of the fund. No order was made as to the petitioner's costs. *Hardy's Estate, In re*, 18 Jur. 370.

(d) Purchases beyond Money in Court.

Company's Liability not increased.]—The devisees in trust, under the will of J. S. R., presented a petition to the court, praying that a sum of money paid in by a railway company, together with another sum held by them for a like purpose, might be invested in the purchase of certain closes of land of the value of the amount of the two sums, and also praying taxation and payment by the company to the petitioners of the costs, charges and expenses attending the purchase:—Held, that, under the act of parliament, the petitioners were not entitled to any such costs, charges and expenses, nor to the costs of the application. *Tetley, Ex parte, Great North of England Ry., In re*, 4 Railw. Cas. 55.

Where money is in court under a railway act previous to being laid out in lands to be settled "to the like uses," the court will lend its aid to an advantageous purchase beyond the amount of the money in court, and will direct the extra costs to be paid out of the money in court. *Newton, Ex parte*, 4 Y. & Coll. 518.

A railway company purchased settled lands, and paid the money into court. Lands were purchased with this sum, and with a sum provided by the tenant for life of the land sold. The court directed that the costs of the company should not be increased by reason of the price given for the purchased land being greater than the sum in court. *Branmer's Estate, In re*, 14 Jur. 236.

A. purchased Green-acre for 1,000*l.* in lieu of Black-acre, which a railway company had taken from him, and for which they had paid 644*l.* into court. The company were ordered to pay A. the same costs as he would have been entitled to under s. 80 of the Lands Clauses Act, if Green-acre had cost 644*l.* only. *Hodge, Ex parte, Sheffield and Lincolnshire Ry., In re*, 16 Sim. 159; 12 Jur. 239.

Lands being taken from a corporation by a railway company, the company paid the price into court. The corporation asked that the amount, with other moneys to be supplied by them, might be laid out in a specified purpose:—Held, that the order should direct the payment of costs according to the Lands Clauses Act; and that it should provide that the corporation should pay all extra costs by reason of the extra amount to be invested. *King's College, Cambridge, Ex parte*, 5 De G. & Sm. 621.

Where settled lands had been taken by a railway company for the purpose of their undertaking, and the purchase-money paid into court, the court, upon an application to invest that sum together with a sum provided by the tenant for life, ordered that the costs of the company should not be increased by reason of the price given for the purchased land being greater than that paid into court. *Loveband, In re*, 30 L. J., Ch. 94; 9 W. R. 12.

Where money has been paid into court under the Lands Clauses Act, and is afterwards invested, together with a larger sum of money, in the purchase of land held under one title, the company must pay all costs except the extra stamp duty on the surplus money. *Carlisle Corporation, Ex parte*, 1 W. R. 103.

Apportionment—Funds arising from different Sources.]—Two conditional contracts had been entered into by a curate for the purchase of lands as a reinvestment of two sums in court, one being a sum of 539*l.* consols, and the other a sum of 4,414*l.* consols. The former sum represented moneys which had been paid into court by a railway company in respect of glebe land belonging to the curacy taken by the company under their statutory powers; the latter sum represented moneys that had arisen from the granting of leases of the land belonging to the curacy under the provisions of a private act. The curate presented a petition for the approval of the contracts by the court:—Held, that the railway company's fund should be applied to one only of the two contracts, and that the company ought to pay (1) half the costs of the petition, such costs not to exceed the costs of a summons adjourned to the judge in chambers; (2) a ratable proportion of the ad valorem stamp on the conveyance; and (3) one fourth part of the other costs of reinvestment under both the contracts. *Bilston (Perpetual Curate), Ex parte*, 37 W. R. 460.

(e) Copyholds.

Enfranchisement.]—There being two sets of trustees, one of freeholds and the other of copyholds, settled to the same trusts, the freeholds were sold to a company under the Lands Clauses Act :—Held, that the proceeds of that sale might be invested in procuring the enfranchisement of the copyholds. Costs of both sets of trustees ordered to be paid by the company. *Cheshunt College, In re*, 1 Jur. (N.S.) 995; 3 W. R. 638.

Upon a petition that money paid into court by a railway company upon the purchase of land might be applied for the purpose of enfranchising other property belonging to the vendor :—Held, that under the Lands Clauses Act, an enfranchisement of copyholds was equivalent to reinvestment in other lands, and the court had power to direct such an application of the money, and the company must pay the costs incurred thereby. *Dixon* v. *Jackson*, 25 L. J., Ch. 588; 4 W. R. 450.

The guardians and overseers of a parish purchased copyhold lands in settlement, and also the lord's interest, under 5 & 6 Will. 4, c. 69, and paid the money into court. On a petition by the tenant for life for investment and payment of the dividends to him :—Held, that the guardians were liable to pay the costs of the purchase, and also of the enfranchisement. *Wilson, In re*, 8 L. T. 413; 11 W. R. 712.

Fine on Admission.]—A railway company having taken copyholds, and paid the purchase-money into court, an order was made for reinvestment of the money upon other copyholds, and for payment by the company of the costs, charges, and expenses incurred of, or relating to, the purchase and the costs of the conveyances, and of the application for reinvestment and consequent thereon :—Held, that the company was not liable to pay the fine upon the admission to the copyholds. *Sawston (Vicar), Ex parte, Eastern Counties Ry., In re*, 27 L. J., Ch. 755; 4 Jur. (N.S.) 473; 6 W. R. 492.

(f) Leaseholds.

The dean and canons of Manchester presented a petition to have moneys which had been paid into court by several railway companies and other public bodies for lands taken from them reinvested in the purchase of leasehold interests in other lands, of which they were reversioners in fee :—Held, that the companies and other public bodies must pay the costs of reinvestment in the same way as if the purchase had been of freeholds. *Manchester (Dean), Ex parte*, 28 L. T. 184.

When all parties interested were sui juris, a railway company was ordered to pay the costs of investing the purchase-money of a leasehold in a freehold estate. *Parker, In re*, 41 L. J., Ch. 473; L. R. 13 Eq. 495; 26 L. T. 12; 20 W. R. 289.

(g) In Case of Lunatics.

Where land belonging to a lunatic is taken, the next of kin of the lunatic have a right to attend the sale, and will have their costs of appearing upon a petition for investment of the purchase-money. *Briscoe, In re*, 2 De G. & J. 249; 10 Jur. (N.S.) 859; 4 N. R. 311.

(h) Trustees and Remaindermen.

Costs of trustees who had been served, and appeared on a petition by a tenant for life for investments of railway purchase-moneys allowed against the company. *Cleveland's (Duke) Harte Estates, In re*, 1 Dr. & Sm. 46; 2 L. T. 78; 8 W. R. 336.

Where a fund is standing to the credit of a cause, as well as in the matter of the act, a petition by a tenant for life for reinvestment in land of money paid into court under 8 & 9 Vict. c. 18, must be served upon all persons interested in the money, or the trustees, if any, who represent them; and the company must pay their costs. *Bradshaw* v. *Fane*, 1 N. R. 159; 9 Jur. (N.S.) 166.

Costs of remaindermen and trustees, who appeared as respondents, upon a petition presented under the 8 & 9 Vict. c. 18, s. 80, and in a suit for reinvestment in land, disallowed. *Wilson* v. *Foster, Lancashire and Yorkshire Ry., In re*, 26 Beav. 398; 28 L. J., Ch. 410; 5 Jur. (N.S.) 113; 7 W. R. 172.

Where the purchase-money of settled estates, which were the subject of a private act, requiring the sanction of the court to a reinvestment in land, had been paid into court by a railway company, a petition was presented by the tenant for life for reinvestment in land, and served upon the trustees and remainderman, according to the provisions of the private act :—Held, that the company was not bound to pay the costs of the trustees and remainderman. *Bowes, In re*, 33 L. J., Ch. 711; 10 Jur. (N.S.) 817; 10 L. T. 598; 12 W. R. 929.

(i) Inquiry as to Title.

Whether payable by Company.]—The court will, on the construction of the general clauses in railway acts, fix the railway company with the costs of the master's report as to the title of the lands to be settled to the like uses. *Marsh, Ex parte, Eastern Counties Ry., In re*, 5 Jur. 502.

Purchase-money had been paid into court by a railway company in the usual manner, under the Lands Clauses Act; and the parties interested in the money wishing to purchase another piece of land, a reference had been made to the master as to whether it would be a proper purchase. The master had refused to certify that it was so, but it did not appear on what ground. On application for payment of the money out of court, the costs of the former application and reference were ordered to come out of the fund. *Stevens, Ex parte*, 15 Jur. 243.

Under the construction of s. 69 of the Lands Clauses Act, a purchase made and completed previously to a reference to the master, will not, although it be afterwards approved, be a purchase within the meaning of the act, so as to entitle the petitioner to his costs. *Bouverie, Ex parte*, 5 Railw. Cas. 431.

Under the act for facilitating the conveyance of workhouses (5 & 6 Will. 4, c. 69), which enables the poor-law guardians to purchase, but not compulsorily, lands of persons under disability, and empowers the court to order the expenses attending the purchase, payment into court, or application for reinvestment, to be paid by the poor-law guardians, but makes no further provision for payment of the expenses of the investigation of title on a reinvestment :—Held, that such expenses are, on the interpretation of the whole act, payable by the poor-law

guardians. *Byron's Settlement, In re*, 4 De G. M. & G. 694.

Lands which were settled to uses were purchased by a corporation, in pursuance of an act of parliament, and the purchase-money was paid into court. Prior to an application to the court for reinvestment of the purchase-money in other lands, the tenant for life laid the abstract relating to the lands proposed to be purchased before his private conveyancer, who approved of the title. An application was then made by the tenant for life for the reinvestment of the purchase-money in such lands, and the usual order for a reference to chambers as to title was made. After consultation with the private conveyancer of the tenant for life, the title was also approved by the conveyancing counsel of the court. The master, on taxation, disallowed the fees paid to the private conveyancer of the tenant for life for advising on the abstract:—Held, that the whole of such fees ought not to be borne by the corporation, but that some allowance ought to be made by the corporation in respect thereof. *Jones, In re*, 27 L. J., Ch. 706; 4 Jur. (N.S.) 887; 6 W. R. 762.

(j) Where Several Companies.

Payable in Equal Shares.]—The bishop of London having sold property to divers corporate bodies they paid the purchase-money into court. The bishop being desirous of reinvesting the money in the purchase of leasehold interests granted out of other lands of the see, petitioned for payment of the money out of court, praying that the costs of reinvestment, might be paid by the several corporate bodies, the purchasers:—Held, that the costs of the reinvestment must be paid by them in equal shares, and not ratably. *London (Bishop), Ex parte*, 2 De G. F. & J. 14; 29 L. J., Ch. 575; 6 Jur. (N.S.) 640; 2 L. T. 365; 8 W. R. 465.

Costs of reinvestment in land of compensation money paid in by two or more railway companies do not follow the rule which directs the companies to bear the costs of the petition equally, but will be apportioned according to the circumstances of the particular case. *Christchurch, Ex parte*, 9 W. R. 474. *See preceding case.*

On a petition for the reinvestment in land of a sum made up of four several amounts, varying from 490*l.* consols to 1,797*l.* consols paid into court to the credit of the petitioners by four several respondents for the purchase-moneys of lands taken under statutory powers, the costs of the reinvestment were ordered to be borne by the respondents equally. *Christ's Hospital, Ex parte*, 27 W. R. 458.

The rule laid down in *London (Bishop), Ex parte* (2 De G. F. & J. 14), that the costs of the reinvestment of moneys paid into court by several companies for land taken by them under the Lands Clauses Act, ought to be borne by the companies in equal shares, except the costs of the ad valorem stamp on the conveyance, is to be followed in the absence of peculiar circumstances of hardship. *Byron, In re*, 1 De G. J. & S. 358; 2 N. R. 294; 32 L. J., Ch. 584; 9 Jur. (N.S.) 838; 8 L. T. 562; 11 W. R. 790.

Four distinct railway companies took portions of the lands of a college, and paid the money into court. A portion of one fund had already been reinvested, leaving a balance in court, and a petition was presented for reinvesting the three other funds and a part only of such balance:—Held, that the costs were payable by the four companies equally. *Merton College, In re*, 1 De G. J. & S. 361; 10 Jur. (N.S.) 222; 10 L. T. 8; 12 W. R. 503.

The trustees of two charities, being identical, purchased one estate on behalf of the two charities out of two sums of money paid into court by two distinct railway companies for parts of the charity lands taken separately by them. The proceedings to complete and apportion the estate were consolidated:—Held, that the costs of the joint proceedings were payable by the railway companies equally and not in proportion to the values. *L. B. & S. C. Ry.* v. *Shropshire Union Ry.*, 23 Beav. 605.

Lands were taken by three separate companies from the same owner; after which one of the companies leased its line for 999 years:—Held, that each company must bear one-third of the costs of the reinvestment, with a proportionate part of the ad valorem stamp. *Carlisle and Silloth Ry., In re*, 33 Beav. 253.

When parts of an estate are taken by several railway companies, and the united compensation moneys are invested in one purchase, the ordinary costs of reinvestment are to be borne by them equally, and not in the proportions of their respective compensation moneys so reinvested. *Lonsdale (Earl), Ex parte*, 32 Beav. 397.

Two railway companies took college lands and paid the purchase-money into court. On petition to invest the whole of one sum and part of the other in a leasehold brickfield, with 977 years to run, adjoining a college living, and thereby to avoid the nuisance: order made, and for payment of the costs equally by both companies. *Trinity College, Cambridge, Ex parte*, 18 L. T. 849.

Great Inequality in Amounts.]—The rule that the costs of a reinvestment in land of funds paid into court under the Lands Clauses Act by different bodies as the compensation money for land taken are to be borne equally by the different bodies, does not apply when there is a great inequality in the amounts of the different funds, but the costs will in that case be apportioned ratably between the different bodies. *St. Bartholomew's Hospital, Ex parte*, L. R. 20 Eq. 369; 32 L. T. 652.

A reinvestment was made in land of several funds in court representing compensation for lands compulsorily taken by different public bodies. There was great inequality in the amounts of the funds reinvested:—Held, that the scale of charge under the general order made by virtue of the Solicitor's Remuneration Act, 1881, the ad valorem stamp on the conveyance, and the surveyor's fees (if any) ought to be borne, not equally, but ratably according to the amounts contributed to the purchase-money by the several bodies who took the lands under their statutory powers. *St. Bartholomew's Hospital, Ex parte* (L. R. 20 Eq. 369), followed; *London (Bishop), Ex parte* (2 De G. F. & J. 14), and *Christ's Hospital, Ex parte* (2 H. & M. 166), distinguished. *Bishopsgate Foundation, In re*, 63 L. J., Ch. 167; [1894] 1 Ch. 185; 8 R. 50; 70 L. T. 231; 42 W. R. 199.

On a petition for reinvestment of several unequal sums of money paid into court under the Lands Clauses Act, by a variety of different bodies, the mere inequality of such sums, however great, is not a ground for departing from the rule as to the apportionment of costs laid

down in *London (Bishop), Ex parte* (2 De G. F. & J. 14); nor yet that only a portion of the fund paid in by any particular company is proposed to be taken for investment. *Christ's Hospital, Ex parte*, 2 Hem. & M. 166.

Oppression and Injury.]—Semble, that this rule will be departed from, in cases of oppression for instance, where a particular company has been brought frequently before the court for the investment of small instalments. *Ib.*

The rule in the *London (Bishop), Ex parte* (2 De G. F. & J. 14), as to the payment in equal shares by several railway companies of the costs of a petition for a single investment in land of several sums of money paid in by them respectively, will be observed in all cases, except where it is shewn that the application is made in a form intentionally to injure a particular railway company. *Merton College, In re*, 33 Beav. 257; 11 W. R. 237. See *S. C.*, on appeal, supra.

When Companies Amalgamated.]—Where one petition is presented for the reinvestment of money paid into court by several railway companies, the costs of the reinvestment other than the ad valorem duty must be paid by the several companies equally; but where the money to be invested has been paid in by several companies, some of which have subsequently amalgamated, the amalgamated company must bear the costs in proportion to the number of companies which it represents. *Maryport and Carlisle Ry., In re*, 1 N. R. 506; 32 L. J., Ch. 811; 9 Jur. (N.S.) 1217; 11 W. R. 410.

Portions of land belonging to a corporation were taken by four different companies, the undertakings of three of which afterwards became united:—Held, that the costs of a joint permanent investment of the purchase-moneys must be borne in halves by the subsisting companies. *Corpus Christi College, Oxford, Ex parte*, 41 L. J., Ch. 170; L. R. 13 Eq. 334.

Portions of an estate were taken by three companies, two of which afterwards merged into one company:—Held, that the amalgamated companies must bear two-thirds of the costs of a joint reinvestment. *Lonsdale (Earl), Ex parte*, 32 Beav. 397.

Crown taking Land.]—Where it was sought to reinvest a fund in court, a portion of which had been paid in as purchase-money of lands taken by the Crown, and two remaining portions on account of lands taken by two railway companies:—Held, that the costs, which were to be borne equally by the companies, should not be increased by reason of the fund exceeding the amounts paid into court by the companies. *Att.-Gen.* v. *Rochester Corporation*, 16 L. T. 408; 15 W. R. 777.

Surveyor's Fee.]—On a petition for reinvestment in land of moneys paid in by several companies and public bodies, the surveyor's fee was ordered to be borne by the several companies and public bodies ratably, according to the amount of the funds invested by them. *London Corporation, Ex parte*, 37 L. J., Ch. 375; L. R. 5 Eq. 418; 17 L. T. 489; 16 W. R. 355. See *Bishopsgate Foundation, In re*, supra.

Number of Petitions or Motions.]—Two portions of a settled estate had been taken under the Lands Clauses Act by different corporations, and the purchase-money had been paid into court and dealt with by different branches of the court. It being desired to invest the two funds together in the purchase of land, two petitions were presented. The court allowed the costs of one only as costs under the act. *Gore Langton, In re*, 44 L. J., Ch. 405; L. R. 10 Ch. 328; 32 L. T. 785; 23 W. R. 842.

Three distinct parts of an estate, belonging to the same person as tenant for life, were taken by three several railway companies, under their compulsory powers. The purchase-money payable by each company was paid into court, and petitions being presented for investment, one of these became attached to the Rolls and the other two to the vice-chancellor's court. Two of the companies were afterwards amalgamated. Three motions for payment in discharge of an incumbrance were served on behalf of the tenant for life in the three matters, and the matter attached to the Rolls Court having been transferred to the vice-chancellor's:—Held, that only the costs of two motions should be allowed to be borne by the subsisting companies moietively. *Midland Great Western Ry., In re*, 9 L. R., Ir. 16.

XV. *Buildings or Works.*

Alterations.]—The costs of obtaining orders for the investment of purchase-money, paid by a railway company, in alterations of almshouses, not to be borne by the company. *Buckinghamshire Ry., In re*, 14 Jur. 1065.

New Erections.]—The act of parliament which regulated the taking and using of land by the Great Western Railway company empowered them to purchase the vicarage-house of Twerton, and authorised the purchase of other land, and the building a new vicarage-house with the purchase or compensation money, but did not provide for the costs, charges and expenses of obtaining the compensation money out of court to defray the expenses of the building; the express words of the act only declaring the liability of the company to pay such costs where the compensation money is taken out of court to invest in the purchase of land:—Held, that the company were not liable for the costs, charges and expenses attendant upon obtaining the compensation money out of court for the purpose of building the new vicarage. *Madon, Ex parte, G. W. Ry., In re*, 4 Railw. Cas. 49; 9 Jur. 74.

Under s. 69 of 8 & 9 Vict. c. 18, farm buildings which are rendered useless by a line of railway running through a farm, and separating the buildings from the arable portion of the farm:—Held, that the costs of an application to the court for the reinvestment of railway purchase-moneys, in the substitution of new farm buildings for old buildings, do not come within s. 80, and are therefore not payable by the company, but the court will not order the costs of the company's appearance to be paid by the petitioners. *Milward, Ex parte, Oxford, Worcester and Wolverhampton Ry., In re*, 27 Beav. 571; 29 L. J., Ch. 245; 6 Jur. (N.S.) 478; 1 L. T. 153.

Under s. 69 of 8 & 9 Vict. c. 18, the court may order the purchase-money of lands to be invested in building, and, as a necessary consequence, the costs of the application may be paid by the company. *Whitfield (Incumbent), Ex parte*, 1 John. & H. 610; 30 L. J., Ch. 816; 7 Jur. (N.S.) 909; 5 L. T. 343; 9 W. R. 764.

A petition was presented for payment out of court of 514*l.*, which had been paid in by the

respondents, in respect of certain land taken by them from the petitioners. The petitioners proposed to expend 1,000*l.* in rebuilding the north porch of the parish church:—Held, that the 514*l.* might be paid out upon the production of the chief clerk's certificate that at least that sum had been expended in rebuilding the porch, the respondents to pay the costs of the petition and consequent thereon. *St. Alphege (Parson), In re*, 55 L. T. 314.

Petition to have purchase-money which had been paid into court by a railway company paid out and applied in rebuilding houses:—Held, that the company must pay the costs of the petition. *Canterbury (Dean), Ex parte, Kent Coast Ry., In re*, 7 L. T. 240; 10 W. R. 505.

A company which had paid into court the purchase-money of lands of a charity taken by them under the Lands Clauses Act, was ordered to pay the costs of a petition to have the money paid out towards the erection of certain works undertaken by the petitioners, under the sanction of the court, for the purpose of improving the supply of water to a town. *Lathropp, In re*, 35 Beav. 297; L. R. 1 Eq. 467; 13 L. T. 784; 14 W. R. 326.

Temporary Erections.]—The procuring and fitting up of houses for the temporary accommodation of the patients of a hospital, whose original buildings have been taken by a railway company, under the Lands Clauses Act, is a proper reinvestment within ss. 69 and 80. A company was accordingly ordered to pay the costs of a petition presented by the trustees of an hospital to obtain payment out of court of part of their compensation money for the purpose of such investment. *St. Thomas's Hospital, In re*, 11 W. R. 1018.

Architects' and Surveyors' Fees.]—The costs, charges and expenses of an investment of a fund paid into court by a public authority, under the Lands Clauses Act, 1845, in the erection of new buildings, and of obtaining the order, and the costs, charges and expenses, including the architect's fees, properly incurred in or about or in relation to the contract for the execution of the works were ordered to be paid by the public authority. *Arden, In re*, 70 L. T. 506—C. A.

Where the purchase-moneys in court of lands compulsorily taken are authorised to be paid out and applied in defraying the expenses of erecting buildings, and it is ordered that the costs of such investment, pursuant to s. 80 of the Lands Clauses Act, 1845 (including therein all reasonable charges and expenses incidental to the investment), shall be borne by the parties by whom the lands were taken, the fees payable to the architect and surveyor for planning and superintending such buildings will come within the term "expenses of building," and are not costs, charges and expenses of and incidental to the investment. *Butchers' Co., In re*, 53 L. T. 491.

xvi. *Payment out to Persons absolutely entitled.*

(a) In General.

Jurisdiction.]—The court has no jurisdiction, except by express enactment, to make a company pay the costs of a petition for payment out to persons becoming absolutely entitled of moneys paid into the Court of Chancery, or the Court of Exchequer, in respect of lands taken by the company from owners under disability. *Ecclesiastical Commissioners, Ex parte*, 5 N. R. 483.

Construction of Private Acts.]—Where part of the purchase-money remained in court to await the decision of contested claims, the Eastern Counties Railway Company were, under s. 48 of their act, held liable to pay the costs of the application of the person rightly entitled to have the money paid to him. *Gardiner, Ex parte, Eastern Counties Ry., In re*, 3 Railw. Cas. 117.

Upon the construction of a railway act, the court declined to make any order as to the costs of an application by vendors to have payment out of court of part of the purchase-money and investment of the remainder. *Molyneux, Ex parte*, 2 Coll. 273; 9 Jur. 786.

The costs of an application for the transfer out of court of a sum of stock, the produce of land taken by a railway company, under the powers of their act, from a party under disability:—Held, upon the construction of the act, to be payable by the company. *Marshall, Ex parte, G. W. Ry., In re*, 1 Ph. 560; 4 Railw. Cas. 58.

Where compensation had been paid into court by the Bristol and Exeter Railway Company:—Held, on the construction of their act, that the costs of obtaining payment of the money out of court were not to be borne by the company, *Bristol and Exeter Ry., In re*, 11 Jur. 686.

Under the 5 & 6 Vict. c. 62, the commissioners of woods and forests are bound to pay the costs of a reference to ascertain the rights of parties to the purchase-money of premises purchased under the act, as expenses incidental to the purchase. *Woods and Forests Commissioners, In re*, 7 Ir. Eq. R. 487.

The court will, under the words "reasonable costs, charges and expenses," in 2 & 3 Vict. c. 61, s. 29, award all necessary costs incurred by parties in obtaining payment out of court of the purchase-money of lands required for the purposes of the commission, or of having it invested upon trusts similar to those to which the lands so required were subject. *Shannon Commissioners, In re*, Fl. & K. 13; 3 Ir. Eq. R. 355.

The costs of payment out of court of money paid in, under s. 67 of the statute 4 Geo. 4, c. 64 (Gaol Act), being the purchase-money of lands taken by justices of the peace, under ss. 45 and 46 of the same act, were ordered to be paid by the corporation of a borough, who, under the Municipal Corporation Act, represented the justices by whom the lands were taken. *Coventry JJ., In re*, 19 Beav. 158; 24 L. J., Ch. 586; 3 W. R. 141.

The purchase-money of lands taken compulsorily by the commissioners of woods and forests, under the 1 Vict. c. 7, was paid into the Court of Exchequer, and an order was made for its investment at the cost of the commissioners. The stock was afterwards transferred into the Court of Chancery, under the 5 Vict. c. 7. Upon a petition for a transfer of the stock by the parties who would have been entitled to the real estate:—Held, that the costs of the petition and transfer must be borne by the commissioners. *Robertson, In re*, 23 Beav. 433; 26 L. J., Ch. 349; 3 Jur. (N.S.) 784.

The commissioners of works and public buildings took lands under the powers of 3 & 4 Vict. c. 87, s. 49, and paid the money into court:—Held, that they must pay the costs of payment out again, although the act in terms directed the payment of costs where the money was to be applied in the purchase of other lands, tenements or hereditaments. *Edmeade, In re*, 6 Jur. (N.S.) 986; 8 W. R. 327.

The commissioners of woods and forests took

possession of property under two special acts of parliament, and paid the money into court. By the first of these acts, passed before the Lands Clauses Act, the commissioners were to be liable to the costs of reinvestment of the purchase-money in other lands. By the second act, passed subsequently to the Lands Clauses Act, the powers and provisions of the former special act were extended to this. Upon a petition for payment of the money out of court to the parties interested :—Held, that the incorporation of the Lands Clauses Act was excluded, so that the commissioners were not liable to pay the costs of the petition, although such costs would have been payable under the Lands Clauses Act. *Cherry's Settled Estates, In re*, 4 De G. F. & J. 333; 31 L. J., Ch. 351; 8 Jur. (N.S.) 446; 6 L. T. 31; 10 W. R. 305. *See now cases* ante, col. 1424.

In a transferred Exchequer case, the court was only authorised by the act to order the costs of reinvestment of the purchase-money of lands compulsorily taken by a corporation. Parties having become absolutely entitled, applied for payment to them out of court of the money, instead of reinvesting it :—Held, that the corporation must pay the costs. *Tiverton Market Act, In re*, 26 Beav. 239.

Where a railway act authorises the payment out of court of purchase-money for the purpose of investment in land, and directs the company to pay the costs of the application for that purpose, but makes no mention of the payment of money to the persons entitled to it, the court has jurisdiction to order payment to the persons entitled, but not to order the company to pay the costs of the application. *Musgrave, In re*, 6 Jur. (N.S.) 797.

Where purchase-money had been paid into court by a railway company, and invested in stock :—Held, on the construction of the company's act, that the court had no power to order the company to pay the costs of obtaining a transfer to the person absolutely entitled, notwithstanding they might have been ordered under the act to pay much larger costs had the petition prayed a reinvestment in land. *Laud, In re*, 4 Kay & J. 81.

The like decision upon a similar act (as in *Laud, In re*, 4 Kay & J. 81), in a matter transferred from the Exchequer notwithstanding. *Mouseley, In re*, 4 Kay & J. 86, n.

Purchase-money had been paid into the Court of Chancery in 1835, under an act which provided, that it should "be lawful for the court to order the expenses of all purchases made with the fund in pursuance of this act, together with the necessary costs and charges of obtaining such order," to be paid by the company lodging it :—Held, that the court had no power to order the costs of drawing-out the fund to be paid by the company. *Ulster Canal Co., In re*, Ir. R. 6 Eq. 208.

Under the compulsory powers of an act, a public body purchased part of a settled estate, and paid the purchase-money into the Court of Exchequer. The act provided that money so paid in should be reinvested in the purchase of land, and that the public body should pay the expenses of all purchases to be made in pursuance of the act :—Held, that, although it was a matter transferred from the Court of Exchequer the Court of Chancery had no power to order the public body to pay the costs of a petition for the payment of the fund to persons who had become absolutely entitled to it. *Harrison, In re*, 40 L. J., Ch. 77; L. R. 10 Eq. 532; 18 W. R. 1065.

Purchase-money had been paid into the Court of Exchequer by a company incorporated under an act prior to the Lands Clauses Act, which provided that the court should have power to order the costs of all purchases, together with the necessary costs of obtaining such order to be paid by the company. The costs of a petition praying for the payment of the dividends of the investments of the purchase-money to a tenant for life had been ordered by the Court of Exchequer to be paid by the company :—Held, that the Court of Chancery had no power to order the costs of a petition for transfer of the fund and payment out of the dividends to a person beneficially entitled, to be paid by the company. *Williams, In re*, L. R. 12 Eq. 488.

A sum of money had been paid into court for purchase of land by a railway company, under their special act. By a section of the act, after making provision for the reinvestment of moneys paid in, it was provided that "the costs, charges and expenses of obtaining the proper orders, and of the other proceedings for such purposes, and of the payment of the dividends and interest of the government or real securities, and of the payment of the principal of the purchase or compensation-money, and of the government or real securities purchased therewith, out of the court, should be paid by the company" :—Held, that the company must pay the costs of the application for paying the purchase-money out of court. *Toft's Estate, In re*, 2 Jur. (N.S.) 131.

Lands Clauses Act.]—Where money is deposited in court under s. 85 of the Lands Clauses Act, the court has under s. 80 jurisdiction to order the company to pay the costs. *Flower, Ex parte, L. B. & S. C. Ry., In re*, 36 L. J., Ch. 193; L. R. 1 Ch. 599; 15 L. T. 258; 14 W. R. 1016.

A special railway act, which is repealed and in part re-enacted by a subsequent amalgamating act, is thereby incorporated with the latter within the meaning of s. 80 of the 8 & 9 Vict. c. 18, providing for the payment of costs in cases where moneys are deposited under the provisions of that act, or of "the special act, or any act incorporated therewith." Therefore, where money had been deposited under a special act, which did not provide for the costs of obtaining payment out of court of deposited moneys, but which was re-enacted by an amalgamating act, with which the Lands Clauses Act was incorporated :—Held, that the costs of payment out of court were within the last-mentioned act. *Ellison, In re*, 8 De G. M. & G. 62; 25 L. J., Ch. 379; 2 Jur. (N.S.) 293; 4 W. R. 306.

Certain land belonging partly to infants having been taken by a company, the money was paid into court. The persons entitled to the fund, having attained their majority, petitioned for payment of the money to them :—Held, that the company must pay the costs of the petition. *Slater's Devisees, Ex parte*, 5 Railw. Cas. 700; 18 L. J., Ch. 431. See also *Palmer, Ex parte*, 13 Jur. 781.

After Order for Payment of Dividends.]—Notwithstanding previous orders for payment to a tenant for life of dividends on purchase-money of lands compulsorily taken, the costs of which had been borne by the company, the court will order the company to pay the costs

of an application by the tenant for life for payment out of court of the corpus to trustees under the provisions of the Second Land Act, 1882. Secus where the applicant was absolutely entitled to the fund at the time when the application for payment of dividends only was made. *Belfast Corporation, In re*, 31 L. R., Ir. 258. S. P., *Ecclesiastical Commissioners, Ex parte*, 39 L. J., Ch. 623.

Sales of Stock.]—Where lands which were subject to a lease were taken for the purposes of a company, and the purchase-money in respect of such leasehold interest was invested under the Lands Clauses Act, the company was ordered to pay the costs of the half-yearly sales of stock for the purposes of distribution. *Long's Estate, In re*, 1 W. R. 226.

Transfer to Separate Account—Termination of Liability.]—After a fund which represents purchase-money paid by a railway company has been invested and transferred to an account not entitled in the matter of a railway company, the liability of the company to pay costs ceases in respect of any subsequent investment or petition for payment of the fund. *Fisher* v. *Fisher*, 43 L. J., Ch. 262 ; L. R. 17 Eq. 340 ; 29 L. T. 720 ; 22 W. R. 638.

Both Parties in Default.]—A tenant at will having agreed to give possession of certain lands to a railway company, for 23*l*., subsequently refused to give possession, unless his sister, who, he alleged, had an equal interest in the premises, was also satisfied. The money was offered to be paid on his giving possession, but was not formally tendered. The company having lodged the sum agreed on in court, to the separate credit of the tenant, solely alleging, in the warrant, his refusal to accept it as the reason for the lodgment ; the court held that the tenant was entitled to draw the money out of court, but refused to give any costs, holding each party to have been in default. *S. E. Ry., In re*, 12 Ir. Eq. R. 398.

Deduction from Purchase-money.] — After notice to treat for the purchase of houses, the owner granted leases for three years to his weekly tenants. The tenants sent in claims, which ultimately failed, but the promoters incurred considerable costs in adjudicating upon them. On a petition by the landowner for the payment out of his compensation, which had been paid into court under the Lands Clauses Act, s. 76 :—Held, that the court could not authorise any deduction from the purchase-money to reimburse the promoters for their loss, or order the petitioner to pay costs ; but that the court had jurisdiction to refuse him his costs, and would do so. *Topple, Ex parte*, 25 L. T. 407 ; 19 W. R. 1058.

Apportionment.]—Where the court is not authorised to order the costs of an application for payment out of court of principal to be paid by the company, it will not order the costs to be apportioned because the application includes a small sum of dividends. *Metford's Trust, In re*, 6 Jur. (N.S.) 796 ; 8 W. R. 634.

Upon petition for payment out of court of money paid in pursuant to an award in respect of land taken by a railway company, to a portion of which land the petitioners subsequently to the arbitration discovered that they were not entitled, an apportionment under the Lands Clauses Act, 1845, s. 78, was directed by the court, the petitioners paying the costs occasioned by such apportionment. *Alston's Estate, In re*, 5 W. R. 189.

Parties Served and Appearing.]—Where a fund in court exceeding 500*l*. in value, and representing the purchase-money of settled lands taken by a railway company, with accumulated interest, had not been dealt with for upwards of fifteen years, and it had become necessary under the Chancery Funds Rules, 1874, r. 91, and the Chancery Funds Amended Orders, 1874, Ord. 14, to serve the official solicitor with the petition for the payment out of the fund :—Held, that his costs were not payable by the railway company. *Clarke's Estate, In re*, 52 L. J., Ch. 88 ; 21 Ch. D. 776.

Where one of several persons entitled petitions under the act, and serves the other persons, it is not of course that the company should pay the costs of such respondents. *Melling* v. *Bird*, 22 L. J., Ch. 599 ; 17 Jur. 155 ; 1 W. R. 219. See *St. Margaret's, Leicester, Prebend, In re*, 10 L. T. 221.

A party who, from the heading of the account, was properly served with a petition, but whose appearance was unnecessary, refused his costs. *Coventry JJ., In re*, 19 Beav. 158 ; 24 L. J., Ch. 586 ; 3 W. R. 141.

Where land belonging to an infant was sold to a company, and the purchase-money paid into court ; upon a petition presented by the infant on attaining twenty-one for payment of the fund, part to himself and part in satisfaction of a debt due to the estate of his guardian, one of whose executors he was, the court refused to allow the costs of the other executors appearing on the petition. *Sinclair, In re*, 16 L. T. 474.

—— **Trustees.**]—Lands devised for the benefit of many persons in aliquot shares, were taken by a railway company, and the purchase-money paid into court. Upon a petition by the surviving trustee and four of the cestuis que trustent, for the payment out, to which the remaining cestuis que trustent were respondents, and appeared by four separate counsel, the court ordered the company to pay the costs of all such separate appearances, except that of one of the respondents, who had originally been a co-petitioner. *Long, In re*, 33 L. J., Ch. 620 ; 10 Jur. (N.S.) 417 ; 10 L. T. 21 ; 12 W. R. 460.

Where a railway takes lands vested in trustees under a will, and the purchase-money is paid into court, and carried to the account of the trustees, during the life of a cestui que trust, and the dividends ordered to be paid to them until further order, they have a right to appear upon a petition by the parties entitled to the money for payment out, and to have their costs against the company. *Burnell, In re*, 10 Jur. (N.S.) 289 ; 10 L. T. 127 ; 12 W. R. 568.

Petition by a cestui que trust entitled absolutely to a fund paid into court by a railway company :—Held, that the trustee had properly appeared by a separate counsel, and the company must pay the costs of his appearance. *Metropolitan Ry., Ex parte*, 16 W. R. 996.

A railway company, under their compulsory powers, took land comprised in a settlement, and paid the purchase-money into court. A testamentary appointment was subsequently made by the tenant for life under a power contained in the settlement, and on her death a petition

was presented by her appointees for the payment of the money out of court. In consequence of the terms of the appointment, it became necessary to serve the petition upon the trustees of the marriage settlements of two of the appointees, and additional costs were occasioned:—Held, that the railway company, having taken the land subject to the possibility that in ordinary events it might be dealt with by way of settlement, must pay the costs (not being costs of adverse litigation) of all parties. Quære, whether the same principle is not applicable to costs occasioned by incumbrances effected subsequently to the payment into court. *Brooshoft's Settlement, In re*, 58 L. J., Ch. 654; 42 Ch. D. 250; 61 L. T. 320; 37 W. R. 744.

Two Hearings.]—A petition was set down for hearing before Bacon, V.-C., only the railway company was served, and they not opposing, the Vice-Chancellor made an order sanctioning certain expenditure which was asked for by the petition. Before, however, this order had been drawn up, the making of it came to the knowledge of the remaindermen. They then applied to the Vice-Chancellor to have the petition reheard in their presence. This was done, and the Vice-Chancellor made a new order, refusing to sanction any of the expenditure asked for:—Held, that the railway company could only be called upon to pay the costs of one hearing before the Vice-Chancellor. *Leigh's Estate, In re*, 40 L. J., Ch. 687; L. R. 6 Ch. 887; 25 L. T. 644; 19 W. R. 105.

Persons holding Common Lands—Amount.]—Common land was taken, and a sum paid under the Lands Clauses Act to a committee of commoners, was, on a bill filed, paid into court. The different persons who in chambers established their claims to share in the funds were held entitled to receive three guineas each for their costs. *Waterton* v. *Burt*, 39 L. J., Ch. 425; 18 W. R. 683.

(b) Charity Trustees.

Petition for the transfer of funds in court (amounting to upwards of 80,000*l.*) into the names of the official trustees of charitable funds. The funds had been paid into court by various public bodies in respect of charity lands situate in numerous parishes in the city of London, and which had been taken under compulsory powers. Under the powers of the City of London Parochial Charities Act, 1883, the charity commissioners had made a scheme for the administration of the funds, and such scheme was binding on the several corporations or public bodies, rectors, vicars, churchwardens and others, in whose names respectively the funds were standing. The petition had been served on these corporations or public bodies (thirty-two in number). Some of the sums in the court amounted to less than 1,000*l.*:—Held, that the thirty-two corporations or public bodies, being bound by the scheme, the service on them was unnecessary, and these costs must be disallowed. As to the mode of the application, that the charity commissioners had exercised a proper discretion, and that the costs ought not to be limited to those which would have been incurred on summonses. *St. Albans, Wood Street, In re*, 66 L. T. 51.

The purchase-money for land, the property of a charity, taken under the provisions of the Lands Clauses Act, 1845, had been paid into court, and invested in government securities. A petition was now presented by the trustees of the charity for the transfer of the fund to the account of "The Official Trustees of Charitable Funds":—Held, that this must be considered as a petition for payment of money out of court; and, therefore, that the parties taking the land must pay the costs of the petition. *Bristol Free Grammar School, In re*, 47 L. J., Ch. 317.

Land belonging to a charity was taken by a corporation under the Lands Clauses Act and the purchase-money paid into court. The charity commissioners having approved a scheme for the reinvestment of the purchase-money in land, and directed that the money when paid out to the official trustee of charity funds should be applied in the proposed purchase, the trustees of the charity petitioned for the transfer of the fund in court to the official trustee, and that the costs, including the costs of reinvestment, might be paid by the corporation:—Held, that payment to the official trustee was payment to a person absolutely entitled, and the corporation were not liable to pay any further costs. *Bishop Monk's Horfield Trusts, In re*, 43 L. T. 793; 29 W. R. 462.

Where a change of interest in certain charity lands, after payment into court of the purchase-money, was caused by the charity being superseded by the school board, and new scheme sanctioned and new governors substituted for the old trustees:—Held, on a petition by the new governors for payment out of the moneys in court, that the change of interest was not caused by the act of the trustees, and that the company was liable for the costs. *Shakespeare Walk School, In re*, 48 L. J., Ch. 677; 12 Ch. D. 178; 28 W. R. 148.

When a petition was presented by the trustees of a charity for the transfer of the purchase-money of lands taken by the commissioners of woods and forests under 3 & 4 Vict. c. 87, the court refused to make any order as to costs, except that the trustees were to have theirs out of the fund. *St. Dunstan's Charity Schools, In re*, L. R. 12 Eq. 537; 24 L. T. 613; 19 W. R. 887.

(c) Tenant in Tail (Disentailing Deed).

A tenant in tail had part of his land taken by a railway company, and barred the entail in the money which had been paid into court, and which he petitioned might be paid out to him; the company were held not to be liable to the costs. *Thoroton, Ex parte*, 17 L. J., Ch. 167; 12 Jur. 130.

A disentailing assurance necessary to enable a landowner to obtain the purchase moneys of land taken by a company and paid into court:—Held, to be "costs in consequence of the purchase," and payable by the company. *Brooking* v. *South Devon Ry.*, 2 Giff. 31; 29 L. J., Ch. 151; 6 Jur. (N.S.) 441; 2 L. T. 204. See *Vaudrey, Ex parte, North Staffordshire Ry., In re*, 3 Giff. 224; 30 L. J., Ch. 885; 7 Jur. (N.S.) 753; 4 L. T. 735.

Upon a petition for the transfer to the petitioner of funds lodged in court as the purchase-money of lands taken by commissioners under their compulsory powers, of which lands the petitioner was tenant in tail in possession, the court refused to direct that the costs of a deed disentailing the funds in court were payable by the commissioners. *Allen, Ex parte*, 7 L. R. Ir. 124.

(d) Where Several Companies.

Moneys paid into court by two companies under the Lands Clauses Act, ordered to be paid out on one petition, and the costs appropriated between the two companies. *Sheffield Corporation, Ex parte*, 21 Beav. 162; 25 L. J., Ch. 587; 2 Jur. (N.S.) 31; 4 W. R. 70.

Sums of money were paid into court for lands belonging to the see of Canterbury, taken by the secretary of state for war, the copyhold commissioners (who were not liable to pay any costs), and fifteen public companies, of which four, by their acts, had not been incorporated with the Lands Clauses Act, and eleven had been incorporated with that act. The ecclesiastical commissioners petitioned to have the funds transferred and paid to them, and the costs paid by all the companies; but the court ordered that the four companies not incorporated should neither receive nor pay costs, and that the other companies should pay the costs in seventeenths. *Ecclesiastical Commissioners, Ex parte*, 11 Jur. (N.S.) 460; 12 L. T. 294; 13 W. R. 575.

A local board of health and a railway company which had each taken part of the settled estate, and whose purchase-money had also been paid into court, were respondents to the petition, by which it was proposed also to deal with the purchase-money of the local board:—Held, that the costs of one hearing before the Vice-Chancellor must be paid in moieties by the railway company and the local board. *Leigh's Estate, In re*, 40 L. J., Ch. 687; L. R. 6 Ch. 887; 25 L. T. 644; 19 W. R. 105.

Some Amalgamated.]—A sum of money was paid into court upon the purchase of certain land by a railway company, whose acts provided for the costs of obtaining the money out of court. That railway was incorporated with a second railway, and the act of the first railway was repealed. The act of the second railway did not provide for the costs. The second railway was then amalgamated with a third railway, and both the previous acts were repealed; but it was provided that where any money had been, or should be, paid into court by either of such dissolved companies, upon the purchase of lands, such moneys should be held and disposed of pursuant to the act under which the same had been paid, and the provisions in such act relating to the money so paid should remain in full force:—Held, that the costs of obtaining the money out of court should be paid by the third railway company. *Chetwode, Ex parte*, 18 L. J., Ch. 418.

Portions of the same estate were taken by four different companies, three of which were afterwards amalgamated:—Held, that the costs of a petition for payment out of the purchase-moneys must be borne by the subsisting companies equally. *Gaskell, Ex parte, Manchester and Leeds Ry., In re*, 45 L. J., Ch. 368; 2 Ch. D. 360; 24 W. R. 752.

xvii. *Allowances in Particular Cases.*

Brokerage or Commission.]—Under the act enabling the corporation of the Trinity House to purchase property, and in certain cases to pay the purchase-money into court to be laid out in stock for the benefit of the parties entitled, providing that the costs of the investment of the purchase-money shall be paid by the corporation, the broker's commission on the purchase of stock is a part of the costs of investment to be borne by the corporation. *Trinity House Corporation, Ex parte*, 3 Hare, 95. S. P., *Wilson, In re*, 1 W. R. 504.

The accountant-general's brokerage on compensation money ordered to be paid by the railway company, so as not to be deducted out of the money paid into court. *Kendal and Westmoreland Ry., In re, Braithwaite's Trust, In re*, 1 Sm. & G. (App.) xv.; 22 L. J., Ch. 915; 17 Jur. 573.

Petition for investment of money paid into court by a railway company for the purchase of settled lands. Brokerage charged by the accountant-general ordered to be paid by the petitioner, and allowed to her in her costs against the company. Form of order. *Braithwaite's Trust, In re*, 22 L. J., Ch. 915; 17 Jur. 753.

Where a sum of money is invested under the Lands Clauses Act, the accountant-general deducts the brokerage from the sum, and the company pays the amount of brokerage to the petitioner. *Harborough, Ex parte*, 23 L. J., Ch. 260; 2 Eq. R. 320; 17 Jur. 1045; 2 W. R. 53.

Railway purchase-money invested in 1844, and asked to be paid out by trustees of a settlement to mortgagees on the property, and that the company might pay brokerage both of investment and selling out, as well as costs of tenant for life, and mortgagees appearing separately:—Held, that the investment being made before the recent rule of deducting brokerage made no difference, but it would be payable by the company, except in this case there had been no taxation of costs of investment, and therefore the company were only liable to brokerage, on selling out; and that mortgagees and tenants for life had a right to appear separately and have their costs. *Legh's Settled Estate, In re*, 2 W. R. 109.

Separate Solicitor.]—Where a public company takes land held in undivided shares, each part owner, bonâ fide employing a separate solicitor, is entitled to his costs of obtaining his share of the purchase-money; but two or more of such part owners employing the same solicitor are, in the absence of special circumstances, not entitled to more than one set of costs. *Nicholl, In re*, 35 L. J., Ch. 516; 14 W. R. 475.

Surveyor's Charges.]—Upon the taxation of a bill of costs relating to the reinvestment in land of moneys paid into court, the master allowed a lump sum for surveyor's charges, being a commission on the amount of the purchase-money according to Ryde's scale, which is a scale prepared on the principle that a commission varying from five to one-half per cent. should be paid to the surveyor according to the amount of the purchase-money. An application was made to the court to direct the master to review his taxation in respect of this item:—Held, that the question was in reality one not of principle but of amount, and that the court would not interfere; but that if it was a question of principle a prevailing practice of paying surveyors by commission ought not to be disturbed. *Att.-Gen. v. Drapers' Co.*, L. R. 9 Eq. 69; 21 L. T. 651.

Court will not Specify.]—Semble, the court will not specify what costs are properly payable within s. 80 of the Lands Clauses Act, 1845,

but will leave all questions on that point to the decision of the taxing-master in the first instance. *Allen, In re*, 7 L. R., Ir. 124.

Power of Attorney.]—The costs of preparing and verifying the execution of a power of attorney from parties residing in Jersey, to draw out of court purchase-money lodged in court, under the provisions of a railway act, are chargeable against the company as costs incident to the drawing out of the money. *Godley, In re*, 10 Ir. Eq. R. 222.

"Taking Land"—Amount of Compensation.]—A railway company gave notice to treat for a piece of land, and no agreement having been come to with the owners, they entered on the land under the powers of s. 85 of the Lands Clauses Act, and paid the deposit into court. Afterwards the company obtained an act by which they were empowered to abandon that part of their undertaking, but it was enacted that the abandonment should not prejudice any landowner's rights to compensation for damage done by entry and occupation, and that the compensation should be determined in the manner provided by the Lands Clauses Act. The owners of the land then entered into an agreement with the company fixing the amount of compensation at 1,350*l.*, but providing that this should not include costs, charges, and expenses which the owners might be entitled to recover under the company's acts, but that such costs, charges, and expenses should be recoverable from the company in addition to the compensation as if the agreement had not been entered into. The company objected to pay the costs of ascertaining the amount of the compensation on the ground that the land had not been taken within the meaning of s. 80 of the Lands Clauses Act. They also objected to pay the costs of the preparation of the agreement:—Held, that the land had been "taken" within the meaning of s. 80, and that the company must pay the costs of ascertaining the amount of compensation and of the preparation of the agreement. *Charlton* v. *Rolleston*, 54 L. J., Ch. 233; 28 Ch. D. 237; 51 L. T. 612—C. A.

Change of Investment.]—Where a change of investment of a fund representing money paid into court by a railway company under the Lands Clauses Act, 1845, is rendered necessary, not by any caprice of the holder, but by the act of the government, the railway company ought to pay the costs of the reinvestment. *Brown, In re*, 59 L. J., Ch. 530; 63 L. T. 131; 38 W. R. 529—C. A.

Money paid by Mistake to wrong Account.]—Where by mistake, the purchase-moneys in court, which belonged to two charities, were carried over to the account of only one of the charities, the company was not ordered to pay the extra costs occasioned by reason of this mistake. *Lathropp, In re*, 35 Beav. 297; L. R. 1 Eq. 467; 13 L. T. 784; 14 W. R. 326.

Two Petitions.]—Two petitions were presented by the same petitioners for payment out of court of money paid in by a railway company. The petitioners were entitled to part of the money under a will, and to the other part under a settlement. The trustees of the will were made parties to one petition, and the trustees of the settlement to the second petition, and both sets of trustees appeared by separate solicitors and counsel:—Held, that the statements in the two petitions should have been included in one; and the company was ordered to pay the costs of the first petition and five guineas only towards the petitioners' costs of the second petition, and three guineas for the costs of each set of trustees. *Pattison, In re*, 4 Ch. D. 207.

Two portions of a settled estate had been taken under the Lands Clauses Act by different corporations, and the purchase-money had been paid into court and dealt with by different branches of the court. It being desired to invest the two funds together in the purchase of land, two petitions were presented. The court allowed the costs of one only as costs under the act. *Gore-Langton's Settled Estate, In re*, 44 L. J., Ch. 405; L. R. 10 Ch. 328; 32 L. T. 785; 23 W. R. 842.

—— **Funds not in same Court.**]—When two funds paid into court under the Lands Clauses Act have been dealt with by different branches of the court, and it is desired to deal with both funds at the same time, the court will give leave to present one petition in both matters in one branch of the court without transferring either of the matters. *Arden's (Lord) Estates, In re*, L. R. 10 Ch. 445; 24 W. R. 190.

Two Motions.]—Three distinct parts of an estate, belonging to the same person as tenant for life, were taken by three several railway companies, under their compulsory powers. The purchase-money payable by each company was paid into court, and petitions being presented for investment, one of these became attached to the Rolls Court and the other two to the Vice-Chancellor's Court. Two of the companies were afterwards amalgamated. Three motions for payment in discharge of an incumbrance were served on behalf of the tenant for life in the three matters, and the matter attached to the Rolls Court having been transferred to the Vice-Chancellor:—Held, that only the costs of two motions should be allowed. *Midland Great Western Ry., In re*, 9 L. R., Ir. 16.

One Hearing—Rehearing.]—When the petition was set down for hearing before the Vice-Chancellor, only the railway company was served, and they not opposing, the Vice-Chancellor made an order sanctioning all the expenditure which was asked for by the petition. Before, however, this order had been drawn up, the making of it came to the knowledge of the remaindermen. They then applied to the Vice-Chancellor to have the petition reheard in their presence. This was done, and the Vice-Chancellor made a new order, refusing to sanction any of the expenditure asked for:—Held, that the railway company could only be called upon to pay the costs of one hearing before the Vice-Chancellor. *Leigh's Estate, In re*, 40 L. J., Ch. 687; L. R. 6 Ch. 887; 25 L. T. 644; 19 W. R. 1105.

xviii. *Form of Order.*

Orders for the payment and taxation of the costs of petitions respecting the application of purchase-money of property taken by railway companies under their statutory powers must follow the words of the Lands Clauses Act, 1845. *Edmunds, In re*, 35 L. J., Ch. 538; 14 L. T. 243; 14 W. R. 507—L.JJ.

Hereditaments were purchased and taken by the corporation of London, under the provision of the Metropolitan Act, 1860, with which was incorporated the Lands Clauses Act, 1845, and the purchase-money paid into court, on a petition praying that the costs of purchase, including all reasonable charges relating thereto, might be taxed and paid by the corporation. The only order the court would make was, "costs according to the Act." *St. James Garlickhithe (Rector), Ex parte, Hayward, In re*, 9 Jur. (N.S.) 1222 ; 9 L. T. 320.

The Lands Clauses Act, 1845, s. 80, only authorises the court to make an order on the company to pay costs, not an order to pay them out of any particular fund. *Neath and Brecon Ry., Ex parte*, 43 L. J., Ch. 277 ; L. R. 9 Ch. 263 ; 30 L. T. 3 ; 22 W. R. 242.

The omission of the words, "except such costs (if any) as are occasioned by litigation between adverse claimants," ought not to be allowed except in very clear cases. *Cant, In re*, 1 De G. F. & J. 153 ; 29 L. J., Ch. 119 ; 6 Jur. (N.S.) 183 ; 1 L. T. 254 ; 8 W. R. 105.

Purchase of other Lands.]—The company are entitled to the insertion of the words "upon the approval and execution of the conveyance." *Eton College, In re*, 7 W. R. 710.

III. ENTRY UPON LANDS.

1. *Generally*, 1483.
2. *Where Purchase-money or Compensation Unpaid or Unsecured*, 1489.
3. *Acquiescence or Consent of Landowner*, 1494.
4. *Omitted Interests*, 1496.
5. *Mistake of Company*, 1498.
6. *Bond and Deposit*, 1499.
7. *Repayment of Deposit*, 1502.

1. GENERALLY.

Not "Compulsory taking."]—An entry on land is not a "compulsory taking" within the meaning of the Lands Clauses Act, 1845—Per Lords Bramwell and Watson. *Great Western Ry.* v. *Swindon and Cheltenham Ry.*, 53 L. J., Ch. 1075 ; 9 App. Cas. 787 ; 51 L. T. 798 ; 32 W. R. 957 ; 48 J. P. 821—H. L. (E.)

Effect of, on Agreement.] — A landowner entered into an agreement with promoters to sell land to them for a railway, the special act was subsequently passed and afterwards the company served the landowner with a notice to treat, and then entered under s. 85 :—Held, that these proceedings assumed the non-existence of any agreement and specific performance of it was refused. *Bedford and Cambridge Ry.* v. *Stanley*, 2 J. & H. 746 ; 1 N. R. 162 ; 32 L. J., Ch. 60 ; 9 Jur. (N.S.) 152 ; 7 L. T. 477 ; 11 W. R. 139.

What constitutes an "Entry."]—A railway company having power to purchase a plot of land for their railway entered upon the same to survey and take level thereof, and probe or bore to ascertain the nature of the soil, and set out the centre line of the railway, and for that purpose they dug a trig line or trench, two inches deep and fourteen inches wide, across the plot of land, but they gave the owner of the land no previous notice of such entry as required by s. 84 of the Lands Clauses Act ; five days after the trig line was made, the owner of the land discovered the fact, and nine days from such discovery he filed his bill for an injunction ; upon the affidavits on the part of the company, that the surveying and setting out of the line of railway was completed on the day the line was made, and that they had no occasion to enter, and did not intend again to enter upon the land, until they had taken the legal steps for permanently using it, the court refused the injunction, but reserved the costs. *Fooks* v. *Wilts, Somerset and Weymouth Ry.*, 5 Hare, 109 ; 4 Railw. Cas. 210.

A corporation having, under an act of parliament, a right to take land for the purpose of certain public works, gave notice to the owner of the inheritance of an intention to take it. They then entered regularly upon the land for the purpose of surveys, &c., and afterwards their contractors, without the knowledge of the corporation, but with the assent of the occupying tenants, brought some waggons and rails, and other implements on the land, and there left them, but did not commence the works or do any damage. This was done without obtaining the assent of the plaintiff, but it became known to his agent in the end of December. In the beginning of the following February, without any previous communication with the defendants, he filed his bill for an injunction to restrain them from allowing the waggons, &c., to remain on the land, and from taking possession of the land, until they had complied with the provisions of the Lands Clauses Act :—Held, that though the corporation were bound by the acts of their contractors, the acts done were not a taking possession within the meaning of the act, and the bill was improperly filed. *Standish* v. *Liverpool Corporation*, 1 Drew. 1.

The entry by a railway company on land for the purpose of diverting over it a public way which ran over lands already in the occupation of the company, is an entry with a view to the permanent user of the land within the meaning of the Lands Clauses Act, s. 84, and no entry for such purpose is lawful, except on payment of the proper purchase-money. *Rangeley* v. *Midland Ry.*, 37 L. J., Ch. 313 ; L. R. 3 Ch. 306 ; 18 L. T. 69 ; 16 W. R. 547.

When Allowed.]—A railway company can only take advantage of the powers of entering on land given by s. 85, where the necessity for immediate entry is so urgent as to preclude them from following the slower modes of procedure which the act provides. *Field* v. *Carnarvon and Llanberis Ry.*, 37 L. J., Ch. 176 ; L. R. 5 Eq. 190 ; 18 L. T. 534 ; 16 W. R. 273.

It is generally incumbent on a company seeking to avail themselves of the provisions of the 85th section of the Lands Clauses Consolidation Act, 1845, to show satisfactorily and clearly that they have fulfilled its conditions and complied with its requisitions ; and if there is room for doubt, the landed proprietor should have the benefit of the doubt. *Barker* v. *North Staffordshire Ry.*, 2 De G. & Sm. 55 ; 5 Railw. Cas. 401 ; 12 Jur. 324 ; 575, 589.

Notice given to a landowner by a railway company of their intention to summon a jury, does not render it inequitable for them to proceed in the meantime, under the 8 Vict. c. 18, s. 85, to obtain possession ; nor is it a sufficient ground to restrain the company from changing the aspect of the property, that the jury may thereby be prevented from accurately awarding compensation

with reference to its original state. *Langham* v. *G. N. Ry.*, 1 De G. & Sm. 486; 5 Railw. Cas. 269; 16 L. J., Ch. 437; 11 Jur. 839. And see *Bolton* v. *London School Board*, 47 L. J., Ch. 461; 7 Ch. D. 766; 26 W. R. 549.

The valuation which, by s. 85, a railway company is required to obtain before exercising the power of entry given by that section, must include compensation for severance, &c. *Field* v. *Carnarron and Llanberis Ry.*, 37 L. J., Ch. 176; L. R. 5 Eq. 190; 18 L. T. 534; 16 W. R. 273.

A railway company exercising that power since the 20th of August, 1867, the date of the passing of the Railway Companies Act, 1867, is not entitled to proceed upon a valuation made prior to that date, but must comply with the provisions of s. 36. *Ib.*

Receiver in Possession.]—A railway company, without the leave of the court, took proceedings under the Lands Clauses Act to take possession of lands in the possession of the receiver under the court. On an ex parte motion they were restrained. *Tink* v. *Rundle*, 10 Beav. 318.

Laches—Injunction.]—A company had taken land not comprised in a notice to treat, and had erected works upon it. The plaintiff claimed this land, which claim was opposed by the company. The plaintiff thereupon proceeded to interrupt and pull down some of the works commenced by the company:—Held, that his remedy should have been by ejectment. That not having applied for an injunction to restrain the proceeding with the company's works, he was not entitled to an injunction. *Lind* v. *Isle of Wight Ferry*, 7 L. T. 416; 1 N. R. 13.

Notice to Treat—Laches.]—In 1846 a railway company served upon the plaintiff, a lessee for years, the usual notice that they required a certain part of his garden for the purposes of their railway. The plaintiff then sent in his claim for compensation, and no further steps were taken until August, 1848, when the company, under s. 85 of the Lands Clauses Act, having procured a valuation of the plaintiff's interest "in invitum," and paid the amount into the bank, and executed a bond for a like sum, entered into possession of the land. The sum paid in and the bond given were afterwards held not to be a compliance with that section, and the company then paid the whole amount of the plaintiff's claim into the bank, and executed to him a bond for the like sum:—Held, that the laches of the company, in not following up their notice of 1846, did not preclude them from taking advantage of s. 85. *Willey* v. *S. E. Ry.*, 1 Mac. & G. 58; 1 H. & Tw. 56; 6 Railw. Cas. 108; 18 L. J., Ch. 201; 13 Jur. 241.

"Wilful Entry"—What is.]—The words "wilfully enter upon and take possession of any lands" in the Lands Clauses Act, 1845, s. 89, do not apply to a case where the parties have entered under a mistaken belief of their right to enter upon the lands. *Steele* v. *Midland Ry.*, 21 L. T. 387.

A railway company, being desirous of entering upon land before an agreement had been come to for compensation pursuant to s. 85, proceeded, under s. 59, to have a surveyor nominated for determining such compensation. One of the justices who nominated him was a shareholder in the company, but this fact was unknown at the time to the company, and the company thereupon entered upon the land:—Held, that this was not a wilful entering within s. 89. *Ib.*

An act enabled a company to take land for the purposes of a railway, the amount of compensation to the owners to be assessed by a jury, if no agreement could be come to respecting it; and empowering the company to deposit the purchase-money or compensation in the Court of Chancery, to the credit of the party entitled to the same. A subsequent section enacted, that if the company should wilfully take possession of any land without having made payment or deposit, they should be liable to a penalty; and, if after conviction or notice from the party in possession, should continue in unlawful occupation of any lands, they should forfeit 25*l.* for each day while they continued in possession. At the end of this section there was a proviso that the company should not be subject to such penalties, if bonâ fide and without collusion they should pay or deposit the compensation money to a wrong party, whom they reasonably believed entitled to it. The company having bonâ fide and without collusion, but without complying with the requisites of the act, taken possession of land belonging to the plaintiff, and deposited the compensation money for his use:—Held, that they were protected by the proviso against the penalties given in the first part of the section, and that the word "wilfully," in the clause, applied only to the first branch of it. *Hutchinson* v. *Manchester, Bury, and Rosendale Ry.*, 15 M. & W. 314; 3 Railw. Cas. 748; 15 L. J., Ex. 293; 10 Jur. 361.

Expiration of Period for Completion of Works.]—The special act of a railway company enacted that "the powers of the company for the compulsory purchase of lands for the purposes of this act shall not be exercised after the expiration of three years from the passing of this act;" and that "if the railways are not completed within five years from the passing of this act, then on the expiration of that period the powers by this act granted to the company for making and completing the railways or otherwise in relation thereto shall cease to be exercised, except as to so much thereof as is then completed." A few years before the expiration of the three years the company served on a landowner a notice to treat for part of his land. A correspondence ensued, no agreement was come to, and the compensation was not assessed. Thirteen days before the expiration of the five years the company, having complied with the requirements of s. 85 of the Lands Clauses Act, 1845, entered and proceeded to make the railway, the landowner objecting and resisting. The land was bonâ fide required for the railway:—Held, that whether the railway could or could not have been completed within the thirteen days, the entry under s. 85 was lawful; that the company could not be restricted by injunction, but were entitled to remain and complete the railway after the expiration of the five years. *Tiverton and North Devon Ry.* v. *Loosemore*, 53 L. J., Ch. 812; 9 App. Cas. 480; 50 L. T. 637; 32 W. R. 929; 48 J. P. 372—H. L. (E.)

By an act of parliament, with which the Lands Clauses Consolidation Act was incorporated, it was enacted that the powers of taking land compulsorily for the purpose of making a certain railway should not be exercised after

the expiration of three years from the period of the passing of the act. The company gave notice to a landowner of their intention to take a part of his land, but took no other step till three days before the expiration of their compulsory powers, when they delivered a bond, and proceeded to take possession under the 85th section of the Lands Clauses Consolidation Act. The landowner thereupon filed his bill, praying an injunction to restrain the company from proceeding further with the purchase, on the ground that their compulsory powers had ceased. Interim injunction granted, but case directed for the opinion of the Court of Exchequer. *Kinnersly* v. *North Staffordshire Ry.*, 6 Railw. Cas. 662.

Where a company has complied with the provisions of s. 85, and has entered upon and taken land within the prescribed period for exercising their compulsory powers, their continuance in possession after the prescribed period, without having the compensation assessed, and the land conveyed to them, is not unlawful, and ejectment cannot be maintained against them under such circumstances. *Doe* d. *Armistead* v. *North Staffordshire Ry.*, 16 Q. B. 526; 20 L. J., Q. B. 249; 15 Jur. 944.

Where promoters of a railway company have, within three years after the passing of their special act, entered upon land by virtue of s. 85 of the 8 & 9 Vict. c. 18, the mere fact of the purchase and compensation not being completed within the three years does not render the possession of the company after the three years unlawful. *Worsley* v. *South Deron Ry.*, 16 Q. B. 539; 20 L. J., Q. B. 254; 15 Jur. 970.

For Purpose of Tunnel.]—In an action for breaking a close and cutting a tunnel through it, a company justified under a local act, by which they were incorporated and empowered to make a railway; averring that the close was a highway, and delineated on their plans and in their books of reference as part of the lands through which the railway was to pass; to which the plaintiff replied, that the close was required to be purchased and permanently used for the railway; and that he being entitled to the soil thereof, subject to a public right of way over the same, the company entered and made the tunnel without his consent, and without giving him notice to sell and convey the same and take it for the purpose of permanently using it for the purpose of the railway:—Held, that it must be taken on these pleadings that the tunnel was made with a view to its permanently forming part of the railway, and that the company was not justified, under 8 & 9 Vict. cc. 18, 20, in having entered on the land through which the permanent tunnel was to pass, without first paying compensation to the owner of it. *Ramsden* v. *Manchester South Junction and Altrincham Ry.*, 1 Ex. 723; 5 Railw. Cas. 552; 12 Jur. 293.

A railway company was entitled by a special act to acquire compulsorily an easement of tunnelling under land, unless a jury should determine that such easement could not be acquired by the company without material detriment to the remainder of such land:—Held, that the company might enter upon the land for the purpose of making the tunnel under s. 85 of the Lands Clauses Act upon depositing the value of the easement, and could not be compelled to deposit the value of the whole land. *Hill* v. *Midland Ry.*, 51 L. J., Ch. 774; 21 Ch. D. 143; 47 L. T. 225; 30 W. R. 774.

Power to take Subsoil apart from Surface.]—A clause in the special act of an underground railway, which act incorporated the Lands Clauses Act, 1845, empowering the company to "appropriate and use the subsoil and undersurface" of lands apart from the surface, provided they be not relieved from liability to compensation under s. 68 of the act of 1845, does not entitle the company to enter upon such subsoil without complying with the provisions of the act of 1845 as to the compulsory purchase of or entry upon lands. *Farmer* v. *Waterloo and City Ry.*, 64 L. J., Ch. 338; [1895] 1 Ch. 527; 13 R. 306; 72 L. T. 225; 43 W. R. 363; 59 J. P. 295.

Diverting Stream.]—The diversion of a stream is a taking and using it within the meaning of the Lands Clauses Act, s. 85, and before such diversion can be made, the value of the stream must be ascertained and secured to the owners of the land through which it passes. *Ferrand* v. *Bradford Corporation*, 21 Beav. 412; 2 Jur. (N.S.) 175.

At what Date Tenant's Interest is to be Calculated.]—A notice to treat was given by a railway company for a strip of land which formed part of lands held by the tenant under a lease. Nothing was done under this notice to treat, but about a year afterwards the company required and took possession of the strip under s. 85 of the Lands Clauses Act, 1845. At the time the notice to treat was given the tenant had an interest for more than a year, but at the time the strip was taken he had an interest for less than a year in the strip taken. The tenant claimed compensation for the strip taken, and for severance damage:—Held, that the time at which the tenant's interest was to be considered was the time when the strip was taken under s. 85, and not the time when notice to treat was given, under which nothing was done: that the tenant had, therefore, an interest in the strip of land less than for a year, and a magistrate had jurisdiction to assess the compensation under s. 121. *Reg.* v. *Kennedy*, 62 L. J., M. C. 168: [1893] 1 Q. B. 533; 5 R. 270; 68 L. T. 454; 41 W. R. 380; 57 J. P. 346.

By Commissioners, for Laying out Streets—Time for.]—In 1830 A. projected the formation of a seaside town, to be built on his lands, and a plan was prepared which showed the sites of various streets, roads, and squares, proposed to be made and formed on such lands. In June, 1833, a private act was obtained by which the lands described on the plan were made a distinct parish for the purposes of the act, and by which commissioners were appointed in whom were vested all roads, streets, and ways, then made and used by the public, or thereafter to be made and adopted by the commissioners as public ways under the act. The act also conferred plenary powers on the commissioners with regard to the paving, lighting, draining, and repairing of such streets, roads, and ways. In February, 1833, A. had sold and conveyed to B., who was one of the principal promoters of the act, and one of the first commissioners appointed thereunder, several of the plots of land described on the plan, and on which were delineated the sites of certain of the proposed roads, streets, and

squares. Previously and subsequently to the act, numerous houses had been built, and some of the roads, streets, and ways shown on the plan had been wholly or partially formed, and had been adopted by the commissioners, but no houses were at any time erected on the lands conveyed to B., and the same (including such parts as comprised the sites of the proposed roads, streets, and squares) were from 1833 to 1867 uninterruptedly held and enjoyed and cultivated as arable and pasture lands by B. and his lessees. In 1868 the commissioners gave B.'s devisees notice of their intention to take possession of the sites of the proposed streets, roads, and squares shown on the plan, and in 1871 they proceeded to mark, grip up, and stump out such sites, on the grounds that the same had been dedicated to the purposes of the act by the promoters of the act, and that they were acting within their statutory powers. On a bill filed to restrain the commissioners from so doing :—Held, that, upon the construction of the act of 1833, the commissioners had no present right to enter upon the plaintiff's land. *Mackett* v. *Herne Bay Commissioners*, 37 L. T. 812—C. A.

Held, also, that the powers of the commissioners could not be exercised over land scheduled in their act and marked out as the site of intended roads and streets, until the roads had been made, laid out, and duly adopted by the commissioners. *Ib.*

2. WHERE PURCHASE-MONEY OR COMPENSATION UNPAID OR UNSECURED.

Temporary Possession.]—A notice given by a railway company, under s. 32 of the Railways Clauses Act, 1845, of their intention to take temporary possession of land, ought to state for which of the purposes mentioned in that section the land is meant to be used. A notice that the company intend to enter upon the land for those purposes, or some or one of them, is not sufficient. *Poynder* v. *G. N. Ry.*, 16 Sim. 3 ; 11 Jur. 646. And see *S. C.*, 2 Ph. 330 ; 16 L. J., Ch. 444.

Not Covered by Agreement.]—Plaintiff agreed to sell to a railway company a certain portion of a field for the price of 229*l.* in the whole, being 120*l.* for the land, and 109*l.* for compensation for damage by severance to the remaining portion, and stipulated that in case additional land shall be wanted, the same shall be taken and paid for after the same rate per acre. The company subsequently took possession of a second portion of the field for purposes authorised by their act, and entered upon the same without having previously paid the purchase-money for that second portion after the rate specified in the agreement, and without having previously agreed upon or ascertained, by reference to a jury, the damage occasioned by the severance of the second portion from the remaining portion of the field :—Held, that the agreement only provided for the amount to be paid to the plaintiffs for the value of the second portion of the field, and that neither by intention nor legal construction did such value include the amount of damage by severance to the remaining portion of the field, which amount was either to be agreed upon by the parties, or ascertained by a jury ; that, until such amount was agreed upon or ascertained, the company were not entitled to enter upon the second portion. *Jones* v. *G. W. Ry.*, 1 Railw. Cas. 684.

Before Payment.]—A railway act provided for the payment into the Court of Exchequer of the money agreed or awarded to be paid for the purchase of lands, to which a title shall be not made out to the satisfaction of the company ; and that, upon payment, tender, or deposit of such purchase-money, the company shall be entitled to enter upon such lands. The company agreed for the purchase of lands, and, before acceptance of title, or payment, tender or deposit of the purchase-money, entered upon the land :—Held, that such entry was illegal ; but that, on payment of the purchase-money into the court in which the bill was filed, the company were entitled to enter. *Hyde* v. *G. W. Ry.*, 1 Railw. Cas. 277.

On a petition for payment into court of the difference between the sum deposited in the bank under s. 85, and the whole of the purchase-money ultimately agreed upon, and for investment and payment of dividends of the whole to the tenant for life :—The court made the order. *London, Tilbury and Southend Ry., Ex parte*, 1 W. R. 533.

A railway company having served notice to treat with the owner of land under 8 Vict. c. 18, had been furnished with a title, and a claim of 500*l.* compensation. It obtained possession from the occupying tenant and commenced the works without paying the money or lodging it in court and giving security required by the act. The court granted an injunction against the company's proceeding with the works, and to compel it to restore the land to its former condition. The injunction not to issue on the company's undertaking to lodge the sum claimed and give the bond required. *Armstrong* v. *Waterford and Limerick Ry.*, 10 Ir. Eq. R. 60.

In 1856 a railway company took possession of a piece of land, a portion of which, undefined by boundaries, belonging to F. Such possession was taken without her consent, and without compliance with the provisions of the Lands Clauses Act, 1845 (ss. 84 and 85), and F. being unable to define the boundaries of her land, the company continued in possession, and constructed a railway on the land without her consent, and refused to pay her anything in respect of her land. In 1868, the plaintiff claiming title under F. brought ejectment against the company, and recovered judgment, and possession was delivered to him by the sheriff under a writ of possession. The company, however, continued to run their trains over the land, and the plaintiff filed a bill against them for an injunction to restrain the trespass. Thereupon the company served the plaintiff with notice of their intention to summon a jury for the purpose of ascertaining the value of the land, under a notice to treat served upon F. in 1856, but which notice had until then been treated by both parties as non-existent, and the plaintiff filed a second bill for an injunction to restrain the company from summoning a jury :—Held, that the plaintiff was entitled to both injunctions. *Stretton* v. *Great Western and Brentford Ry.*, 40 L. J., Ch. 50 ; L. R. 5 Ch. 751 ; 23 L. T. 379 ; 18 W. R. 1078.

A railway company by taking possession of land without any agreement, and without taking the steps required by the Lands Clauses Act, 1845, are trespassers. *Bristol and North Somerset Ry.* v. *Somerset and Dorset Ry.*, 22 W. R 601 —L.JJ.

A railway company which compulsorily has taken land, and applied it to the purposes of the

railway, should pay the purchase-money into court before notice of motion for that purpose is served. *Williams* v. *Llanelly Ry.*, 19 L. T. 310.

When difficulties have arisen as to the title, the company having taken possession and used the land, the costs of a motion to pay the purchase-money into court directed to be costs in the cause. *Ib.*

A railway company which had entered into possession of land pending negotiations for purchase, ordered to pay the purchase-money into court before answer. *Griffiths* v. *Crystal Palace and South London Junction Ry.*, 12 Jur. (N.S.) 560; 14 L. T. 753.

The entry by a railway company on land for the purpose of diverting over it a public way which ran over lands already in the occupation of the company, is an entry with a view to the permanent user of the land, and no entry for such purpose is lawful, except on payment of the proper purchase-money. *Rangeley* v. *Midland Ry.*, 37 L. J., Ch. 313; L. R. 3 Ch. 306; 18 L. T. 69; 16 W. R. 547.

Arbitration — Consent Revoked.]— Where, after an agreement to refer to arbitration, the owner revoked his assent to the reference, but the arbitrators nevertheless proceeded to make their award, and the owner filed a bill for an injunction to restrain the defendants, acting under powers given them by act of parliament, from taking possession, but did not show any good reasons for the revocation of his assent, the injunction was refused. *Pope* v. *Duncannon (Lord)*, 9 Sim. 177; 2 Jur. 178.

—— **Injunction—Costs.**]—An injunction was sought to restrain a railway company from entering on land before payment of the purchase-money. They remained in possession three months, and then paid the purchase-money:—Held, that they must pay the costs of the suit. *Kensington (Lord)* v. *Metropolitan Ry.*, 14 L. T. 580; 14 W. R. 754.

A railway company, assuming to act under s. 85 of the Lands Clauses Act, took possession of some lands belonging to A., whereupon A. filed an injunction bill against the company, and moved accordingly. By an arrangement made at the hearing, the company undertook to bring the question of the value before a jury as soon as possible, and the value was accordingly ascertained, and the amount paid to A. A motion by A., that the taxing-master might tax costs of the suit, and that the company might pay them, and that all further proceedings in the suit might be stayed, was refused, but the costs of it were reserved. *Langham* v. *G. N. Ry.*, 5 Railw. Cas. 263; 17 L. J., Ch. 436; 12 Jur. 574. *And see* 16 L. J., Ch. 437; 11 Jur. 839.

A railway company must pay the costs of a motion to dissolve an injunction obtained against them from their having failed to comply with the provisions of the Lands Clauses Act. Plaintiff at liberty to make application to the court for the purpose of disposing of the suit in which the injunction has been obtained, and the costs of it. *Woodward* v. *Eastern Counties Ry.*, 3 W. R. 330.

Part Payment.]—A railway company paid part of the purchase-money of land required by them, and took possession, but retained the balance until the vendor should make a good title:—Held, that the company had purchased the right of possession, and would not be compelled to give up possession, or to pay the balance into court. *Capps* v. *Norwich and Spalding Ry.*, 9 Jur. (N.S.) 635; 11 W. R. 657.

C. contracted with a railway company to sell land, with a stipulation that they should have possession and pay the purchase-money in two years with interest. They took possession, but only paid one-third of the purchase-money, and a bill was filed for specific performance and payment of the purchase-money unpaid and interest. Before answer the plaintiff moved for payment of the balance of the purchase-money into court, or delivery up of the land. Order made for payment or delivery up within a month; and if the land should be delivered up payment into court by the vendors of the one-third received by them in a fortnight after delivery up of possession. *Cooper* v. *L. C. & D. Ry.*, 14 W. R. 985.

A railway company purchased some land, took possession, and constructed their railway, but part of the purchase-money remained unpaid. They subsequently leased their line to another railway company. Upon a bill by the landowner to obtain payment of the purchase-money remaining unpaid, asking for an injunction to restrain both companies from using the line:—Held, that such an injunction might be granted, to be put in force if the money should not be paid within a limited time. *Cosens* v. *Bognor Ry.*, 36 L. J., Ch. 104; L. R. 1 Ch. 594; 12 Jur. (N.S.) 738; 15 L. T. 168; 14 W. R. 1002.

Default in Payment of Bond.]—A railway company, by agreement with a landowner, were let into possession of land which they required for part of their line, and made their railway over it, giving a bond for payment of the purchase-money on a future day. Default was made in payment of the bond:—Held, that the landowner was not entitled to an injunction to restrain the company from continuing in possession until the purchase-money was paid. *Pell* v. *Northampton and Banbury Junction Ry.*, 36 L. J., Ch. 319; L. R. 2 Ch. 100; 12 Jur. (N.S.) 897; 15 L. T. 168; 15 W. R. 27.

Private Act.]—The commissioners appointed under the local acts of parliament, for improving the town of Cambridge, have, upon the true construction of those acts, a continuing right to exercise, from time to time, the power thereby vested in them, of taking property for the purposes of the acts, and of referring the assessment of the price to a jury, so long as may be required for carrying into full effect the purposes contemplated by the acts. A person whose property is required by the commissioners for the purposes of the acts is not entitled to restrain them, by injunction, from taking the steps prescribed by the acts for obtaining possession of the property, until they shall have shown a sufficient fund in hand to satisfy the price which may be awarded to him, or until they shall have shown the means by which they propose to procure it. *Salmon* v. *Randall*, 3 Myl. & C. 439.

A railway act, by s. 12, empowered the company to take lands for the purposes of the act, and to enter upon lands adjoining to the railway, and to dig and use materials obtained therein; making full satisfaction for the lands, and for damage by reason of the execution of all or any of the powers thereby granted. Sect. 31 enabled persons interested in such lands to receive payment for the value, and compensation for any damage by the severance of such lands, &c.

Sect. 32 provided for the impanelling of juries to assess the amount of the purchase-moneys and compensation. Sect. 53 enabled the company, upon payment, &c., of the money agreed upon or awarded for the purchase of any lands, immediately to enter upon such lands; provided, that before such payment, &c., it should not be lawful for the company to enter upon such lands for any of the purposes of the act. Sect. 54 provided that, before taking temporary possession of any lands, the company should agree with the owners or occupiers for an annual rent in respect thereof; and, if required, should give security for payment of compensation for any permanent injury which might be sustained. The company having entered upon lands of the plaintiff, for the purpose of taking the subsoil to form an embankment, he filed his bill, praying that they might be restrained from so doing, until they should have agreed with him for a fixed annual rent during their occupation of the land, and given security for compensation:—Held, that the acts complained of were not within s. 54, but were, by the proviso of s. 53, brought within the conditions of s. 12. *Innocent* v. *North Midland Ry.*, 1 Railw. Cas. 242.

Lands not entered on—Injury to.]—In the case of damage to a party whose lands are not entered upon, but are injuriously affected by the exercise of the powers of a railway company upon their own lands, or upon the lands of another party, and for which damage compensation is required to be made by s. 6 of the Railways Clauses Act, it is not unlawful for the company to execute the works which occasion the damage before the amount of compensation for the same is ascertained, paid, or deposited. *Hutton* v. *L. & S. W. Ry.*, 7 Hare, 259; 18 L. J., Ch. 345; 13 Jur. 486. See also *Pollock, In re*, 13 Jur. 760.

Lands Deteriorated.]—A railway company had taken possession of houses under an agreement with the vendors, but had so acted with the property after they had taken possession that it became much deteriorated in value. The court ordered the payment of the purchase-money into court without allowing the company the alternative of giving back possession. *Pope* v. *G. E. Ry.*, L. R. 3 Eq. 171; 15 L. T. 239; 15 W. R. 192.

Railway Opened.]—An injunction granted after a decree to restrain a railway company from continuing in possession of land agreed to be sold until payment of the purchase-money and arrears of rent-charges and costs, where the agreement contained a clause providing that the land should revert to the owner in case of non-completion of the railway by a specified time, the railway having been completed and opened after the specified time. *Nelson (Lord)* v. *Salisbury and Dorset Junction Ry.*, 16 W. R. 1074.

A railway company contracted to purchase lands from the chairman of the company, and was allowed to take possession without payment. It subsequently agreed with his devisees for other lands, but the purchase-money for those other lands not being paid, a suit for specific performance was instituted, and a decree made fixing a day for payment. That day having long passed, a motion was made for sale, and payment out of the proceeds, although the railway was in operation:—Ordered, that if the company did not pay on or before that day three months, the railway was to be sold. *Jersey (Earl)* v. *South Wales Mineral Ry.*, 19 L. T. 446.

Death of Landowner—Agreement.]—A railway company after serving notice to take land, agreed in writing with the owner to accept the title, and the conveyance was executed by him and delivered to his solicitors as an escrow with a written authority to the company to pay the money to them. The owner died, having made a will and appointed executors, and the company requiring the land, but the executors not having proved, paid the money into the bank under the 8 & 9 Vict. c. 18, and took possession. The executors filed a bill to restrain such taking possession, and for an injunction:—Held, that the escrow could have been made effectual upon the condition upon which it was authorised to be delivered, but that the authority died with him by whom it was given; and that there being a contract, the case was withdrawn from the operation of 8 & 9 Vict. c. 18, and the injunction refused on the term of the company bringing the purchase-money and interest, provided for by the contract, into court. *Newton* v. *Metropolitan Ry.*, 10 W. R. 102.

3. Acquiescence or Consent of Landowner.

Without Consent of Commoner.]—Under the Lands Clauses Act, 1845, ss. 99—107, if a railway take possession, by virtue of their act, of land over which there are rights of common, after payment to the lord of the manor of compensation in respect of his ownership in the soil and a conveyance by him to the company, and they construct their railway on the land without having first paid compensation to the commoners in respect of their rights of common, a commoner may maintain an action against the company for the disturbance of his rights of common. *Stoneham* v. *L. B. & S. C. Ry.*, 41 L. J., Q. B. 1; L. R. 7 Q. B. 1; 25 L. T. 788; 20 W. R. 77.

Without Aid of Sheriff.]—Where a landowner refuses to allow a company to enter on land on which they are entitled to enter under s. 85, but does not actually resist their entry, they are justified in entering peaceably without calling on the sheriff under s. 91 to give them possession. *Loosemore* v. *Tiverton and North Devon Ry.*, 51 L. J., Ch. 570; 22 Ch. D. 25; 47 L. T. 151; 30 W. R. 628. *S. C.*, in H. L., supra, col. 1486.

Effect of Consent of Landowner.]—A railway company having entered upon land for the purposes of their act, with the consent of the owner, he is not at liberty to treat them as trespassers. *Knapp* v. *L. C. & D. Ry.*, 2 H. & C. 212; 32 L. J., Ex. 236; 9 Jur. (N.S.) 761; 8 L. T. 541; 11 W. R. 890.

A company was empowered to purchase land and enter upon and use the same for the purposes of a railway. But they were not, "except by the consent of the owner or occupier," to enter upon any such lands until they should have paid or deposited in the Bank of England the purchase-money or compensation agreed or awarded to be paid for all interest in the same. The company, with the consent of the owner, entered, in 1847, upon lands, required for the purposes of the railway, the amount of compen-

sation having been by an agreement between them referred to an arbitrator, who, in 1849, awarded a sum as compensation. No tender of a conveyance, nor payment of the sum awarded had been made, and after the award a demand of possession was served upon the company:—Held, that ejectment could not be maintained against the company, the owner's only right being to enforce the payment of compensation under the award. *Doe* d. *Hudson* v. *Leeds and Bradford Ry.*, 16 Q. B. 796; 20 L. J., Q. B. 486; 15 Jur. 946.

A canal company, having power to purchase lands for gross sums, or for annual rent-charges, to be determined by commissioners in cases of disabilities, took possession of the lands of an infant on an agreement with his tenant, and after an award by the commissioners of the gross sum or annual rent-charge, which ought to be paid, but which award was invalid, no one being party to it who had power to bind the infant's interest, the awarded gross sum was paid by the company to the steward on an agreement for its return if the land were not conveyed to the company on the infant attaining his majority. No conveyance was executed, and the purchase-money was returned, but the company continued in the use of the land for their canal, paying to the landowner, for forty years after he attained his majority, a rent of nearly the amount awarded by the commissioners. The company also, with his knowledge, purchased the interests of leaseholds in the lands:—Held, that an ejectment brought by the landowner, and the intended erection of a bridge by him, ought to be restrained by injunction, on the ground of acquiescence, the company undertaking to put in force their parliamentary powers (which had not expired) to acquire the land. *Somersetshire Coal Canal Co.* v. *Harcourt*, 2 De G. & J. 596; 27 L. J., Ch. 625; 4 Jur. (N.S.) 671; 6 W. R. 670.

Before the amount to be paid by a railway company for land, required by them for the purposes of their railway, had been determined, a verbal consent, by one party stated to be qualified, by the other alleged to be general, was given, whereupon the company entered upon the land, and commenced works which would permanently affect it:—Held, that the court would not interfere, by injunction, to stop the works, if perfect justice could be done by compelling the company to pay for the land, but ordered the proximate value to be deposited until the amount could be determined. *Langford* v. *Brighton, Lewes and Hastings Ry.*, 4 Railw. Cas. 69. See also *Cromford Canal Co.* v. *Cutts*, 4 Railw. Cas. 442.

In 1794 an act authorised the making of a public canal through lands of which A. was the owner and B. his lessee, and upon payment of the compensation, the land was to vest in the company. An arrangement was made in respect of compensation with B., but not with A. The canal was made "with the full consent and approbation of and in accordance with the wishes of A.," whose name was mentioned in the act, and it was enjoyed until the expiration of the lease in 1844. The representatives of A. then recovered at law the land taken for the canal:—Held, in equity, that A., having thus sanctioned the formation of the canal, was not entitled to retake possession, but only to a fair compensation, to be determined by the agricultural value of the land taken, as calculated in 1843, and not in 1794. Held, secondly, that persons who had bought A.'s property, with notice in the conditions of sale as to the canal, were equally bound by the same equity. *Beaufort (Duke)* v. *Patrick*, 17 Beav. 60; 22 L. J., Ch. 489; 17 Jur. 682; 1 W. R. 280.

The owner of land, upon which a railway company, empowered by parliament, are about to enter, is not entitled to an interlocutory injunction to restrain them from so entering if, by his silence and conduct, he has permitted the company to carry on their works upon the supposition that they were entitled to enter on and take the land in question. *Greenhalgh* v. *Manchester and Birmingham Ry.*, 3 Myl. & C. 784; 8 L. J., Ch. 75; 3 Jur. 693.

A., on whose fields a railway company had entered without notice or permission, filed a bill and applied for an injunction to restrain them from digging away a part of one field, and depositing it on a certain other field; but it appearing that there had been a disposition to treat on the part of A., and that the steps taken were necessary for the public safety, on the company undertaking to pay into court the probable value of the land taken, the injunction was refused. *Tower* v. *Eastern Counties Ry.*, 3 Railw. Cas. 374.

A subsequent treating with a railway company will be considered by the court as a waiver of objections to proceedings, the subject of the treaty, although such proceedings be not, in fact, authorised by the railway act. *Ib.*

Where an act authorises the construction of a railway over the land of another upon making compensation, and the railway is made without authority from the owner of the land, but is afterwards used for fifteen years with his knowledge, he will not be permitted to interfere with the possession. All he is entitled to is to have the compensation assessed and paid. *Mold* v. *Wheatcroft*, 27 Beav. 510.

Disputed Ownership.]—After a railway company had purchased a piece of land from A., who was mentioned in the book of reference to be the owner of it, B., a neighbouring landowner, part of whose land the company had also taken, claimed to be owner of the piece of land, and filed a bill for an injunction to restrain the company from continuing in possession of it, and from committing waste on it. But the affidavits as to title on both sides being inconclusive, the court refused the injunction. *Webster* v. *S. E. Ry.*, 1 Sim. (N.S.) 272; 6 Railw. Cas. 698; 20 L. J., Ch. 194; 15 Jur. 73.

4. Omitted Interests.

Interest acquired after Notice to Treat.]—A railway company gave notice to a tenant-at-will to take part of the lands, and the company was allowed to take possession and complete their line. Afterwards, a person, who had subsequently to the notice purchased one-ninth of the land, filed a bill, merely praying an injunction to restrain the railway company from entering upon, continuing in possession of, or otherwise interfering with the land. The bill was dismissed with costs. *Carnochan* v. *Norwich and Spalding Ry.*, 26 Beav. 169. *See also* Notice to Treat, supra, cols. 1315 et seq.

Interest Acquired contemporaneously by Mistake.]—A landlord entered into some arrange-

ment with his tenant for a lease for eight years. Afterwards, a railway company being in want of part of the farm, agreed with the landlord for its purchase. Subsequently to this, by some mistake, the landlord, on the same day, granted a lease of the whole farm to the tenant, and conveyed a part of it to the company. A question also arose, under the agreement, whether the landlord or the company was to make compensation to the tenant. The company took possession and the tenant brought ejectment :—Held, under these circumstances, that the company could maintain a suit to stay the ejectment and ascertain the rights, and an inquiry was directed. *Norwich Ry.* v. *Wodehouse*, 11 Beav. 382; 13 Jur. 435.

All Interests must be Settled.]—Semble, a railway company is not entitled to take possession of land under the provisions of the Lands Clauses Act, 1845, until it has settled, not only with the persons in possession of the land, but also with all persons having any interest. *Inge* v. *Birmingham, Wolverhampton and Stour Valley Ry.*, 3 De G. M. & G. 658; 1 W. R. 300.

The E. C. and the L. & B. Railway Companies were duly empowered to make a railway, and to take certain lands for that purpose. After giving the usual notice, as required by the provisions of the Lands Clauses Act, to the lessee in possession of the lands, the companies, with his permission, entered into possession, and commenced the necessary works. The lessee made no statement of his interest, and no information was given to the companies of the interests of the plaintiffs. Afterwards the companies paid valuable consideration to, and obtained a conveyance from, parties who claimed to be owners of the property, and to be capable of conveying it. Other parties who claimed to be part owners, who had not been served with notices, and who were ignorant of the above proceedings, then came forward, and, together with the lessee, denied the right of the former parties to grant a conveyance. On motion for an injunction by the new claimants, the court would not interfere with the possession by the companies, but required the companies to undertake to proceed forthwith to determine the value of the land, to undertake to pay the value when determined, and to give the new claimants the usual bond under s. 85 of the Lands Clauses Act, and thereupon directed an inquiry whether the new claimants could make a title, without prejudice. The order did not give liberty to adverse claimants to come in and prove their claims, as they could apply by summons at chambers. *Alston* v. *Eastern Counties Ry.*, 1 Jur. (N.S.) 1009; 3 W. R. 559.

Mortgagees.]—Some property was mortgaged to the plaintiffs, who were not to receive their money until a future day. A railway company, with knowledge, treated with the mortgagor alone, and, not agreeing, paid into court, to the credit of the mortgagor, the amount of compensation, but made no provision for the compensation to the mortgagees, under s. 114 of the Lands Clauses Act. The company then took possession, and commenced pulling down the building. The court restrained the company from proceeding, until the value of the mortgagee's interests had been ascertained and paid or secured. *Ranken* v. *East and West India Docks*, 12 Beav. 298; 19 L. J., Ch. 153; 14 Jur. 7.

A railway company served H. with notice of their intention to take lands, of which he was in possession as tenant for life, but who was treated as owner, and so scheduled in the book of reference, though the company had notice of his limited interest. An agreement was entered into between the company and a land valuer (acting as the agent of H.), who agreed to sell the lands for 300*l*. H. invested the purchase-money in shares, and the company entered his name on the register of shareholders. The company took possession of the lands, and had used the same for the purposes of the railway works. Mortgagees alleged that H. had no power to sell, and he himself denied that he had authorised the agreement made in his name, or had let the company into possession. The company filed a bill against H. for specific performance, but subsequently ordered it to be dismissed. The company contended that they were rightfully in possession, and that the mortgagees ought to have proceeded under s. 68 of the Lands Clauses Act to have the compensation, the right to which they did not deny, ascertained as therein directed :—Held, that the company was not rightfully in possession, and that s. 68 applied, not only where a company must be rightfully in possession, but where compensation was sought by persons having a limited interest; and the court granted an injunction to restrain the company continuing in possession until compensation had been made to every person having an interest in the lands. *Perks* v. *Great Wycombe Ry.*, 3 Giff. 662; 8 Jur. (N.S.) 1051; 7 L. T. 150; 10 W. R. 788.

5. Mistake of Company.

Restraining Proceedings.]—Where a railway company acting bonâ fide has made a mistake as to the lands they have valued and taken possession of, and the question between the company and the landowner is merely one of value, the court will not, by injunction, stay the works on the property taken. The court, in such cases has regard to the injury which may be done to the public. *Wood* v. *Charing Cross Ry.*, 33 Beav. 290.

Where a railway company have taken possession under s. 85 of the Lands Clauses Act, 1845, when in consequence of unintentional error, they were not entitled so to do, the court will authorise their continuing in possession upon afterwards complying with the requisitions of the statute. *Willey* v. *S. E. Ry.*, 1 Macn. & G. 58; 1 H. & Tw. 56; 6 Railw. Cas. 108; 18 L. J., Ch. 201; 13 Jur. 241.

By Agent—Possession given up.]—The plaintiff, the rector of Stoke-upon-Trent, was empowered by an act of parliament to sell the glebe lands, or to lay out the same for building purposes. The provisional committee of a railway company, who were soliciting an act of incorporation, by an agreement in writing, contracted with the plaintiff to purchase a portion of the glebe, which had been laid out for building, and the plaintiff, as part of the terms of the agreement, withdrew his intended opposition, and assented to the railway bill, which passed into an act. At the time of entering into the agreement all the lands, except one field, which was let to a tenant, were lying waste; and, after the agreement, an agent of the

company, conceiving that they had purchased and paid for the land, agreed to let the unoccupied portion from week to week, and received a small sum from the tenants of that portion of the land; but discovering his mistake, on the remonstrance of the plaintiff, he put an end to the tenancy, and tendered to the plaintiff the rent received. It was not determined whether the railway would pass through the glebe land. On a motion, that the company might be ordered to pay into the court the amount of the purchase-money for the land:—Held, that although where a purchaser has taken and continues possession, he cannot retain it without paying the purchase-money into court; yet, that, in the present case, the agent of the company having entered by mistake, and having quitted possession, the rule did not apply. *Tomlinson* v. *Manchester and Birmingham Ry.*, 2 Railw. Cas. 104.

6. Bond and Deposit.

Surveyor—Appointment and Valuation.]—A valuation of a house taken by a railway company by a surveyor who did not enter the house valued is not a proper valuation. *Cotter* v. *Metropolitan Ry.*, 10 Jur. (N.S.) 1014; 10 L. T. 777; 12 W. R. 1021.

It is not necessary for a company, acting under the provisions of s. 85 of the Lands Clauses Act, to give notice to the party with whom they are dealing for the land. *Bridges* v. *Wilts, Somerset and Weymouth Ry.*, 4 Railw. Cas. 622; 16 L. J., Ch. 335; 11 Jur. 315.

The instrument, by which a surveyor is appointed under s. 85 of the Lands Clauses Act, need not specify either the lands which the surveyor is to value, or the course of the railway. *Poynder* v. *G. N. Ry.*, 16 Sim. 3; 2 Ph. 330; 16 L. J., Ch. 444; 11 Jur. 646.

—— **Validity of Bond.**]—A nomination by the justices, under s. 85 of the Lands Clauses Act, of the surveyor employed by the company, and who has already in the course of such employment valued the land, does not necessarily invalidate a bond under the section. *Langham* v. *G. N. Ry.*, 1 De G. & Sm. 486; 5 Railw. Cas. 269; 16 L. J., Ch. 437; 11 Jur. 839.

Bond—Form.]—A railway company under the powers of the Lands Clauses Consolidation Act, 1845, gave the usual notice of a reference to a jury to assess the value of a portion of a house, shop, and outbuildings which had been occupied together, coffee being roasted in the outbuildings, and sold in the shop. They gave a bond to the lessee, her heirs, executors, administrators, and assigns, and paid into court 600*l.*, the amount at which the value of the buildings taken by them had been estimated under the provisions of the act; they then proceeded to enter into possession, and to pull down the buildings. The lessee filed her bill, to which neither the superior landlord nor her sub-lessee was a party, for an injunction to restrain the company from continuing in possession of the buildings on the ground that the bond given was invalid by reason of its being conditioned for payment of the sum specified to the heirs, executors, administrators, and assigns of the lessee. The court refused to interfere. *Dakin* v. *L. & N. W. Ry.*, 3 De G. & Sm. 414; 13 Jur. 579.

Where a railway company treat with a claimant as the party interested in the land, it is sufficient that the bond to be given under s. 85 secures payment of the compensation-money to the claimant, his executors, &c., without referring to "the parties interested in the premises." *Willey* v. *S. E. Ry.*, 1 Macn. & G. 58; 1 H. & Tw. 56; 6 Railw. Cas. 100; 18 L. J., Ch. 201; 13 Jur. 241.

Semble, that the condition of the bond must be for payment absolutely, and not on demand. *Langham* v. *G. N. Ry.*, infra.

A bond given, under 8 & 9 Vict. c. 18, s. 85, where the value of the premises taken was less than 200*l.*, and exceeded 20*l.*, instead of being conditioned for "payment to the party, or deposit in the Bank of England for the benefit of the parties interested," was conditioned for payment "to the party, her heirs, executors, administrators or assigns," and for "deposit in the Bank of England or otherwise for the benefit of the parties interested, as the case may require, under the provisions contained in the Lands Clauses Act":—Held, that the introduction of the words "or otherwise" was not authorised by the act, and that the bond was not, therefore, in compliance with it. *Hosking* v. *Phillips*, 5 Railw. Cas. 560; 3 Ex. 168; 18 L. J., Ex. 1; 12 Jur. 1030.

The condition of a bond given by a company, on taking possession of land before the purchase-money was ascertained, was on demand to pay to the owner, or on demand to deposit in the Bank of England the amount of such purchase-money when determined:—Held, that the condition was bad, as giving the party claiming to be owner the option of compelling payment either to himself or into the bank, whatever the title might turn out. *Poynder* v. *G. N. Ry.*, 2 Ph. 330; 5 Railw. Cas. 201; 16 L. J., Ch. 444.

A bond, conditioned for payment "at any time hereafter" to A., or deposit in the Bank of England for the benefit of the parties interested, of purchase-money or compensation, is not a proper bond. *Cotter* v. *Metropolitan Ry.*, 10 Jur. (N.S.) 1014; 10 L. T. 777; 12 W. R. 1021.

—— **Sureties.**]—Two sureties are required as well when the bond is given by a corporation as by an individual. Semble, that the several bond of the company and joint bond of the sureties is sufficient. *Barker* v. *North Staffordshire Ry.*, 2 De G. & Sm. 55; 5 Railw. Cas. 401; 12 Jur. 324, 589.

The approval of sureties in a bond under s. 85 may be given by the justices on an ex parte application of the company. But if such a bond be made to landowners jointly, they being tenants in common of the land, it is not a sufficient compliance with the act. *Langham* v. *G. N. Ry.*, 5 Railw. Cas. 263; 1 De G. & Sm. 486; 16 L. J., Ch. 437; 12 Jur. 574; 11 Jur. 839.

Amount of Valuation.]—When a railway company, having given notice of their intention to take part of a house or a factory, is obliged to take the whole, they cannot take possession of the part they require, without paying into the bank the value of the whole which they are obliged to take. *Giles* v. *L. C. & D. Ry.*, 1 Drew. & Sm. 406; 30 L. J., Ch. 603; 7 Jur. (N.S.) 509; 5 L. T. 479; 9 W. R. 587.

If when a company gives notice to take part of property, and is required by the owner to take the whole, the amount to be secured by deposit and bond, under s. 85, before the company can

take possession of the property they require, is the value of the entire property, not of the portion actually required by the company. *Underwood* v. *Bedford and Cambridge Ry.*, 31 L. J., Ch. 215; 7 Jur. (N.S.) 941.

A railway company gave notice of their intention to take ten pieces of land, authorised to be taken by their special act, according to s. 18 of the Lands Clauses Act. They afterwards entered upon eight of such pieces only, and had them valued, and deposited the amount of valuation in the bank, and gave security by bond under their corporate seal, but without sureties, to the landowners, under s. 85:—Held, that the company could not enter on less than all the lands comprised in their original notice, and deposit the value of and give security for such less security. *Barker* v. *North Staffordshire Ry.*, 2 De G. & Sm. 55; 5 Railw. Cas. 401; 12 Jur. 324, 589.

The compensation in respect of which the bond is given by a railway company under s. 85 of the Lands Clauses Act, on entering upon lands before agreement, does not include compensation for minerals under the Railways Clauses Act, 1845, ss. 78, 81. *Neath and Brecon Ry., Ex parte*, 45 L. J., Ch. 196; 2 Ch. D. 201; 24 W. R. 357.

The valuation which by s. 85 of the Lands Clauses Act a railway company is required to obtain before exercising the power of entry given by that section must include compensation for severance, &c. *Field* v. *Carnarron and Llanberis Ry.*, 37 L. J., Ch. 176; L. R. 5 Eq. 190; 18 L. T. 534; 16 W. R. 273.

A railway company was entitled by a special act to acquire compulsorily an easement of tunnelling under land, unless a jury should determine that such easement could not be acquired by the company without material detriment to the remainder of such land:—Held, that the company might enter upon the land for the purpose of making the tunnel under s. 85 of the Lands Clauses Consolidation Act upon depositing the value of the easement, and could not be compelled to deposit the value of the whole land. *Hill* v. *Midland Ry.*, 51 L. J., Ch. 774; 21 Ch. D. 143; 47 L. T. 225; 30 W. R. 774.

Where a railway company took possession of the plaintiff's land, under the Lands Clauses Act, s. 85, paid into court 868*l.* as the value of the land, and the land was afterwards duly valued at 1,227*l.*, and the plaintiff moved for an order directing the company to pay the difference in the value into court:—Held, that the difference must be paid in forthwith. *Ashford* v. *L. C. & D. Ry.*, 14 L. T. 787.

To what Account.]—Money paid into the bank under s. 86 to the credit of "Ex parte, the promoters of the undertaking, the account of the landowner":—Held, to be rightly paid in. *Poynder* v. *G. N. Ry.*, 16 Sim. 3; 5 Railw. Cas. 196; 11 Jur. 646. *And see* 2 Ph. 330; 5 Railw. Cas. 201; 16 L. J., Ch. 444; 11 Jur. 648.

Investment.]—A petition by a railway company for investment of money paid into court by them under the provisions of the 85th section of the Lands Clauses Consolidation Act, 1845, need not be served upon the landowner for whose security the money was deposited. *Carmarthen and Cardigan Ry., Ex parte*, 2 N. R. 515.

Landowner cannot Claim Benefit and Repudiate.]—A landowner is not entitled to avail himself of the security provided by s. 85 of the Lands Clauses Act in the deposit of the money, and at the same time to repudiate the proceeding, the benefit of the result of which it was the object of the act thus to secure to him. *Fooks, In re*, 2 Macn. & G. 357.

For what available.]—The sum deposited under the act as a security for what the jury should find, is not available for any other purpose, and consequently mortgagees of the land have no lien upon it, but, as equitable mortgagees, they are entitled to a lien on the property comprised in the memorandum of deposit, and, in default of payment, to an assignment to them by the company of such property. *Martin* v. *L. C. & D. Ry.*, 35 L. J., Ch. 795; L. R. 1 Ch. 501; 12 Jur. (N.S.) 775; 14 L. T. 814; 14 W. R. 880.

Interest.]—Sect. 85 of the Lands Clauses Act makes 5*l.* per cent. interest payable on a sum recovered, under s. 68, for neglecting to issue a warrant to the sheriff within twenty-one days after notice that the proprietor wishes to have the question of compensation settled by a jury. *Aberdare Ry., In re*, 8 W. R. 603.

7. Repayment of Deposit.

Deduction of Costs.]—Money paid into the bank by a railway company, under s. 85 of the Lands Clauses Act, ordered to be repaid to them under s. 87, without any deduction for costs payable by them to the landowner. *Stevens, Ex parte, London and Southampton Ry., In re*, 16 Sim. 165; 12 Jur. 238. Affirmed, 2 Ph. 773; 5 Railw. Cas. 437; 13 Jur. 2.

A railway company, being desirous of taking land under s. 85 of the Lands Clauses Act, 1845, paid into court the amount at which the land was valued by the surveyor, and also gave the owner of the land the bond prescribed by that section. Subsequently, the amount at which the land was valued by the jury was paid by the promoters, and the bond returned to them; they now petitioned to have the money returned which they paid into court. The owner of the land opposed this petition, on the ground that the petitioners had not yet paid the costs of investigating the title, of the conveyance, of the inquiry before the jury, and of a suit by the owner in another branch of the court for an injunction, which the promoters had rendered necessary:—Held, that the costs of the suit were not costs provided for by the act, and that they should be disposed of by that branch of the court to which the suit was attached; and that, as to the other costs, the court had not discretion, under s. 80 of the Lands Clauses Act, to order them to be paid out of the fund in court, the remedy as to those costs being otherwise and fully provided for by the act. *G. N. Ry., Ex parte*, 16 Sim. 169; 5 Railw. Cas. 269; 17 L. J., Ch. 314; 12 Jur. 885.

A railway company took possession of land under the powers and for the purposes of their act, and duly paid money into court for the land. The parties differed as to the completion of the contract, and a jury ultimately assessed the purchase- and compensation-money at a fixed sum. The vendor brought an action against the company for that sum with interest, and for

certain costs due to him from the company. Those costs were, however, disallowed by the master. The company pleaded never indebted to the action, except as to so much as they paid into court, which sum did not include the amount of the disallowed costs. Issue was afterwards joined in the action, but no notice of trial given. The company then presented a petition praying payment out of the court to them of their deposit, but the vendor opposed them, on the ground that the disallowed costs were still unpaid, and the action pending:—Held, that the company were entitled to their deposit, and the vendor was not allowed any costs of the petition. *Wimbledon and Dorking Ry. Act, In re*, 9 L. T. 703.

A railway company served a notice to treat, and gave the usual bond, and made the deposit required by s. 85 of the Lands Clauses Act. The landowner filed a bill to restrain the company from entering, but a motion for injunction stood over by arrangement, and no further steps were taken. Ultimately, the company abandoned the purchase with the concurrence of the owner:—Held, on a petition for a re-transfer of the deposit to the company, and for the cancelling of the bond, that the owner was not entitled to have the costs of the suit out of the deposit. *Birmingham, Wolverhampton and Dudley Ry., Ex parte*, 1 Hem. & M. 772; 3 N. R. 290.

But, semble, he would have been so entitled if the purchase had been abandoned by reason of the inability of the company to complete. *Ib.*

Transfer of Mortgage.]—A railway company having taken lands under their compulsory powers, and paid the deposit into court, may take a transfer of a mortgage on the land and recover the deposit by virtue thereof. *London, Tilbury and Southend Ry., Ex parte, Marriage, In re*, 9 W. R. 843.

Petition for Payment.]—Where a corporation after paying a deposit into court and entering on lands under the provisions of the Lands Clauses Act, 1845, has afterwards concluded the purchase by contract, the deposit will be returned, upon the petition of the corporation, without service upon the vendor, if the consent in writing of the latter to the prayer of the petition be obtained. *Huddersfield Corporation, Ex parte, Dyson, In re*, 46 L. T. 730.

Where a railway company, prior to entering upon lands, has made a deposit in the bank and given a bond under s. 85 of the Lands Clauses Act, 1845, the court has jurisdiction, under s. 87, in the event of the nonperformance of the condition of the bond, to order payment out of the deposit to the landowner on a petition presented by him for that purpose adversely to the company. *Mutlow's Estate, In re*, 48 L. J., Ch. 198; 10 Ch. D. 131; 27 W. R. 245.

Where a railway company has paid the estimated value of a piece of land into court under s. 85 of the Lands Clauses Act, and afterwards concludes the purchase by contract, the court will not order the payment out to the company of the sum deposited, unless the vendor joins in the petition, or a copy of it be served upon him. *South Wales Ry., In re*, 6 Railw. Cas. 151.

Upon petition by a railway company for repayment to the secretary of money paid into court under the 8 & 9 Vict. c. 18, s. 85:—Held, that payment to the secretary might be ordered upon the petition being stamped with the seal of the company, without the necessity of verifying the seal. *L. C. & D. Ry., Ex parte*, 8 W. R. 636.

Evidence that Bond satisfied.]—The court considered the production by a railway company of a bond given by the company under s. 85 of the Lands Clauses Act, 1845, sufficient evidence that the conditions thereof had been satisfied, and ordered money which had been paid into court thereunder to be paid to the company. *L. & N. W. Ry., In re*, 26 L. T. 687.

A railway company, being desirous of entering upon certain lands before agreement, made the usual deposit and gave the usual bond. Afterwards, by an agreement in writing between the company and landowner, it was referred to an arbitrator to determine the purchase-money for the lands taken by the company, and also the "compensation for any damage sustained by the landowner by reason of the execution of their works, and which, under the special act, the Lands Clauses Act, or the Railway Clauses Act, the landowner was entitled to claim against the company":—Held, that the bond did not include compensation awarded by the arbitrator in respect of minerals under the Railway Clauses Act, ss. 78 and 81, and that the company, having paid the sum awarded as the purchase-money and compensation in respect of the lands taken by them, had performed the condition of the bond, and was entitled to the return of its deposit. *Neath and Brecon Ry., Ex parte*, 45 L. J., Ch. 196; 2 Ch. D. 201; 24 W. R. 357.

Costs of.]—*See* supra, col. 1443.

IV. COMPENSATION.

A. In Respect of what Injuries, 1505.
B. In Respect of what Interests.
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  2. *Ancient Lights*, 1522.
  3. *Commons*, 1524.
  4. *Copyholds*, 1524.
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C. In Respect of what Persons, 1527.
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E. Settling Amount, and Practice Thereon.
  1. *Notice of Claim*, 1545.
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F. Restraining Proceedings to Obtain, 1590.

A. IN RESPECT OF WHAT INJURIES.

Land must be Taken, Affected or Entered on.]—The words "lands which shall have been taken for or injuriously affected by the execution of the works," in s. 68 of 8 & 9 Vict. c. 18, include such lands only as are actually taken or actually affected by the works of a railway company. *Burkinshaw* v. *Birmingham and Oxford Junction Ry.*, 6 Railw. Cas. 600; 5 Ex. 475; 20 L. J., Ex. 246.

They apply to the case of lands entered upon and used under s. 85, and the landowner is in such case bound to initiate proceedings for settling the compensation. *Doe* d. *Armistead* v. *North Staffordshire Ry.*, 16 Q. B. 526; 20 L. J., Q. B. 249; 15 Jur. 944. S. P., *Adams* v. *London and Blackwall Ry.*, 2 Mac. & G. 118; 2 Hall & T. 285; 19 L. J., Ch. 557; 14 Jur. 679.

A canal company was empowered by act to take lands, &c., "making satisfaction to the owners or proprietors of, or persons interested in the lands," &c., so taken, for any damages by them sustained. By another clause it was enacted, that in the event of the company, owner or parties interested, not agreeing as to the sum to be paid for the absolute purchase of the land, certain commissioners were to settle what sum was to be paid for the purchase, and also what distinct sum was to be paid as a compensation to "parties interested." The company purchased from L. land over which the plaintiff had a railroad, by way of easement. They entered upon the land in December, 1834, but did no injury to the plaintiff's railroad until February, 1836. The plaintiff gave no notice to the company of his having any interest in the land, and nothing was paid to him by the company as compensation:—Held, that the plaintiff was not entitled to compensation under the act until he had sustained some actual injury; and that the company was bound to give compensation at any time after the injury. *Thicknesse* v. *Lancaster Canal Co.*, 4 M. & W. 472; 8 L. J., Ex. 49.

—— **Evidence of Taking Possession by Company.**]—A person who had a leasehold interest in premises held by a tenant from year to year, received notice from a projected railway company that the premises were required for the purposes of their undertaking; and the company subsequently arranged with the tenant, and received from him the key. She thereupon gave the company notice of the amount of her claim and the nature of her interest in the premises, and requiring them to issue their warrant to the sheriff to summon a jury; and, upon their neglecting so to do, she brought an action for the sum claimed:—Held, that these facts warranted the jury in finding that the company had actually taken the premises, and consequently that they were liable for the amount demanded. *Barker* v. *Metropolitan Ry.*, 17 C. B. (N.S.) 785; 10 Jur. (N.S.) 1127; 11 L. T. 312; 13 W. R. 82.

Right of Action if Act not Passed.]—In order to found a claim for compensation under s. 68 of the Lands Clauses Act, 1845, and the Railways Clauses Act, 1845, some special or peculiar damage must be done to the lands by reason of the construction of the works, which diminishes the value of the lands, which damage would have been the subject of an action at law before the statute. But no compensation is given for damage if the thing done was one for which, if done without any statutory power, no action could have been maintained; nor when a right of action, which would have existed if the works had not been authorised by statute, would have been merely personal. *Caledonian Ry.* v. *Walker's Trustees*, 7 App. Cas. 259; 46 L. T. 826; 30 W. R. 569; 46 J. P. 676—H. L. (Sc.). S. P., *Beckett* v. *Midland Ry.*, 37 L. J., C. P. 11; L. R. 3 C. P. 82; 17 L. T. 499; 16 W. R. 221.

No claim can be made in respect of damage for which the claimant would not have had an action, supposing the railway act had never been passed. *City of Glasgow Union Ry.* v. *Hunter*, L. R. 2 H. L. (Sc.) 78. S. P., *Wood* v. *Stourbridge Ry.*, 16 C. B. (N.S.) 222.

In order to entitle a claimant to compensation there must be an injury to the land or some interest in it which would have been the subject of an action before the statute. *Reg.* v. *Metropolitan Board of Works*, 10 B. & S. 391; 38 L. J., Q. B. 201; L. R. 4 Q. B. 358; 17 W. R. 1094; S. P., *Hopkins* v. *G. N. Ry.*, 46 L. J., Q. B. 265; 2 Q. B. D. 224; 36 L. T. 898—C. A.

The test to be applied is, whether the act done would be sufficient ground to maintain an action if it was not authorised by the act of parliament. *Metropolitan Board of Works* v. *McCarthy*, 43 L. J., C. P. 385; L. R. 7 H. L. 243; 31 L. T. 182; 23 W. R. 115.

A private act, incorporating the Lands Clauses Act, 1845, contained special clauses giving compensation for damage caused by the exercise of the powers of the act to the proprietors of certain specified estates:—Held, on the construction of these clauses, that they were limited to damage which, but for the act, would have been actionable. *Rhodes* v. *Airedale Drainage Commissioners*, 45 L. J., C. P. 861; 1 C. P. D. 402; 35 L. T. 46; 24 W. R. 1053—C. A.

A corporation, being authorised by act of parliament to stop up or level a street for the purpose of its act, in the course of operations wrongfully cut into the cellars of a house, which were under the street, leaving them open and exposed. The corporation, also, in the course of the works, partially stopped the traffic along the street. An injunction having been obtained restraining the corporation from cutting into the cellars, with an inquiry as to damages:—Held, that although the owner was entitled to damages for the structural injury to his cellars, he was not entitled to damages for depression caused to his trade by reason of the difficulty of access to his shop, it not being shewn that the depression arose from the wrongful, as distinguished from the authorised, act of the corporation. *Bigg* v. *London Corporation*, L. R. 15 Eq. 376; 28 L. T. 336.

—— **Exception to Rule—Part of Land Taken.**]—The rule that compensation is only given by s. 6 of the Railways Clauses Act, 1845, and s. 68 of the Lands Clauses Acts, 1845, where what would have been actionable against a company in the absence of statutory powers is permitted by those powers, and compensation allowed in lieu and by reason of such right of action being taken away is not applicable where part of the land is taken and compensation is sought, not only for the value of the part taken, but for the rest of the land being injuriously affected either by severance or otherwise. *Stockport, Timperley and Altringham Ry., In re*, 33 L. J., Q. B. 251; 10 Jur. (N.S.) 614; 10 L. T. 426; 12 W. R. 762.

Where a railway, by passing through a farm, separated the farm buildings from the arable land so that they could not be conveniently used :—Held, to be an injury to the farm buildings within the meaning of s. 68 of the Lands Clauses Act, 1845. *Milward, Ex parte, Oxford, Worcester and Wolverhampton Ry., In re*, 29 L. J., Ch. 245 ; 6 Jur. (N.S.) 478 ; 1 L. T. 153.

Though compensation may not be granted to a person annoyed by the smoke and vibration occasioned by trains passing along a railway constructed under the authority of an act of parliament where no part of his land has been taken, compensation may be given for deterioration in the value of his property occasioned in a similar manner where a part of his land has been taken for the construction of a work authorised by an act. *Buccleuch (Duke)* v. *Metropolitan Board of Works*, 41 L. J., Ex. 137 ; L. R. 5 H. L. 418 : 27 L. T. 1.

Under statutory powers incorporating the Lands Clauses Consolidation Act, 1845, the respondents gave the appellant notice to treat for the purchase of part of his land, which they required for sewage works. In an inquisition held under that act evidence was given that the existence of sewage works, even if conducted so as not to create an actionable nuisance, depreciated the market value of the appellant's other lands for building purposes. The land taken was let on long building leases ; of the other lands part was in hand and part was let for short periods for brick making. The land taken was separated from the other lands, in part by other property of the appellant's, and in part by a railway. The jury gave a verdict for the value of the land taken and a further sum for all damage sustained or to be sustained by reason of the injuriously affecting the other lands by the exercise of the respondents' statutory powers :—Held, that the jury had not exceeded their jurisdiction in awarding the further sum. For part of the appellant's land having been taken for the sewage works, compensation might be awarded for damage to be sustained by reason of the injuriously affecting his other lands, not only by the construction of the sewage works but by their use. *Stockport, Timperley and Altringham Ry., In re* (33 L. J., Q. B. 251) approved. *Essex* v. *Acton Local Board*, 58 L. J., Q. B. 594 ; 14 App. Cas. 153 ; 61 L. T. 1 ; 38 W. R. 209 ; 53 J. P. 756—H. L. (E.)

The plaintiff had constructed a reservoir on part of his land, the only use of which was to supply with water mills and other buildings which might be erected on the rest of his land, which was suitable for building purposes. A railway company gave notice to treat for a large portion of this building land, and the amount to be paid to the plaintiff for purchase-money, compensation and damage, was by agreement referred to arbitration. At the arbitration he claimed compensation for the loss he would sustain by reason of his losing the sale of the water from his reservoir to buildings that might have been erected on the land taken by the company, and in support of this claim he gave evidence as to the profits he expected to realise on this account :—Held, that the land with the reservoir upon it was "injuriously affected" by the severance, that the arbitrators were justified in considering such claim and in receiving such evidence in support of it, and that the award made by them was valid. *Ripley* v. *G. N. Ry.*, L. R. 10 Ch. 435 ; 31 L. T. 869 ; 23 W. R. 685.

Statutory compensation cannot be claimed by reason of noise or smoke of trains, whether part of the claimant's lands is taken or not. *City of Glasgow Union Ru.* v. *Hunter*, L. R. 2 H. L. (Sc.) 78.

Anticipated damage from the noise and smoke of trains does not appear to be a proper subject of estimate for compensation under the railway statutes. *Ib.*

Where Action lies for Injury.]—Sect. 68 of the Lands Clauses Act, 1845, has reference to cases where a party is injuriously affected by reason of acts authorised to be done by a public company, in pursuance of the provisions of their private act, and is inapplicable to cases where the injury complained of may (as under s. 29 of the Gas Clauses Act, 1847) be compensated by recourse to an action for damages. *Imperial Gas Light and Coke Co.* v. *Broadbent*, 7 H. L. Cas. 600 ; 29 L. J., Ch. 377 ; 5 Jur. (N.S.) 1319.

The legislature having given the promoters no power to annoy the occupiers of neighbouring property with smoke, an injury from this cause is not the subject of compensation but a ground of action. A man may have a right of action where he cannot claim statutory compensation. *City of Glasgow Union Ry.* v. *Hunter*, L. R. 2 H. L. (Sc.) 78.

A person who sustains an injury from the execution of works authorised by a statute is not, generally speaking, entitled to compensation under the compensation clauses of the statute, unless the injury sustained is such as, had the works not been authorised by the statute, would have given the claimant a right of action. *New River Co.* v. *Johnson*, 2 El. & El. 435 ; 29 L. J., M. C. 93 ; 6 Jur. (N.S.) 374 ; 1 L. T. 295 ; 8 W. R. 179.

A company, in the execution of works authorised by a local act which incorporated the Waterworks Clauses Act, 10 & 11 Vict. c. 17, intercepted water from percolating underground into a well belonging to J., and also abstracted from the well water which had already so percolated into and was in it. By 10 & 11 Vict. c. 17, s. 12, in the exercise of the powers conferred by the act, the undertakers shall do as little damage as can be, and shall make full compensation to all parties interested for all damage sustained by them through the exercise of such powers :—Held, that, inasmuch as, apart from the statute, no action would have lain by J. against the company, in respect of either the interception or the abstraction of such water, the statute gave no right to compensation in respect of either. *Ib.*

By a section of a statute, if any person, after the commissioners or any person employed or authorised by them shall have begun to carry the statute into execution, shall sustain damage or injury in his lands or chattels by or in consequence of any act of the commissioners, their agents, workmen or servants, the damage or injury shall be ascertained by a jury before the sheriff :—Held, that the section applied only to damages resulting from acts authorised by the statute ; but, assuming it to extend to unauthorised acts on a review of the statute, and inasmuch as the cause of action was for an omission or nonfeasance, it was not the subject of compensation within the section. *Coe* v. *Wise* 7 B. & S. 831 ; 37 L. J., Q. B. 262 ; L. R. 1 Q. B. 711 ; 14 L. T. 891 ; 14 W. R. 865—Ex. Ch.

A water company constructed under its act of parliament a reservoir for storing the water

of a river, the river flowing into the reservoir at the upper end, and being discharged at the lower. The tenants of the plaintiff, who was the owner of dye works, at which the water of the river was used for dyeing purposes, complained that the effect of the reservoir was to make the water turbid and unfit for use. The plaintiff then filed a bill against the company to restrain them from fouling the water. The company made an offer to the plaintiff's tenants to construct a filter for the works, which would have remedied the injury complained of, but this offer was declined. The plaintiff did not deny that the reservoir had been constructed in strict accordance with the act of parliament, and it did not appear that there was any probability of her losing her tenants:—Held, that the injury complained of was not one which the company's act authorised them to commit, and that therefore the plaintiff's remedy was not under the compensation clauses of the Waterworks Act, 1847, but that she was entitled to an injunction restraining the company from so storing or discharging the water of the reservoir as to foul the water of the river to the injury of the plaintiff. *Clowes* v. *Staffordshire Potteries Waterworks Co.*, 42 L. J., Ch. 107; L. R. 8 Ch. 125; 27 L. T. 521; 21 W. R. 32. S. P., *Caledonian Ry.* v. *Colt*, 3 Macq. H. L. 833; 7 Jur. (N.S.) 475; 3 L. T. 252. *Thomas* v. *Birmingham Canal Co.*, 49 L. J., Q. B. 851; 43 L. T. 435; 45 J. P. 21.

The drainage of a district had for many years been carried into a stream (affecting the same in an inappreciable degree only), which afterwards, and beyond the limits of the district, flowed through C.'s land. The population of the district subsequently much increased, and further drainage becoming necessary, the board of health for the district executed additional works, the effect of which was to cause substantial injury to C., by reason of the pollution of the water of the stream:—Held, that C. was not entitled to compensation, under the 18 & 19 Vict. c. 120, s. 86, but had his remedy by action. *Cator* v. *Lewisham Board of Works*, 5 B. & S. 115; 34 L. J., Q. B. 74; 11 Jur. (N.S.) 340; 13 L. T. 212; 13 W. R. 254—Ex. Ch.

—— **Land Outside Purposes of Acts.**]—A public company was empowered to hold lands and to purchase certain scheduled messuages, and was required to make compensation by a particular process to persons "damaged or injured by or in the taking down of any of the messuages or buildings to be taken down for the purposes or otherwise in the execution of the act." The company purchased a house not mentioned in the schedule, and in pulling it down injured the adjoining house:—Held, that the tenant of the adjoining house was not entitled to compensation by the process provided by the act. *Rex* v. *Hungerford Market Co.*, 1 A. & E. 668; 2 N. & M. 340; 3 L. J., K. B. 50. *See also* 1 A. & E. 676; 3 N. & M. 622; 3 L. J., K. B. 168.

Where a statute provides that a waterworks company shall make compensation for damages done in executing the works, and these works are restricted to a particular line, damage occasioned by executing the prescribed works is within the proviso, although the property injured is not within the line. *Rex* v. *Nottingham Old Waterworks Co.*, 5 N. & M. 498; 5 L. J., K. B. 11.

—— **Percolating Water.**]—By s. 12 of the Waterworks Clauses Act, 1847, powers are given for the execution of certain works, provided always that the undertakers shall make full compensation to all parties interested for all damage sustained by them through the exercise of such powers. A company, in the execution of works authorised by their act, which incorporated that section, intercepted water which would have percolated through the strata of the earth into a well of A., and also drained off water which had percolated through the strata and reached the well:—Held, that she was not entitled to compensation for the damage she had sustained, inasmuch as, supposing the act had not passed, she had no right of action in respect of either the water which would have reached her well, or that which had reached it. *New River Co.* v. *Johnson*, 2 El. & El. 435; 29 L. J., M. C. 93; 6 Jur. (N.S.) 374; 1 L. T. 295; 8 W. R. 179.

A. was owner of an estate which had been purchased by a testator, under whose will he claimed in 1838. It was situate upon a bed of gravel, which was itself embedded in a basin of clay extending under the estate and under the lands adjoining. Water, which rose through the gravel bed by means of natural springs, was collected in a small pond, and thence overflowing the edge of the clay basin formed a rivulet which supplied other ponds, and was used by the owner for watering his gardens and horses. Commissioners of sewers, in the course of making a sewer in 1855, cut through the two beds of gravel and clay at a short distance from the estate, and the effect of the cutting was to drain the springs in the gravel, and to prevent them from finding their way into the pond and from supplying the rivulet and the other ponds:—Held, that he was not at common law entitled to compensation from the commissioners in respect of the abstraction of the water. *Reg.* v. *Metropolitan Board of Works*, 3 B. & S. 710; 32 L. J., Q. B. 105; 9 Jur. (N.S.) 1008; 8 L. T. 238; 11 W. R. 492.

Obstruction or Inconvenience—Particular Use.]—To entitle a claimant to compensation he must shew that he has sustained a particular damage from the execution by the company of the works authorised by the special act, and that the damage is one for which he might have maintained an action if the work had not been authorised by parliament; and, also, that the injury of which he complains is an injury to his estate and not a mere obstruction or an inconvenience to him personally or to his trade, although it might have been the subject of an action if the works which occasioned it had not been executed under the sanction of parliament. *Beckett* v. *Midland Ry.*, 37 L. J., C. P. 11; L. R. 3 C. P. 82; 17 L. T. 499; 16 W. R. 221.

The damage must be one which is sustained in respect of the property itself, and not in respect of any particular use to which it may from time to time be put. *Ib.*

Damages are not recoverable for stoppages and other mere inconveniences incident to the crossing of a public road by a railway on the level, under the sanction of parliament. A level crossing in such a case is a grievance to be endured without complaint by private persons, from a consideration of the benefit gained by the public. *Caledonian Ry.* v. *Ogilvy*, 2 Macq. H. L. 229.

No compensation can be claimed for inconvenience sustained from the authorised crossing on a level of a public road by a railway. *Wood* v. *Stourbridge Ry.*, 16 C. B. (N.S.) 222.

A special verdict found that the only approach to the house of the plaintiff was by a private road; that a railway crossed the road on a level, in an oblique direction, so that at the point where the railway intersected the road, a train coming along the railway at ordinary speed could not be seen for more than seventeen seconds before it reached that point; that there were gates on each side of the railway across the road, which were kept locked, a key being kept by a servant of the company, whose business it was to unlock the gates when any person had occasion to pass through them, and the plaintiff also having a key; and that by reason of these facts and the execution of the works by the company, his property was depreciated in value:—Held, that his lands were "injuriously affected," within s. 68, by the erection of the gates, and, per Lord Campbell, C.J., by the passage of trains along the railway. *Glover* v. *North Staffordshire Ry.*, 16 Q. B. 912; 20 L. J., Q. B. 376; 15 Jur. 673.

Where an access to private property by a public highway or private way is interfered with by the construction of the works, and the value of the property, irrespective of any particular use which may be made of it, is so dependent upon the existence of that access as to be substantially diminished by its obstruction, then the owner is entitled to compensation for such interference. *Caledonian Ry.* v. *Walker's Trustees*, 7 App. Cas. 259; 46 L. T. 826; 30 W. R. 569; 46 J. P. 676—H. L. (Sc.)

Trustees were possessed of a spinning mill ninety yards from an important main thoroughfare in Glasgow, having parallel accesses on the level from two sides of the mill to the thoroughfare. A railway company, under their special act, cut off entirely one access, substituting therefor a deviated road over a bridge with steep gradients, and the other access they diverted and made less convenient; but none of the operations were carried on ex adverso the premises. When the bill was before parliament the trustees were induced to withdraw their opposition in consideration of an agreement, by which the company undertook, that in the event of the land of the trustees and of others being injuriously affected by the construction of any of the works proposed by the bill, their claim to compensation should not be barred by reason of the company not taking part of their land. The trustees claimed compensation for the diminished value of their premises by reason of the detour and gradients:—Held, that though the agreement gave no right to compensation, the trustees were entitled to it under the Railways and Lands Clauses (Scotland) Acts, 1845. *Ib.*

The obstruction of access to a private property by a public road need not be ex adverso, but it must be proximate, and not remote or indefinite, to entitle the owner of that property to compensation for the loss of it. And it is a question whether a mere change of gradient alone would be a proper subject for compensation. *Ib.*

B. was possessed of a house fronting on a public highway. A railway company erected an embankment on a portion of the highway opposite to the house, thereby narrowing the road from fifty to thirty-three feet, and thus materially diminishing the value of the house for selling or letting, and obstructing the access of light and air to it:—Held, that this was such a permanent injury to his estate in the premises as to entitle him to compensation. *Beckett* v. *Midland Ry.*, supra.

Where access to a sewer for the purpose of repairing it has not been prevented by the execution of the works, but only rendered less easy and convenient, there is no right to compensation under s. 68 of the Lands Clauses Act, 1845. *Birkenhead Corporation* v. *L. & N. W. Ry.*, 55 L. J., Q. B. 48; 15 Q. B. D. 572; 50 J. P. 84—C. A.

A corporation being authorised by act of parliament to stop up or level a street for the purpose of its act, in the course of operations wrongfully cut into the cellars of a house, which were under the street, leaving them open and exposed. The corporation also, in the course of the works, partially stopped the traffic along the street. An injunction having been obtained restraining the corporation from cutting into the cellars, with an inquiry as to damages:—Held, that although the owner was entitled to damages for the structural injury to his cellars he was not entitled to damages for depression caused to his trade by reason of the difficulty of access to his shop, it not being shewn that the depression arose from the wrongful, as distinguished from the authorised, act of the corporation. *Bigg* v. *London Corporation*, L. R. 15 Eq. 376; 28 L. T. 336.

C., being owner of houses situate on a high road, a company, under the authority of its act of parliament, constructed its railway upon and across the high road, and obstructed and diverted the road, thereby causing difficulty of access to the houses, and rendering them less suitable to be occupied as shops:—Held, that the houses were injuriously affected, and that he was therefore entitled to compensation. *Chamberlain* v. *West End and Crystal Palace Ry.*, 2 B. & S. 605; 32 L. J., Q. B. 173; 9 Jur. (N.S.) 1051; 8 L. T. 149; 11 W. R. 472—Ex. Ch.

An injury to the goodwill or a loss of profit in the business of a shop, caused by an obstruction, whether permanent or temporary, of a highway in the lawful execution of the works of a railway company, where no part of the land on which the business is carried on is taken or otherwise injuriously affected, is not the subject of compensation. *Cameron* v. *Charing Cross Ry.*, 19 C. B. (N.S.) 764; 11 Jur. (N.S.) 282; 12 L. T. 121; 13 W. R. 390—Ex. Ch.

One who sustains a private and a particular injury from the diversion or obstruction of a public road by the works of a railway company, which diversion or obstruction, if done without the sanction of an act of parliament, would give a right of action, is entitled to compensation. *Wood* v. *Stourbridge Ry.*, 16 C. B. (N.S.) 222.

M. carried on business in premises consisting of a house, warehouse and stables, near a draw dock leading into the river Thames. The dock was free and public, but was principally used by him and certain other persons whose premises were in proximity to it. A roadway existed between the edge of the dock and M.'s premises, which had an enhanced market value by reason of the proximity of the dock. The metropolitan board of works in making an embankment, under their private act, filled up and destroyed the dock, and thereby M.'s premises became diminished in value in the market:—Held, that he was entitled to compensation, as his land had been injuriously affected by the works. *Metropolitan Board of Works* v. *McCarthy*, 43 L. J., C. P. 385; L. R. 7 H. L. 243; 31 L. T. 182; 23 W. R. 115.

The right to compensation will accrue whenever it can be established that a special value

attached to the premises by reason of their proximity to or relative position with the highway obstructed, and that this special value has been permanently injured by the obstruction. *Ib.*

Upon injunction to restrain the defendants from raising a footway, under powers contained in local acts (which incorporated the Lands Clauses Act), in front of the plaintiff's house and thereby preventing access to a warehouse, and from otherwise damaging their property, it having been established that the defendants were empowered, under their acts, to alter the footway, and also that the plaintiffs had sustained and would sustain injury hereby, an injunction was refused, but it was referred to chambers to ascertain and certify the amount of injury, and what would be a proper sum to be awarded by way of damages in respect of such injury. *Wedmore* v. *Bristol Corporation*, 7 L. T. 459.

By the Chelsea Improvement Act (8 & 9 Vict. c. cxlii.), the Lands Clauses Act, 1845, was incorporated in these words: "So much of the Lands Clauses Act, 1845, as is applicable to, and is not modified, by this act, or as is not inconsistent with the provisions thereof, shall apply to the improvements by this act authorised to be made, and shall be read as forming part of this act." By ss. 124 and 127, compensation is expressly given where projections made before the passing of the act are ordered to be removed, and where a house taken down to be rebuilt is ordered to be set back to the line of the street. By s. 104, power is given to alter the level of streets, but there is no provision as to compensation:—Held, notwithstanding the absence of any such provision, that the lessee of a house injuriously affected by the raising of the level of a street under the powers of s. 104, was entitled to compensation. *Reg.* v. *St. Luke's, Chelsea*, 41 L. J., Q. B. 81; L. R. 7 Q. B. 148; 25 L. T. 914; 20 W. R. 209—Ex. Ch.

By a deed of conveyance land was conveyed to the respondents' predecessor in title, "the situation, dimensions, and boundaries whereof are particularly described in the map or plan drawn on these presents . . . together with all streets, ways, rights, easements and advantages." The plan showed a piece of land at the intersection of "G. Street" and "M. Street," which were delineated communicating on a level. The land was in fact, at the date of the conveyance, waste building land on the outskirts of a town, and neither of the streets had been made or dedicated to the public. The soil of the intended streets was the property of the vendor. Houses were built on the land fronting M. Street, and both streets were made and used as streets; but the appellant company afterwards made a branch line passing under G. Street, near the property in question, and thereby altered the level of that street, and cut off the access for horses and vehicles from M. Street into G. Street; a means of access for foot passengers remained:—Held, that the conveyance granted to the purchaser a right of way from M. Street into G. Street, and that the alteration of levels had "injuriously affected" the land within the meaning of the Railway Clauses Act, 1845, so as to entitle the respondents to compensation. *Furness Ry.* v. *Cumberland Building Society*, 52 L. T. 144; 49 J. P. 292—H. L. (E.)

Under statutory powers conferred by an act incorporating the Lands Clauses Act, 1845, a railway company stopped up a street in which were a house and premises used as an hotel, whereby the value thereof for using, selling, or letting as an hotel and public-house was diminished:—Held, that the owner was entitled to compensation under the Lands Clauses Act, 1845, for the depreciation in the special value of the premises as an hotel and public-house. *Wadham* v. *North Eastern Ry.*, 55 L. J., Q. B. 272; 16 Q. B. D. 226; 34 W. R. 342—C. A. Affirming 52 L. T. 894; 49 J. P. 599.

B. was the owner of a house and garden fronting the river Thames, with an exclusive easement over a causeway and jetty with steps, by which the same was available at any state of the tide. The metropolitan board of works, under the powers conferred on them by the Thames Embankment Act, 1862, deprived him of the jetty by constructing the embankment on its site; and, in consequence of the execution of the works, a public road was placed between his garden and the river. But it was possible for him still to have access to the river by means of landing steps which the board built in the embankment. B. having claimed compensation for the removal of the jetty, and for the depreciation of the premises by the execution of the works, the matter was referred, and the arbitrator awarded a lump sum of 8,325*l.*:—Held, that the substitution of the road for the water-way was an injurious affecting of the premises, and that B. was entitled to whatever compensation the umpire had awarded, whether he included loss of prospect and of privacy, and other amenities, or merely the loss of the water-way. *Buccleuch* (*Duke*) v. *Metropolitan Board of Works*, 41 L. J., Ex. 137; L. R. 5 H. L. 418; 27 L. T. 1.

The claimants carried on business as potters on premises in a street running down to the Thames, and about seventy yards from it; at the end of the street there was a public right of dipping for and taking water; and at the end of another adjoining street there was a public draw dock for barges. The claimants in carrying on their business had used the public right of fetching water from the river and bringing barges to the draw dock. The metropolitan board of works, in constructing the Thames Embankment, obstructed the right of fetching water and of bringing barges to the dock:—Held, that this was not an injurious affecting of the claimants' premises within s. 68 of the Lands Clauses Act, and therefore they were not entitled to compensation. *Reg.* v. *Metropolitan Board of Works*, 10 B. & S. 391; 38 L. J., Q. B. 201; L. R. 4 Q. B. 358; 17 W. R. 1094.

The damage which will support a claim for compensation, under the Lands Clauses Act, 1845, must be a physical interference with a right, public or private, which increases the value of the premises apart from any special use to which they may be put, if by such interference they are lessened in value; provided that such right is not merely one enjoyed by the occupier of the premises in common with the public at large, or one personal to himself. *Metropolitan Board of Works* v. *M'Carthy*, 43 L. J., C. P. 385; L. R. 7 H. L. 243; 31 L. T. 182; 23 W. R. 115.

Flooding of Lands.]—An occasional flooding of lands caused by a proper execution of parliamentary powers, is within s. 68 of the Lands Clauses Act, 1845. *Ware* v. *Regent's Canal Co.*, 3 De G. & J. 212; 28 L. J., Ch. 153; 5 Jur. (N.S.) 25; 7 W. R. 67.

When in consequence of the construction of the works of a railway, a constantly-recurring injury arose by floods or heavy rains washing earth on to the plaintiff's property, an injunction was granted as the proper remedy, instead of sending the case to have the damage assessed under the Lands Clauses Act, s. 68. *Keates* v. *Holywell Ry.*, 28 L. T. 183.

Temporary or Permanent Obstruction.]—A railway company, in the construction of its line of railway, and under the powers of its statute, temporarily obstructed a highway, adjoining which was a house occupied by a licensed victualler, whereby the number of passengers passing along the highway was diminished, and he sustained damage by the falling off of his business:—Held, that such damage was not the subject of compensation. *Ricket* v. *Metropolitan Ry.*, 36 L. J., Q. B. 205; L. R. 2 H. L. 175; 16 L. T. 542; 15 W. R. 937.

The 18 & 19 Vict. c. 120, s. 135, authorises the metropolitan board of works to repair and maintain certain sewers, with full power to carry such sewers through or under any lands, making compensation for any damage done thereby, and the Lands Clauses Act is incorporated with such act. In exercise of the powers conferred on them by their act, and for the purpose of enabling them to reconstruct a sewer running under a street, the board erected a hoarding in such street, which rendered the access to the plaintiff's premises less convenient than it had been before; but no part of such premises was taken, nor did it appear that the hoarding was kept up beyond a reasonable time:—Held, that he was not entitled to compensation for the damage he had sustained by the erection of such hoarding. *Herring* v. *Metropolitan Board of Works*, 19 C. B. (N.S.) 510; 34 L. J., M. C. 224.

Semble, the words in s. 68 of the Lands Clauses Act, "injuriously affected by the execution of the works," mean the execution of the permanent works, such as the building of retort-houses, making a railway, &c., and do not refer to the making of gas or the user of the railway. *Imperial Gas Light and Coke Co.* v. *Broadbent*, 7 H. L. Cas. 600; 29 L. J., Ch. 377; 5 Jur. (N.S.) 1319.

Under the Lands and Railways Clauses Acts the owner or occupier of lands injuriously affected during the execution of the works authorised by the special act is entitled to compensation if the injury is sufficient to lessen the value of the property. Observations of Lord Chelmsford, L.C., in *Ricket* v. *Metropolitan Ry.* (L. R. 2 H. L. 175, at p. 194) commented on. *Ford* v. *Metropolitan and Metropolitan District Rys.*, 55 L. J., Q. B. 296; 17 Q. B. D. 12; 54 L. T. 718; 34 W. R. 426; 50 J. P. 661—C. A. Affirming Cab. & E. 593.

The words "injuriously affected" in s. 68 of the Lands Clauses Act comprehend cases of injury independent of taking land, and are not limited to damage sustained by persons whose lands or a part of whose lands are taken, used, or directly interfered with, and the right to compensation extends to and may be asserted in respect of consequential damage. *East and West India Docks* v. *Gattke*, 3 Macn. & G. 155; 6 Railw. Cas. 371; 20 L. J., Ch. 217; 15 Jur. 261.

A lessee of premises not required for the purpose of a railway served a notice and claim upon the company for a certain amount of compensation under s. 68 of the Lands Clauses Act. The alleged injuries resulted from the dust and dirt occasioned by the works of the railway, from the temporary diversion of a foot-path which passed along the premises of the claimant, and from the stoppage of a lane along which the lessee claimed to be entitled to a right of way to the back of his premises:—Held, that the claimant was entitled to proceed under the notice, and to have the amount of compensation assessed by a jury. *Ib.*

Damage by Construction not by subsequent Use.]—The damage must be done by the construction of the works; and not afterwards, when the works have been completed. *City of Glasgow Union Ry.* v. *Hunter*, L. R. 2 H. L. (Sc.) 78.

No compensation is given under s. 68 when damage arises, not out of the execution, but only out of the subsequent use of the works. *Caledonian Ry.* v. *Walker's Trustees*, 7 App. Cas. 259; 46 L. T. 826; 30 W. R. 569; 46 J. P. 676—H. L. (Sc.) S. P., *Hopkins* v. *G. N. Ry.*, 46 L. J., Q. B. 265; 2 Q. B. D. 224; 36 L. T. 898—C. A.

A person of whose land no part has been taken for the purposes of a railway is not entitled under the common law or the Lands Clauses and Railways Clauses Acts, 1845, to compensation for nuisance to his premises from the working (without negligence) of the railway. *Hammersmith Ry.* v. *Brand* (L. R. 4 H. L. 171) followed. *Att.-Gen. and Hare* v. *Metropolitan Ry.*, [1894] 1 Q. B. 384; 9 R. 598; 69 L. T. 811; 42 W. R. 381; 58 J. P. 342—C. A.

The words "injuriously affected" in s. 68 of the Lands Clauses Act, 1845, comprehend cases of damage arising from the user of the railway as well as of damage sustained in the construction of the railway. *L. & N. W. Ry.* v. *Bradley*, 3 Macn. & G. 336; 6 Railw. Cas. 551; 15 Jur. 639.

On the execution of an inquiry before the sheriff and a jury to determine the compensation to be paid to the proprietor of a messuage and land in consequence of their having been or being injuriously affected by reason of the execution or construction of the railway and works, it did not appear that any structural injury was or would be caused to the premises by the construction of the railway, but it did appear that by reason of the workings of the railway after it had been opened for traffic they were and would be subjected to vibration, noise, and smoke from passing trains, and were and always would be affected and depreciated and lessened in value thereby:—Held, that the claimant was not entitled to compensation. *Hammersmith and City Ry.* v. *Brand*, 38 L. J., Q. B. 265; L. R. 4 H. L. 171; 21 L. T. 238; 18 W. R. 12.

And compensation cannot be claimed for deterioration in the value of property adjoining a railway, by reason of the premises being overlooked by persons on the railway and railway platform. *Penny* v. *S. E. Ry.*, 7 El. & Bl. 660; 26 L. J., Q. B. 225; 3 Jur. (N.S.) 957; 5 W. R. 612.

Actual injury to premises from the vibration caused by ballast trains on the railway during the construction of the works is a ground for compensation; but, per Lord Campbell, C.J., not injury from that cause after the construction of the railway. *Ib.*

Statutory compensation cannot be claimed by reason of noise or smoke of trains, whether part

of the claimant's land is taken or not. *City of Glasgow Union Ry.* v. *Hunter*, L. R. 2 H. L. (Sc.) 78.

An owner of a cotton mill took proceedings against a railway company, to obtain compensation for part of his land required by the company. The warrant required the jury to assess compensation for the land taken, and for the damage by reason of the severance of the land, or its being otherwise injuriously affected. Upon the inquiry the claimant insisted that he was entitled to damages on account of the increased risk of fire to his mill from the passage of the company's trains:—Held, that the jury had rightly included the damages for such injury in their verdict. *Stockport, Timperley and Altringham Ry., In re*, 33 L. J., Q. B. 251; 10 Jur. (N.S.) 614; 10 L. T. 426; 12 W. R. 762.

Right of Pre-emption—Personal Right.]—C., an owner of land proposed to be taken by a railway company under their compulsory powers, was also owner of a right of pre-emption over adjoining land. The line of the company's proposed railway passed over this adjoining land; but the company's notice to treat contained no expression of any intention of purchasing such right. C.'s counter-notice claimed 2,300*l.* for the purchase of his land, and 200*l.* for his right of pre-emption. The parties being unable to agree on the amount payable by the company, the matter was referred to arbitration. No evidence was adduced that the right of pre-emption was incident to the ownership of C.'s own land, or that, if it was only a personal right, its value would be affected by the mere taking of such land:—Held, that the right of pre-emption must be deemed to be a mere personal right. *Clout* v. *Metropolitan and District Rys.*, 48 L. T. 257.

Mandatory Injunction in Addition to Compensation—Access to Lands.]—S. was entitled to the houses in Cecil and Salisbury Streets, and to a piece of low-level ground at the south ends of these streets. The low level communicated by means of two lanes at the backs of the streets with the Strand on the north side, and by means of wharves with the river Thames on the south side. In 1862, the Thames Embankment Act authorised the construction of the embankment road and of the ornamental gardens alongside of the river. These improvements were completed in 1870; their effect was to deprive the low-level ground in question, and also the two streets, of all communication with the river or with the embankment on the south side. S., as the owner of the depreciated property, had obtained 10,000*l.* as compensation assessed by an umpire; but under s. 62 of the act of 1862, S. was entitled besides to full and free communication to the embankment road and the river, and he claimed that such right belonged to him in respect as well of the houses in Cecil and Salisbury Streets as of the low-level ground, and that the right in dispute was to a wheel or a cart way, and not to a footway merely. The makers of the improvements had offered to construct a convenient footway across the gardens to the embankment road, but such offer had not been entertained. A wheel or cartway would have seriously injured the ornamental gardens:—Held, that, having regard to the circumstances of the property in 1862, and to an act of Geo. 3, relative to the buildings upon it, the act of 1862 did not reserve any right of way, much less a wheel or cart way, to the low level; and that a mandatory injunction to construct a convenient footway for the occupiers of Cecil and Salisbury Streets could not be granted on the state of the pleadings, or an inquiry directed at that stage of the suit. *Salisbury (Marquis)* v. *Metropolitan Board of Works*, 21 W. R. 259.

B. IN RESPECT OF WHAT INTERESTS.

1. GENERALLY.

Easement—Interest in Land.]—An easement is an interest in land for the invasion of which compensation may be claimed. *Eagle* v. *Charing Cross Ry.*, 36 L. J., C. P. 297; L. R. 2 C. P. 638; 16 L. T. 593; 15 W. R. 1016.

When lands are injuriously affected by the construction of works authorised by an act of parliament, the owner is entitled to compensation if an easement appurtenant to the lands is taken, just as he would be if part of the lands was taken. *Buccleuch (Duke)* v. *Metropolitan Board of Works*, 41 L. J., Ex. 137; L. R. 5 H. L. 418; 27 L. T. 1.

Under the powers of the Thames Embankment Act of 1862, the temporary diversion of an existing pier, and ultimately the substitution of a new pier in its place, was contemplated. The right of the existing pier belonged to a company, under a recoverable licence from the conservators of the Thames, and it did not appear that the enjoyment of the benefit of the licence would be destroyed by the intended works themselves, though they might lead to its revocation:—Held, that the pier company was not entitled to compensation as a condition precedent, their easement not being required to be permanently taken, and that the remedy of the company was under s. 68, as injuriously affected. *Temple Pier Co.* v. *Metropolitan Board of Works*, 34 L. J., Ch. 262; 11 Jur. (N.S.) 337; 12 L. T. 369; 13 W. R. 535.

A wharf owner, who has not any special easement or privilege over the bed or soil of the river, but only the common right of passage to his property, has neither an easement over nor a right in land, within the enlarged definition given to that word by s. 4 of the Thames Embankment Act of 1862. *Macey* v. *Metropolitan Board of Works*, 33 L. J., Ch. 377; 10 Jur. (N.S.) 333; 10 L. T. 66; 12 W. R. 691.

A person so situated, therefore, whose land is not taken, but whose right of passage is injuriously affected by the works authorised by the Embankment Act, has no right to compensation before those works are proceeded with; but, having regard to the provisions of that act, and of the various acts incorporated therewith, his right to compensation arises when his damage is completed; and his remedy is under s. 68 of the Lands Clauses Act, or by arbitration alone. *Ib.*

A house was divided into a front and a back block; and the plaintiffs were lessees of three rooms on the first floor in the back block. The lease did not expressly grant any mode of access. Access to the rooms demised to the plaintiffs was gained from the street by passing through a hall or vestibule, and then up some stairs to the plaintiff's rooms. The defendants, in the exercise of compulsory powers under the Railways Clauses Act, took down the front block of the

house, and removed the hall. The interference with the hall and the injury to the access to the rooms of which the plaintiffs were lessees lessened their value. An arbitrator having awarded compensation to the plaintiffs under the Lands and Railways Clauses Acts :—Held, that the access through the hall was not a way of necessity, but was in the nature of a continuous and apparent easement which passed under the demise of the rooms, and that an interference with this quasi easement was sufficient to give rise to a valid claim for compensation. *Ford* v. *Metropolitan and Metropolitan District Rys.*, 55 L. J., Q. B. 296 ; 17 Q. B. D. 12 ; 54 L. T. 718 ; 34 W. R. 426 ; 50 J. P. 661—C. A. Affirming Cab. & E. 593.

—— **Right of Access to Sewer.**]—The plaintiffs, in 1843, under the authority of a local act, constructed a sewer on land, part of which had been bought by the defendants, a railway company, but had not then been used for their works. Part of the remainder was bought by the defendants after the construction of the sewer, but no part of the land was the plaintiffs', or had ever been granted to them. The local act not only authorised the plaintiffs to make the sewer, but vested it in them, with the duty to repair it, without, however, giving them any express right of access thereto. In 1863, the defendants, in exercise of the powers conferred on them by their special act, with which was incorporated the Railways Clauses Act, 1845, constructed an embankment over the sewer, which, though it made it less easy, did not prevent the plaintiffs getting access to the sewer in order to repair it. The plaintiffs being obliged afterwards to repair, and having incurred extra expense in doing so, in consequence of such embankment, claimed compensation from the defendants under s. 68 of the Lands Clauses Act, 1845, and s. 6 of the Railways Clauses Act, 1845, for injuriously affecting the plaintiffs' interest in the sewer :—Held, by the Queen's Bench Division, that the plaintiffs had no interest in land within the meaning of the Lands Clauses Act, 1845, s. 68, and therefore could not maintain the claim to compensation :—Held, by the Court of Appeal, that, as a right of access to the sewer had not been expressly given by the local act, but had to be implied, the right of access, which ought to be implied, was not any particular mode of access, but such only as was reasonably necessary for enabling the repair of the sewer to be done, and as that had not been prevented by the defendants' embankment, but only rendered less easy and convenient, the plaintiffs had no right to compensation. *Birkenhead Corporation* v. *L. & N. W. Ry.*, 55 L. J., Q. B. 48 ; 15 Q. B. D. 572 ; 50 J. P. 84—C. A.

—— **Trespass not maintainable.**]—An act authorising a company to construct a canal gave certain commissioners power to purchase lands, and directed them to make compensation to persons interested therein for all damages sustained :—Held, that a party entitled to an easement over lands so purchased by them could not maintain trespass for acts done upon those lands, to the prejudice of his easement ; but as soon as any damage was actually sustained, he ought to have claimed compensation under the act. *Thicknesse* v. *Lancaster Canal Co.*, 4 M. & W. 472 ; 8 L. J., Ex. 49.

Right of Shooting.]—A party who has a right of shooting over land by an agreement, not under seal, with the owner, has not such an interest as to entitle him to compensation from a railway company, in respect of the shooting being diminished in value by the company constructing a railway over part of such land. *Bird* v. *G. E. Ry.*, 19 C. B. (N.S.) 268 ; 34 L. J., C. P. 366 ; 11 Jur. (N.S.) 782 ; 13 L. T. 365 ; 13 W. R. 989.

Piers in Bed of River.]—By 20 & 21 Vict. c. cxlvii., the bed of the Thames was vested in conservators, with power to them to grant licences for embanking, making docks and building jetties, on payment of consideration, to be assessed in a particular way, and be partly paid over to the crown ; by 21 & 22 Vict. c. cxviii., a railway company was empowered to make a railway bridge over the Thames, but the works were not to be commenced without the consent of the conservators and their approval of the plans ; the railway company obtained approval of the construction of the bridge as proposed, and thereupon erected the piers of their bridge in the bed of the river :—Held, that the conservators were entitled to have compensation assessed under the Lands Clauses Act, which was incorporated as usual in the railway act. *Thames Conservators* v. *Victoria Station and Pimlico Ry.*, 38 L. J., C. P. 4 ; L. R. 4 C. P. 59 ; 19 L. T. 934.

Taking unused Water Pipes.]—A railway company under their act took land under which the water pipes of a waterworks company were laid. The pipes were buried beneath the embankment of the railway, and ceased to be used. Afterwards, in making a tunnel, the railway company took up the pipes. The waterworks company claimed compensation for the value of the pipes under the Lands Clauses Act, 1845, s. 68 :—Held, that they had no interest in land, and therefore were not entitled to compensation under that section. *New River Co.* v. *Midland Ry.*, 36 L. T. 539 ; 25 W. R. 502—C. A.

Taking part of a Stream.]—The abstraction by a waterworks company of water from a stream for the purposes of the undertaking does not, under the Waterworks Clauses Act, 1847, s. 6, entitle a riparian owner below to require the company to treat for the purchase of his portion of the stream, but only entitles such riparian owner to claim compensation under the Lands Clauses Act, 1845, s. 68, for the stream being injuriously affected. *Bush* v. *Trowbridge Waterworks Co.*, 44 L. J., Ch. 645 ; L. R. 10 Ch. 459 ; 33 L. T. 137 ; 23 W. R. 641.

Support to Sewer.]—A sewer made by the metropolitan commissioners of sewers under the powers vested in them by 11 & 12 Vict. c. 112, was transferred to the metropolitan board of works by 18 & 19 Vict. c. 120. The Metropolitan Railway Company having, by the construction of their railway, deprived the sewer of its lateral support less than twenty years after it was made, the sewer burst. In an action by the metropolitan board of works to recover the sum awarded by an arbitrator, under the Lands Clauses Act, for the damage thereby sustained :—Held, that the metropolitan board of works had acquired no right to lateral support for their sewer, either under the above acts or otherwise, and were not entitled to recover. *Metropolitan Board of Works* v. *Metropolitan Ry.*, 38 L. J.,

C. P. 172; L. R. 4 C. P. 192; 19 L. T. 744; 17 W. R. 416—Ex. Ch.

Subsoil of Street—Cul-de-Sac.]—A railway company authorised to construct a line of railway under a public street is not bound to give notice to treat or to pay compensation to the owner of the land adjoining the street in respect of any part of the soil of such public street. *Souch* v. *East London Ry.*, 42 L. J., Ch. 477; L. R. 16 Eq. 108; 21 W. R. 590.

A cul-de-sac dedicated to the public is for this purpose in the same position as a public street. *Ib.*

A person was the owner of a piece of ground with two rows of houses which had existed more than twenty years, with a passage between them ending in a cul-de-sac, the whole of the soil of which was conveyed to him. A railway company, under the powers of its act, gave notice to treat for some of the houses on each side, but the soil of the passage between the houses was expressly excluded from the notice. The railway was to be carried in a tunnel under the property. Evidence tending to shew dedication being given, an injunction to restrain the company from entering on the cul-de-sac without giving notice to treat was dissolved. *Ib.*

A railway company under its act, with which was incorporated the Lands Clauses Act, 1845, took some houses, the property of S., and tunnelled under the part of a passage, of which he was the owner, lying between the houses. He called upon the company to undertake, before 1.30 of Wednesday, 9th of October, 1872, not to enter into possession of such portion of the passage as lay between the houses taken by the company, but the company did not enter into any such undertaking. S. filed a bill for an injunction to restrain the railway company from taking or using any part of the passage without giving him due notice and making him compensation. An injunction was granted, which was dissolved upon the application of the company upon paying 100*l.* into court to answer the amount of any compensation which might be awarded. The company alleged that the passage was a public one, and there was no occasion for it to give notice to or compensate S.:—Held, that the question whether the passage was a private or public way did not affect the case, as S. had a good title to the subsoil, and that S. was entitled to compensation under the Lands Clauses Act, 1845, s. 68, for any damages he had sustained, and that as the company had held him at arm's length, it must pay the costs up to the hearing. *Souch* v. *East London Ry.*, 22 W. R. 566.

Disturbing Ferry.]—A railway company under the powers of their special acts constructed a bridge and a footway across a river, at a distance of about six hundred yards from the landing-place of an ancient ferry, but without any physical interference with the passage of the ferry-boats. The bridge when completed was opened to foot-passengers on payment of tolls, and also used for conveyance of merchandise by the company's trains, causing a serious diminution in the profits of the ferry:—Held, that the owner of the ferry was entitled to compensation under the Railways Clauses Act, 1845, s. 6, as being a person interested in land (which included a hereditament such as a ferry) injuriously affected by the company's works, for the injury to the ferry was the direct and immediate result of the construction of the bridge for the use of passengers. *Reg.* v. *Cambrian Ry.*, 40 L. J., Q. B. 169; L. R. 6 Q. B. 422; 25 L. T. 84; 19 W. R. 1138. *But see next case.*

A railway company, under the authority of its act, constructed across a river half a mile above an ancient ferry, a railway bridge and a foot-bridge, the foot-bridge being used by persons going to the railway station and also to other places. The traffic across the ferry fell off, and the ferry was given up. The owners of the ferry claimed compensation under the Lands and Railways Clauses Acts:—Held, that no compensation could be recovered, first, on the ground that an action could not have been maintained for disturbance of the ferry in respect of the traffic either by the railway or by the foot-bridge, if they had been erected without the authority of an act; and, secondly, on the ground that, the injury to the ferry being occasioned, not by the construction but by the working of the railway, the ferry had not been injuriously affected within the Lands Clauses Act or the Railways Clauses Act. *Hopkins* v. *G. N. Ry.*, 46 L. J., Q. B. 265; 2 Q. B. D. 224; 36 L. T. 898—C. A.

Ferry passing with Land.]—A ferry may pass with land, under a conveyance of the land, with "all profits and commodities belonging to the same"; and where, as far as living memory went, the land and ferry had always been enjoyed by the same person, and there was no evidence to shew that they ever had been the subjects of separate conveyance:—Held, that a jury, in awarding compensation to the owner of the land, under 8 & 9 Vict. c. 20, s. 6, was justified in concluding that the ferry did pass with the land under these words. *Reg.* v. *G. N. Ry.*, 14 Q. B. 25; 19 L. J., Q. B. 25; 14 Jur. 128.

2. Ancient Lights.

Obstruction of.]—When a school board acquires land as a site for a school, under the compulsory powers given by the Elementary Education Act, 1870, and builds a school so as to obstruct the ancient lights of an adjoining landowner, the remedy of the adjoining landowner is by claiming compensation under the Lands Clauses Act, 1845, s. 68, and not by bill for an injunction. *Clark* v. *London School Board*, 43 L. J., Ch. 421; L. R. 9 Ch. 120; 29 L. T. 903; 22 W. R. 354.

By the Railway Clearing House Extension Act, 37 Vict. c. xvi., which incorporated the Lands Clauses Act, 1845, the railway clearing committee was empowered to take lands, and to erect thereon any buildings and works for the purpose of the clearing system. The owners of a neighbouring house filed a bill to restrain the erection of a building on land acquired under the act, on the ground that it interfered with their ancient lights:—Held, that the clearing committee could not be restrained by injunction, and that the plaintiffs' remedy was under the Lands Clauses Act, 1845, s. 68. *Bedford (Duke)* v. *Dawson*, 44 L. J., Ch., 549; L. R. 20 Eq. 353; 33 L. T. 156.

By an act incorporating the Lands Clauses Acts, the metropolitan board of works were authorised to acquire specified land for the purpose of (among others) the G. Street improvement, and to purchase easements over such land. By s. 33 of their act they were required to sell or

let specified portions of the land for the construction and maintenance of artizans' dwellings, so that the land should be cleared of existing houses by degrees and a minimum number of dwellings should be provided. By an amendment act the board were required to devote three plots of land, the subject of the G. improvement, to provide a minimum number of artizans' dwellings, and s. 33 of the principal act was repealed with respect to the G. improvement:—Held, that provisions as to selling and letting similar to those contained in s. 33 of the principal act were implied by the amendment act:—That an adjoining owner had no right to an injunction to restrain a tenant of the board from obstructing ancient lights by building artizans' dwellings on one of the plots of land devoted to that purpose, but that his right was to compensation from the board under s. 68 of the Lands Clauses Act, 1845; and that the board could not impose on their tenant a liability to be restrained from building the artizans' dwellings so as to obstruct access of light to ancient lights. *Wigram* v. *Fryer*, 56 L. J. Ch. 1098; 36 Ch. D. 87; 57 L. T. 255; 36 W. R. 100.

New Building Erected.]—The claimants, being the owners of certain buildings with ancient lights, pulled them down and erected a new building on their site. The position of certain portions of the windows of the new building coincided with that of portions of the old windows, while other portions of the new windows occupied wholly different positions. Before any right to the access of light to the non-coinciding portions of the new windows had been acquired, a railway company, in the exercise of their powers, erected a warehouse which obstructed the lights of windows in the new building:—Held, that the claimants were entitled to compensation in respect of the whole of the windows so obstructed, including the windows and portions of windows which did not coincide with any of the ancient lights. *London, Tilbury and Southend Ry. and Gower's Walk Schools, In re*, 59 L. J., Q. B. 162; 24 Q. B. D. 326; 62 L. T. 306; 38 W. R. 343—C. A.

Lands Clauses Act Excluded.]—A vestry was empowered by local acts (35 Geo. 3, c. 73, and 57 Geo. 3, c. 29) to pave and repair, and to raise or lower the ground of the streets within their district, without making compensation to owners of property thereby injured. The Metropolis Local Management Act, 1855, by s. 98, empowers every vestry to pave and repair, and to raise or lower the ground or soil of the streets in their district as they think fit; and by s. 150, they have power to purchase "any land or any right or easement in or over land," necessary for the formation or protection of any works authorised to be executed under the act. By ss. 151 and 152, the Lands Clauses Act, 1845, except the compulsory purchase clauses, 16 to 68, which are expressly excluded, is incorporated; and by s. 247, all acts which are inconsistent with the metropolitan act are repealed. Under the provisions of these acts, or one or more of them, the vestry raised and altered the road and pavement of a street in their district in a manner justified by the act, but thereby obstructed the ancient lights of and entrances to certain houses of the plaintiff, and injuriously affected the houses. Notice was given to the vestry under the Lands Clauses Act, s. 68, to summon a jury to settle the amount of compensation, but the vestry refused to pay the compensation claimed, or to enter into any agreement, or to summon a jury:—Held, that the works were done under the local acts of Geo. 3, which were not repealed or superseded by the Metropolitan Local Management Act, 1855; that, there having been no agreement to purchase, ss. 150, 151 and 152 of the Metropolitan Act did not apply; and that s. 68 of the Lands Clauses Act being expressly excluded from the metropolitan act, the plaintiff had no claim under that section. *Baker* v. *St. Marylebone Vestry*, 35 L. T. 129; 24 W. R. 848.

3. Commons.

Agreement whether enforceable.]—Sects. 101 to 106, inclusive, of the Lands Clauses Act, 1845, with reference to the ascertaining of compensation for common lands, are not imperative so as to preclude the enforcement of specific performance of an agreement entered into otherwise than as mentioned in those sections. *Bee* v. *Stafford and Uttoxeter Ry.*, 23 W. R. 863.

Amount Divisible.]—The copyhold tenants of a manor were entitled to common of pasture upon waste and lammas lands subject to by-laws made by the homage, and such rights were preserved after enfranchisement. The last by-laws, made in 1835, provided that every copyholder and freeholder should be entitled to turn on one head of cattle for every 10*l.* of annual value of his lands and tenements, provided that the whole number should not exceed thirty; and that every occupier of any copyhold or freehold lands should be entitled to turn on a certain number of cattle according to the rental or annual value of his lands and tenements. Portions of the common lands were taken compulsorily, and compensation for the rights of common was paid to a committee of the copyholders:—Held, that such compensation was divisible among the copyhold tenants of the manor and the freeholders within the manor according to the stint fixed by the first clause of the by-laws. *Foæ* v. *Amherst*, 44 L. J., Ch. 666; L. R. 20 Eq. 403.

Every freeman of Bedford was entitled so long as he was resident there to turn out one head of stock annually upon certain commonable land. Non-resident freemen had no such right over the land, but might obtain such right by coming to reside in Bedford. A railway company took part of the land, and the compensation money paid for the extinction of commonable rights was paid into court. In a suit for ascertaining the rights of all parties to the money:—Held, that the money ought to be reinvested in land to be held on the same trusts as that sold; and that in the meantime the same ought to be invested in stock, and the dividends divided among such freemen as would have been entitled in each year to rights of common over the land. *Nash* v. *Coombs*, 37 L. J., Ch. 600; L. R. 6 Eq. 51; 16 W. R. 663.

4. Copyholds.

Enfranchisement—Basis of Assessment.]—In 1873 a railway company took possession of certain copyhold land, and erected works thereon. In November, 1875, the conveyance to the company was executed and enrolled. In January, 1877, the lord required the company to enfran-

chise the land, and the question of the compensation payable to the lord was referred to arbitration. By the custom of the manor an arbitrary fine of three years' improved value was payable on alienation. The arbitrator assessed the compensation on the basis of the improved value of the land which had accrued by reason of the works executed by the company. Sect. 95 of the Lands Clauses Act, 1845, provides for the conveyance of copyhold lands to the promoters of the undertaking, and stipulates that until enfranchisement such lands shall continue subject to the same fines, rents and services as were theretofore payable. By s. 96, within three months after the enrolment of the conveyance, or within one month after taking possession, whichever shall first happen, the promoters shall procure the enfranchisement of the lands, and for that purpose shall apply to the lord to enfranchise the same, and shall pay him compensation, "and in estimating such compensation the loss in respect of the fines, heriots and other services payable on death, descent, or alienation, or any other matters which would be lost by the vesting of such copyhold lands in the promoters of the undertaking or by the enfranchisement of the same, shall be allowed for":—Held, that the lord was only entitled to compensation on the basis of the value of the land at the expiration of one month from the taking possession by the company. *Lowther* v. *Caledonian Ry.*, 61 L. J., Ch. 108; [1892] 1 Ch. 73; 66 L. T. 62; 40 W. R. 225—C. A.

Reversionary Interest.]—In 1779, copyhold land, held of the manor of T., was demised for a term of sixty-five years; the lessee obtained from the lord at the same time a grant of part of the waste of the same manor, and afterwards made a private canal, with the consent of the reversioner of the copyholds, through both the copyhold and waste land. In 1794, an act of parliament was passed authorising a company to make the S. canal, of which the private canal was to form a part, and for this purpose it was to be widened and improved, under certain conditions. In 1797, the canal was opened for traffic, but no agreement was ever come to for the purchase of the interest of the owner of the reversion of the copyholds. Upon the expiration of the lease in 1844, an action of ejectment was brought by certain parties claiming this reversion, and judgment was given for the plaintiffs in the action. A bill was thereupon filed by the lord of the manor, who was under the act entitled to that portion of the canal which ran through the above manor, to restrain execution in the action, and to compel the defendants in equity to execute proper conveyances to the plaintiff, on the payment of what, if anything, was due to them for compensation, and also to restrain the defendants from interfering with the use of the canal:—Held, that the defendants were not, under the special circumstances of the case, entitled to obtain possession of the land covered by the canal, or to interrupt or interfere with its use, but that they were entitled to receive fair and reasonable compensation for their reversionary interest, and that the amount of such compensation was to be ascertained by reference to the value of the land when the reversion fell into possession, without regard to its being required for the purposes of the canal. *Beaufort* (*Duke*) v. *Patrick*, 17 Beav. 60; 22 L. J., Ch. 489; 17 Jur. 682; 1 W. R. 280.

Conveyance.]—A canal company was authorised by statute to purchase land on voluntary or compulsory sale by the persons interested, at prices to be agreed upon or ascertained by commissioners or a jury; and a form of conveyance was prescribed, purporting that the party granted all his "right, title and interest to and in the same, and every part thereof, to hold to the company for ever." The company was authorised to enter upon payment of price or tender, and was made liable to render compensation for damage done by their works, if claimed within six months. A copyholder in fee executed a conveyance in the statutory form to the company, who paid him the price, and entered:—Held, that this conveyance passed only such interest as the copyholder could convey without the lord; and that on the copyholder's death, no other person having been admitted, the lord might, seize quousque for want of a tenant, and maintain ejectment and an action for mesne profits against the company. *Dimes* v. *Grand Junction Canal*, 9 Q. B. 469; 16 L. J., Q. B. 107; 11 Jur. 429—Ex. Ch.

Fees and Fines.]—A steward of a manor, entitled by a custom to a fee upon surrender and another fee upon admittance to copyhold lands, is only entitled to the fee payable in respect of a surrender without admittance. *Cooper* v. *Norfolk Ry.*, 6 Railw. Cas. 94; 3 Ex. 546; 18 L. J., Ex. 176; 13 Jur. 195.

A lord of a manor, entitled by custom to fines on surrender and admittance to copyholds, is not entitled to payment of any fine upon the execution of a conveyance by a copyholder to a railway company, or upon the enrolment of such conveyance; nor to any compensation for the loss thereof. *Ecclesiastical Commissioners* v. *L. & S. W. Ry.*, 14 C. B. 743; 2 C. L. R. 1797; 23 L. J., C. P. 177; 18 Jur. 911; 2 W. R. 560.

The provisions of 15 and 16 Vict. c. 51, and 21 & 22 Vict. c. 94, do not apply to a purchase of copyholds by a railway company under the 8 & 9 Vict. c. 18, s. 95, so as to entitle the lord, for his own absolute use (as incident to his life estate, and against the remaindermen), to the fines in respect of admittance directed by s. 6 of the 21 & 22 Vict. c. 94, to be paid by the tenants as a condition of obtaining enfranchisement. *Wilson, In re*, 2 J. & H. 619; 1 N. R. 301; 32 L. J., Ch. 191; 9 Jur. (N.S.) 1043; 7 L. T. 772; 11 W. R. 294.

5. Tithes.

Amount of Compensation.]—The clergy of the city of London were, by a decree made under the authority of an act of parliament, 37 Hen. 8, c. 12, declared entitled to 2*s.* 9*d.* in the pound of the rent by the year of all houses, shops, &c., as and for tithe. The Blackwall Railway Company's act empowered that company to remove certain houses, and it declared, that for indemnifying the rectors, &c., against such loss as might accrue to them from the railway taking down houses, &c., and until new houses should be erected on the ground which should be cleared of such an annual rent or value that the tithes actually payable therefor should be fully equal to the tithes or yearly sums of money payable for the houses quitted by the occupiers, the company should pay tithes for the houses quitted by the occupiers "according to the last assessment thereof to the 25th March last," and such sum

or sums should diminish in proportion to the tithes actually payable for new houses erected and occupied on ground which should be so cleared. In respect of all the houses taken by the company, with the exception of two, annual payments had been taken in lieu of tithes, at a rate, in each instance, below 2*s.* 9*d.* in the pound on the annual value agreed between the rector and the occupiers. The rector claimed to be paid 2*s.* 9*d.* in the pound upon the annual value of all the premises taken by the company :—Held, that where there had been an agreed rent, but the rector had received less than 2*s.* 9*d.* in the pound, he was not now entitled to receive 2*s.* 9*d.* in the pound; that the object of the act was only to give indemnity to the rector; and that the term "assessment" had reference to the arrangement throughout the parish, whereby the amount of tithes to be paid to the 25th March, 1839, had been understood, agreed and settled. Held, also, that the amount of tithe payable by the company was to be credited with the tithes actually payable to the rector in respect of new houses, and not merely with the sums actually received by the rector in respect of such new houses. *London and Blackwall Ry.* v. *Letts*, 3 H. L. Cas. 478; 6 Railw. Cas. 687; 15 Jur. 995. And see *Letts* v. *London Corn Exchange Co.*, 1 De G. M. & G. 398.

Held, that the word "assessment" did not mean the assessment to the poor-rate. *Ib.*

Where a railway company was given compulsory powers, under a special act, to take property subject to tithes, on condition that the owner of the tithes was indemnified, either by their being still paid to him according to the last annual assessment, or by purchasing them under the Lands Clauses Consolidation Act, 1845, upon payment of compensation; and the company elected to purchase the tithes:—Held, that the last annual assessment was not to be taken as the basis for estimating the compensation to be so paid. *Esdaile* v. *Metropolitan and District Rys.*, 46 J. P. 103.

Semble, it is only so much of a railway station as is a "house" which is subject to tithes. *Ib.*

A house is an inclosed space, with walls, a roof, and an entrance capable of being closed. *Ib.*

C. IN RESPECT OF WHAT PERSONS.

"Owner or Proprietor."]—The words "owner or proprietor of land," used in a compensation clause in a local act, to indicate the persons to whom compensation is to be made for injuries arising out of the prosecution of the act, have not necessarily any technical meaning confined to the owner of the inheritance, but must be construed with reference to the general object of the act, and mean any person who has any estate or interest—as, for instance, a tenant—in the land who sustains loss or damage. *Lister* v. *Lobley*, 2 H. & W. 122; 7 A. & E. 124; 6 L. J., K. B. 200.

Persons under Disability.]—Sect. 68 of the Lands Clauses Act, 1845, applies to persons under disability claiming compensation for permanent injury to land as well as to owners in fee. *Stone* v. *Yeovil Corporation*, 46 L. J., C. P. 137; 2 C. P. D. 99; 36 L. T. 279; 25 W. R. 240—C. A.

A reference to valuation, under s. 9, may be had in the case of "permanent damage or injury" to lands held by a tenant for life, as well as to lands "to be purchased or taken from any party under any disability or incapacity." *Ib.*

Limited Interest—Mortgagees.]—The provisions of s. 68 of the Lands Clauses Act, 1845, apply not only where a company must be rightfully in possession, but where compensation is sought by persons having a limited interest, e.g. mortgagees. *Perks* v. *Great Wycombe Ry.*, 3 Giff. 662; 8 Jur. (N.S.) 1051; 7 L. T. 150; 10 W. R. 788.

Semble, the court will not subject a person being in possession of land taken by a railway company under the Lands Clauses Act to adverse proof of his title, when the purchase-money has been paid in court, under s. 79. *Sterry's Estate, In re*, 3 W. R. 561.

Tenancy—Right to use Room.]—A right for directors to use a board-room for certain purposes, at certain times, and for a clerk to use a desk in an office for certain purposes, does not constitute a tenancy so as to entitle the company to recover compensation for disturbance under the Lands Clauses Acts. *Municipal Freehold Land Co.* v. *Metropolitan and District Rys.*, 1 Cab. & E. 184.

—— **Interesse Termini.**]—The plaintiff agreed to take a theatre for eight weeks, to commence on a future day. Before the commencement of the term, and before entry by the plaintiff, the defendants, by excavating on their property, deprived the theatre of the support of the adjacent land, so that the theatre was rendered unsafe, and was closed during the eight weeks by order of the proper local authorities. The plaintiff sued the defendants in respect of the damage suffered by him in consequence of their acts:—Held, that the defendants had injured a proprietary right of the plaintiff, who was, therefore, entitled to maintain the action. *Gillard* v. *Cheshire Lines Committee*, 32 W. R. 943—C. A.

—— **Length of Landlord's Interest.**]—A. agreed, in writing, to let to B. premises at a rent of 36*l.*, payable quarterly; and not to raise the rent or give B. notice to quit so long as he continued to pay the rent when due. A., who had only a leasehold interest to expire in 1881, had also agreed verbally with B. to let him remain in the premises for such term of years, not exceeding A.'s term therein, as B. might desire to continue tenant. A railway company contracted to purchase the interest of B. in the premises, which he described as "held for any term at tenant's option, but not beyond the term and interest of A., which term will expire in 1881." The company disputed B.'s title to the interest described, and paid the purchase-money into court:—Held, that the relation of landlord and tenant made B. a purchaser for valuable consideration to the extent of his lease; that the Statute of Frauds was no bar in equity to B.'s claim; that B. was not a mere tenant from year to year, but had a right to retain possession as long as his landlord's interest existed, and to enforce that right in equity; and that he was entitled to the purchase-money. *King, In re, East London Ry., Ex parte*, L. R. 16 Eq. 521; 29 L. T. 288; 21 W. R. 881.

—— **Exercise of Reserved Powers—Implied Obligation.**]—In January, 1872, A.'s predecessor in title obtained by feu contract from a superior a building lot situated at the south side of an estate. With the contract was incorporated a plan which shewed the whole estate divided into

feuing lots, with several streets running east and west; and one street twenty-four feet wide, connecting the turnpike road on the north to another road on the south, and forming one side of A.'s feu. The lot was disponed "together with free ish and entry thereto by the streets laid down on the said plan, but in so far only as the same may be opened and not altered in virtue of the reserved power after mentioned." The reserved power was, that "the superior should have full power and liberty to vary and alter the said plan or streets or roads thereon in so far as regards the ground not already feued." In July, 1872, a railway company gave the superior statutory notice that they intended to take a strip of ground running from east to west through the estate. In 1877 they executed the works and, inter alia, cut off all access for carriages by the street marked on the plan running from south to north, twenty-four feet wide. None of A.'s land was taken. In an action by the railway company for interdict against A. taking further proceedings in a claim for compensation in respect that his lands were injuriously affected under s. 6 of the Railways Clauses (Scotland) Act, 1845:—Held (Selborne, L.C., doubting), that A. was not entitled to compensation, because (1) the access in question had not been "opened" in the sense meant in his feu contract before the statutory notice; and (2) there was no obligation in the feu contract cast upon the superior to pursue his feuing scheme, and give the feuars at some future time access along any of the roads or streets marked on the plan. *Fleming* v. *Newport Ry.*, 8 App. Cas. 265—H. L. (Sc.)

Held, also, when there is an implied obligation by the superior to prosecute his feuing scheme for the benefit of the feuars, the feuars have a vested interest de futuro in the roads and streets shewn on the feuing plan, sufficient to sustain a claim for compensation under the Railways Clauses (Scotland) Act, 1845. *Ib.*

The compulsory taking by a railway company under their statutory powers of part of a superior's estate cannot be regarded as equivalent either in fact or law, to an exercise of a power reserved by the superior himself. *Ib.*

—— **Year to Year.**]—Under a local act, incorporating s. 121 of the Lands Clauses Act, 1845, the defendants, in November, 1865, served upon the plaintiff, who held premises as yearly tenant, a notice, stating their intention to take the premises, and requiring possession in six months. In fact, possession was not taken by the defendants until 1867, and the plaintiff meanwhile remained in possession, and continued to carry on his business upon the premises. In January, 1867, the defendants took an assignment of the interest of the plaintiff's landlord (the lessee for a term of the premises), but no landlord's notice to quit was ever given to the plaintiff. In February, 1867, the defendants demanded immediate possession of the premises, declining to pay any compensation, and, upon refusal, obtained possession under a provision of their local act, which, however, required that no such possession should be taken until payment or deposit of purchase or compensation-money should have been made:—Held, that the plaintiff was entitled to compensation; and that the defendants, had, therefore, not complied with the provisions of their local act, and were liable to be sued in trespass. *Cranwell* v. *London Corporation*, 39 L. J., Ex. 193; L. R. 5 Ex. 284; 22 L. T. 760—Ex. Ch.

A tenant from year to year who has received notice under s. 121 of the Lands Clauses Act, 1845, requiring him to give up possession at the expiration of six months is entitled to compensation for any expenses he may thereby incur, although before the expiration of the six months he is informed that the corporation do not intend to take possession. *Chadwick* v. *Rochdale Improvement Commissioners*, 4 W. R. 643.

A tenant, from year to year, of land, required by a railway company has no claim to compensation if he has received legal notice to quit, and his land is not required until the expiration thereof. *Merrett, Ex parte*, 2 L. T. 471.

A joint occupation, for business purposes, of distinct premises, separately leased to two partners in trade, is not necessarily an interest less than that of a tenant from year to year, though there is no formal stipulation as to the term of such occupation. *Reg.* v. *East London Ry.*, 17 L. T. 291.

—— **Void Agreement for Lease.**]—A person holding lands under an agreement for lease for a term exceeding three years, though at law a mere tenant from year to year, is entitled to have his purchase-money and compensation for lands required by a company assessed by a jury or by arbitration, under s. 68 of the Lands Clauses Act. *Sweetman* v. *Metropolitan Ry.*, 1 H. & M. 543; 10 L. T. 156; 12 W. R. 304.

—— **Holding over after Notice.**]—A railway act required tenants from year to year to deliver up possession of their lands, if required by the company, six months after notice, whether such notice was given with reference to the time of the commencement of the tenancy or not, the company compensating the tenant for his unexpired term or interest. A tenant from year to year under a Christmas holding, who, on a reasonable expectation that his landlord would not put an end to the tenancy, had made improvements on his land, received, in January, notice to quit in six months, and, at the Michaelmas following, possession was demanded by the company. The company then finding that it was not a Michaelmas holding, told the tenant he might retain possession till Christmas. The tenant remained in possession until after that period:—Held, that as he had held over after notice, his situation was the same as if a regular landlord's notice had been given, and that he was not entitled to compensation. *Reg.* v. *London and Southampton Ry.*, 2 P. & D. 243; 10 A. & E. 3; 1 Railw. Cas. 717; 8 L. J., Q. B. 220.

The owner of a freehold estate, which was in the occupation of a yearly tenant, contracted to sell it to a corporate body for a sum of money which was paid into court. The tenant received due notice from the owner to quit at the end of six months, but he remained in possession without the consent of either vendor or of the purchaser:—Held, that he was not entitled to any portion of the purchase-money as compensation for his interest in the estate. *Nadin, Ex parte*, 17 L. J., Ch. 421.

—— **Right of Renewal.**]—Land, as to which a dispute as to the amount of the lessee's interest was pending (viz. whether he had a right of renewal for sixty-one years from 1885, or whether his interest expired altogether at the

end of his existing term of sixty-one years, 1890), was taken by a railway company, under an agreement by which it was provided that if the lessee should substantiate his right of renewal, the company would pay him a further sum (the amount, if in dispute, to be settled by arbitration, pursuant to the Lands Clauses Act), in addition to the price of the existing term. The company having since bought up the lessor's reversion in fee, the lessee filed a bill against them, praying a declaration of his right to a renewal from 1885, and payment of compensation on that footing:—Held, that the court had jurisdiction to decide this question of future right of renewal, on which the lessee's claim to compensation depended, and for ascertaining which no means were afforded by the Lands Clauses Act. *Bogg* v. *Midland Ry.*, 36 L. J., Ch. 440; L. R. 4 Eq. 310; 16 L. T. 113.

—— **Precarious Interests—Improvements.**]—A lessee, who has expended large sums upon the land demised, under a reasonable expectation of a renewal of his lease, is not entitled to compensation in respect of such expectancy, where the land is taken from him by a company under a statute directing compensation to be paid to the owners and occupiers of land through, under, in, or upon which the works authorised should be made, for the value of such land, and also for the damages sustained by them in making such works. *Rex* v. *Manchester and Liverpool Ry.*, 6 N. & M. 186; 4 A. & E. 650; 1 H. & W. 689; 5 L. J., K. B. 106.

Tenants held a piece of ground, at a yearly rent, under a written agreement. The rent was payable half-yearly, at Lady-day and Michaelmas-day. No term was mentioned, but the tenancy was to be determinable by six months' notice on either side. It was provided, that in case the tenants erected nay buildings on the ground, they were to have the privilege of removing them at any time during the occupation, or, otherwise, they were to be allowed a beneficial interest in the same to the amount of the sum expended in the erection of the buildings, such beneficial interest to extend over a period of twenty years from the date thereof; that was to say, if they were required to give up possession before the expiration of the term, they were to be allowed one-twentieth part of the amount expended for each remaining year of the unexpired term. They erected buildings on the land. A company having purchased the freehold, "subject, nevertheless, to the tenants' rights," served the tenants with a notice to quit, and subsequently took possession under the powers of the Lands Clauses Act, and commenced pulling down the buildings that had been erected:—Held, that, notwithstanding the determination of the tenancy by the notice, the tenants had such an interest in the premises as entitled them to an injunction to restrain the company from removing or otherwise dealing with the premises until that interest was provided for. *Rogers* v. *Hull Dock Co.*, 34 L. J., Ch. 165; 10 Jur. (N.S.) 1245; 11 L. T. 463; 13 W. R. 217. See also *Holt* v. *Gaslight and Coke Co.*, 41 L. J., Q. B. 351; L. R. 7 Q. B. 72; 27 L. T. 442.

—— **Termination of Interest of Claimant.**]—A railway company commenced to build warehouses, which were intended to be 100 feet in height. The lessee of a warehouse, the light of which would be affected when the buildings were completed, gave notice to the railway company that he held on a lease for an unexpired term of fourteen years, which could be determined by six months' notice, to expire on November 11 then next, and required the company to determine whether they would take over the lease, or whether he should give the requisite notice. The company declined to interfere, and the lessee on May 6 gave notice to determine his tenancy. There was no evidence that at the time the building had progressed so far as to affect the light to the warehouse. Afterwards the lessee gave notice to the company of his claim for compensation for injuriously affecting his lands, and an inquiry was held before the sheriff and a jury:—Held, that the act of the lessee in giving notice to terminate his lease, not being the natural result of the acts of the railway company, but a free exercise of will on his part, he could not recover compensation on the footing that he was entitled to a fourteen years' lease. *Reg.* v. *Poulter*, 57 L. J., Q. B. 138; 20 Q. B. D. 132; 58 L. T. 534; 36 W. R. 117; 52 J. P. 244—C. A.

A., in occupation of land under a building agreement determinable if the buildings were not completed by the 30th of November, 1885, was informed in 1883 of the promotion of a bill for a railway which would affect the land. A. thereupon had an interview with his landlord's agent, who told him to suspend building operations till the result of the railway scheme was known—no express agreement to extend the time for building being come to. In 1883, the company obtained their act, and on the 31st of July, 1883, purchased from the landlord such part of the land as was required; the purchase being made expressly subject to the building agreement. On the 16th of September, 1884, the company gave A. notice to treat. A. sent in no claim, and in January, 1886, the company took possession without making a deposit or giving a bond, as required by the Lands Clauses Act, insisting that A. had no interest in the land. A. thereupon commenced his action for an injunction, and to have it declared that the building agreement was subsisting and that he was entitled to have his interest assessed on that footing:—Held, that as the company had, without complying with the provisions of the Lands Clauses Act, entered upon land of which A. was lawfully in occupation, he had ground for an action, and that, the action being brought to trial, the court had jurisdiction to make a declaration as to his interest in the property; and that, although the term named in the agreement had expired, he had an interest in the land, for that the agent's direction to suspend building raised an equity against the landlord to prevent his ejecting A. at the end of the term until he had a reasonable time after notice to complete the building, and that the railway company took subject to that liability. *Birmingham Land Co.* v. *L. & N. W. Ry.*, 40 Ch. D. 268; 60 L. T. 527—C. A.

—— **Hungerford Market Act.**]—The Hungerford Market Company was empowered to make compulsory purchases of land for the use of the market, and the leases, &c., of the premises on it; and the lessees and tenants for years or at will were to give up possession at three months' notice, but compensation was to be made to any such tenant required to quit before the expiration of his term. The act provided, that all tenants for years, from year to year, or at

will, "who shall sustain any loss, damage, or injury in respect of any interest whatsoever for goodwill, improvements, tenants' fixtures, or otherwise, which they now enjoy, by reason of the passing of this act," should be entitled to compensation, to be assessed, if necessary, by a jury. A tenant from year to year was ejected by the company, but received a regular half-year's notice to quit. She had been many years in possession, and the tenancy was not likely to have been determined if the act had not passed:—Held, that she was entitled to compensation for the whole marketable interest which she had in the premises at the time when the act passed; and that the goodwill, though of premises of so uncertain a tenure, was protected by the act as an interest which would, practically, have been valuable as between the tenant and a purchaser, though it was not a legal interest as against the landlord. *Furlow, Ex parte*, 2 B. & Ad. 341; 9 L. J. (o.s.) K. B. 255.

Otherwise, where the tenancy was from year to year, determinable at three months' notice ending with the year, and with a stipulation against underletting without leave. *Ib.*

When, under the provisions of the same act, the company was treating for the purchase of certain premises, a person entered into an agreement to rent them for one year, and that if, with the owners' consent, he should hold beyond the year, he should quit, or be at liberty to quit, at any quarter-day, on receiving or giving three months' notice; that he would not underlet or give up possession to anyone, make any alteration without a written consent of his landlord, would keep all the glass entire, and so leave the same, together with all articles mentioned in a schedule, and all improvements or additions which he should make during his occupation, for the benefit of his landlord. The tenant occupied, with the consent of his landlord, for several years, while the above negotiations were proceeding. He afterwards received due notice to quit, and the purchase by the company was completed:—Held, that he was not entitled to compensation from the company in respect of the improvements made by him during his occupation. *Reg.* v. *Hungerford Market Co.*, 1 P. & D. 492; 9 A. & E. 463; 8 L. J., Q. B. 114. *S. C.*, 1 N. & M. 404, 548; 4 B. & Ad. 592, 596.

A tenant, whose term had expired, was entitled to compensation for goodwill, and for the chance of obtaining a renewal, under the same act. *Ib.*

But not for fixtures set up or purchased, or for improvements made by him, inasmuch as he had no legal interest in them:—Held, nevertheless, that this might be considered by the jury in estimating the chance of a beneficial removal. *Ib.*

—— **Less than One Year.**]—By s. 121 of the Lands Clauses Act, if any such lands (i.e. lands authorised to be taken) shall be in the possession of any person having no greater interest therein than as a tenant for a year, or from year to year, and if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest, and the amount of such compensation shall be determined by two justices in case the parties differ about the same:—Held, that the section applied to the case of a person who had less than one year of a term unexpired at the date of his being required to give up possession; and that such person was not entitled to proceed under s. 68, and claim to have the compensation settled by arbitration. *Reg.* v. *G. N. Ry.*, 46 L. J., Q. B. 4; 2 Q. B. D. 151; 35 L. T. 551; 25 W. R. 41.

—— **Quarterly Tenant.**]—The metropolitan board of works had, under the powers of the Metropolitan Streets Improvement Act, 1872, purchased a house of the owner, pending the plaintiff's tenancy, and had given the plaintiff, who was a quarterly tenant, notice to quit at the expiration of his tenancy. On motion for an injunction to restrain the board from entering upon the premises until they had given the plaintiff the notice to treat required by s. 18 of the Lands Clauses Act, 1845, and should have paid him, or deposited in the bank, the compensation awarded to be paid under the act for his interest in the premises:—Held, that the plaintiff, as a quarterly tenant, had no interest, legal or equitable, in the premises within the meaning of s. 18 of the Lands Clauses Act. *Syers* v. *Metropolitan Board of Works*, 36 L. T. 277—C. A.

The board, in giving the notice to quit, were merely exercising their right as reversioners under their purchase from the freeholder. *Ib.*

Executor—Title to Lease.]—A testator directed that his sons, with whom he had been in partnership, might hold, use, occupy and enjoy certain leasehold premises so long as they might carry on business therein, they paying the rent. The premises were required by a public body for improvements under an act of parliament giving them power compulsorily to purchase lands and premises, and they had given notice to purchase. The executor claimed compensation for the interest which his testator's estate had therein, and the sons also claimed compensation for the compulsory loss of their business:— Held, that the executor was entitled to a gross sum in respect of the value of the testator's lease, subject to a deduction of the value of the interest of the sons in the premises, in consequence of their being compelled to cease carrying on their business. *Penny* v. *Penny*, 37 L. J., Ch. 340; L. R. 5 Eq. 227; 18 L. T. 13; 16 W. R. 671.

Interest created—After Notice to Treat.]—An interest in property created by an agreement entered into by the owner after a notice to treat has been served on him is not a subject for compensation. *Edwards, Ex parte*, 40 L. J., Ch. 697; L. R. 12 Eq. 389; 25 L. T. 149; 19 W. R. 1047.

Where, therefore, an owner of property after a notice to treat had been served on him entered into an agreement with a person who had for several years occupied part of the property as a weekly tenant for a lease of the same to him for a term of three years:—Held, that the tenant was not entitled to compensation in respect of the interest created by such agreement. *Ib.*

—— **After Act passed.**]—Where, by act of parliament, a corporation was empowered to purchase subsisting interests in certain hereditaments, and it was directed that the purchase-money should be reinvested in land, and in the meantime be laid out in funds, and dividends paid to persons entitled to rents:—Held, that neither persons who had taken leases since the passing of the act nor lessors in respect of their right to renew were entitled to any compensation out of purchase-money. *London (Bishop), In re*, 1 Sim. & S. 268.

Whether Lessor's Consent necessary.]—Where a railway company serves a notice, under the Lands Clauses Act, on a lessee to take land held under a lease containing a proviso against assignment with the licence of the lessor, the necessity for such licence is taken away by the operation of the act. *Slipper* v. *Tottenham and Hampstead Junction Ry.*, 36 L. J., Ch. 841; L. R. 4 Eq. 112; 16 L. T. 446; 15 W. R. 861.

Where a portion of the land comprised in a lease is taken by a railway company, the lessee is not bound under the Lands Clauses Act, s. 119, to procure the lessor's consent to the agreement with the company for the apportionment of the rent. *Ib.*

Specific performance decreed against a company by whom leasehold land had been so taken under a notice, where the lessor's licence to the assignment and consent to the apportionment of rent had not been obtained. *Ib.*

Landlord's Rights.] — A landlord was empowered to resume possession of any part of the land demised, in case it should be required by him "for the purpose of building, planting, accommodation, or otherwise":—Held, that this did not entitle the landlord to resume possession of land required by a railway company, so as to defeat the tenant's right to compensation. *Johnson* v. *Edgware Ry.*, 35 Beav. 480.

The claimants demised land to a corporation at a low rent on condition of its being laid out and maintained as a public park. The lease contained a proviso that in case any part of the land should be compulsorily taken under the powers of any act of parliament it should be lawful for the claimants to re-enter upon and repossess it. Part of the land having been compulsorily taken by a railway company under the powers of an act of parliament:—Held, that the claimants were entitled to the commercial value of the land taken as freed from the lease, and not merely to the capitalised value of the rent paid therefor by the corporation. *Morgan & L. & N. W. Ry., In re*, 66 L. J., Q. B. 30; [1896] 2 Q. B. 469; 75 L. T. 226; 45 W. R. 176.

P. let to B., G. & Co. a farm and colliery, with a small railway leading thereto. During the tenancy a railway company paid 5,000*l.* to B., G. & Co. to buy off their opposition to the company's line, the tenants to finish a branch railway which the company had previously agreed with them to complete. B., G. & Co. afterwards availed themselves of certain clauses of their leases to put an end to their tenancy about seven years before it would expire by effluxion of time. P. thereupon claimed of the tenants a portion of the compensation for diminution of value and noncompletion of the branch railway. The agreement had been entirely confined to the railway company and B., G. & Co., and P. had not been mentioned in it:—Held, that P. had no locus standi; that, under the circumstances the doctrine of jus quæsitum tertio did not apply, but that the landlord should have had recourse to the usual remedies provided by the legislature for such cases. *Peddie* v. *Brown*, 3 Macq. H. L. 65; 3 Jur. (N.S.) 895; 5 W. R. 871. See *Finnie* v. *Glasgow and South Western Ry.*, 3 Macq. H. L. 75.

Mortgagor and Mortgagee.]—The owner of business premises mortgaged them with the machinery and fixtures. A railway company gave notice to take part of the premises for its railway, but before the price was fixed the mortgagor died, and the mortgagees entered into possession of the property. A suit was instituted for the administration of the mortgagor's estate, which proved to be insolvent, and a receiver was appointed, who, with the consent of the mortgagees, carried on the business. Arbitrators and an umpire were appointed to fix the compensation-money payable by the company. The umpire awarded 15,950*l.*, of which he certified that he had awarded 2,800*l.* in respect of the loss of profits in carrying on the business. The executors claimed the 2,800*l.* as belonging to the mortgagor's estate, to be divided among his general creditors:— Held, that the sum of 2,800*l.* was in the nature of compensation for the value of the goodwill of the business, which passed with the premises; and that the whole of the sum of 15,950*l.* belonged to the mortgagees. *Pile* v. *Pile, Lambton, Ex parte*, 45 L. J., Ch. 841; 3 Ch. D. 36; 35 L. T. 18; 24 W. R. 1003.

A public body acting under the powers of their act, and of the Lands Clauses Act, gave notice to the plaintiff, who was a tailor, to take his house, which was leasehold. After some negotiation they offered him 400*l.*, of which 150*l.* was to be apportioned to his leasehold interest, and 250*l.* to his trade damage and personal expenses, to which the plaintiff agreed. The plaintiff had mortgaged his leasehold interest and could not make a good title. The plaintiff then brought an action for specific performance of the agreement, and the defendants afterwards paid the 400*l.* into court under s. 26 of the Lands Clauses Act, executed a deed-poll, and took possession:—Held, that the plaintiff was entitled to judgment in the action, and to have the 250*l.* paid at once to him. *Cooper* v. *Metropolitan Board of Works*, 53 L. J., Ch. 109; 25 Ch. D. 472; 50 L. T. 602; 32 W. R. 709—C. A.

Although in some cases the goodwill of trade premises passes to a mortgagee, that does not apply to a case where the goodwill depends on the personal skill of the owner. *Ib.*

Renewable Leaseholds — Fine.] — Renewable leaseholds being under notice to be taken by a company, the lease was not renewed. That company turned out abortive, and afterwards another company came forward and took the same lands, and paid the purchase-money into court:—Held, that the vendors were not entitled to any part of the compensation-money by way of compensation for the fine which they omitted to take in consequence of the notice from the first company. *Westminster (Dean), Ex parte*, 18 Jur. 1113.

Land subject to Chief Rent.]—A., an owner in fee of land to which a right of running water was appurtenant, agreed with a water company to accept 2,500*l.* as compensation for his right in the water; and subsequently let the company into possession of the water. The land was subject to a chief rent, and the owner of the chief rent also claimed from the company compensation for the loss of the water. The company refused to pay the 2,500*l.* to A. unless he obtained the concurrence of the owner of the rent in the deed of conveyance. A. then brought an action for the 2,500*l.*, and the company filed a bill for specific performance of his agreement, and for an injunction to restrain the action:—Held, that the company was entitled to the injunction no

bringing the money into court to abide the decision of the conflicting claims for compensation. *Stockport District Waterworks* v. *Jowett*, 13 W. R. 977.

Purchase-money or Compensation.]—A railway company, when constructing their line, excavated soil on the land of M., and used the stuff for ballast. No notice was given to him that his land was required for the purposes of the company. After a delay on their part of some years, the matter was, with other claims for consequential injury, referred to arbitration. The articles recited his allegation that the lands had been "taken and used and otherwise injured," and provided for the ascertainment of the purchase-money for the lands taken and used. The award found that the company had "cut the soil of a portion of the lands, and that it has been taken and used," &c., and awarded a sum "as and for the purchase-money of the portion of the lands," &c. The money was paid to the owner, and subsequently the pond formed in the excavation was taken by another railway company, under their compulsory powers. He claimed that on the construction of the deeds, and under the facts of the case, he had remained the owner of the lands:—Held, that the lands were taken by the company, and that the money was paid for the purchase, and not merely as compensation for injury thereto. *Macrory, Ex parte, Belfast Central Ry., In re*, 19 W. R. 238.

D. PRINCIPLES OF ASSESSMENT.

Profits made on other Premises.]—A party carried on an old-established business at 11, Parliament-street. His lease being about to determine, he purchased the lease of No. 10 in the same street with the intention of transferring his business to No. 10 upon the determination of his lease of No. 11. Before such transfer was effected the commissioners of works and public buildings gave him notice to treat with respect to No. 10, under the powers of the Public Offices Sites Act, 1866, which incorporates the Lands Clauses Act. The question of the amount that the commissioners were to pay to him for the compulsory taking of No. 10 was referred to arbitration. The arbitrator admitted evidence of the profits that he had been making at No. 11, and awarded to him 1,000*l.* in respect of goodwill attaching to or loss of profits which might or would have been made at No. 10, Parliament-street, if the premises had not been taken for the purposes of the act:—Held, that he had not exceeded his powers in so doing, and that the award of such compensation was good. *White* v. *Public Works Commissioners*, 22 L. T. 591.

Part of Building Estate taken for Sewage Works.]—Under statutory powers incorporating the Lands Clauses Act, 1845, the respondents gave the appellant notice to treat for the purchase of part of his land, which they required for sewage works. In an inquisition held under that act evidence was given that the existence of sewage works, even if conducted so as not to create an actionable nuisance, depreciated the market value of the appellant's other lands for building purposes. The land taken was let on long building leases; of the other lands part was in hand, and part was let for short periods for brick-making. The land taken was separated from the other lands, in part by other property of the appellant's, and in part by a railway. The jury gave a verdict for the value of the land taken and a further sum for all damage sustained or to be sustained by reason of the injuriously affecting the other lands by the exercise of the respondents' statutory powers:—Held, that the jury had not exceeded their jurisdiction in awarding the further sum, for the damage was not too remote to form the subject of compensation, even though no nuisance might be caused. *Essex* v. *Acton Local Board*, 58 L. J., Q. B. 594; 14 App. Cas. 153; 61 L. T. 1; 38 W. R. 209; 53 J. P. 756—H. L. (E.)

Tied Public-house.]—Where certain brewers were the owners in fee of a public-house which was let for an unexpired term of seven years, and there was in the lease a covenant by the tenant not to sell on the premises any beer other than that purchased of them, and a corporation was empowered, by a special act (which incorporated the Lands Clauses Act), to take the premises:—Held, that, in ascertaining the amount of the purchase-money and compensation to be paid by the corporation to the brewers, the additional value of the premises, by reason of the covenant to sell their beer only, was to be taken into consideration. *Bourne* v. *Liverpool Corporation*, 1 N. R. 425; 33 L. J., Q. B. 15; 10 Jur. (N.S.) 125; 8 L. T. 572.

Confusion of Seed-beds.]—A seedsman had offices in Covent-garden, where he kept his stock, and had also a market garden at Wandsworth, where he sowed small quantities of all the seeds in his stock on trial, after which he sold each parcel at a higher price, by reason of his giving a warranty, based on his experience of these trial crops. A board of works entered upon his land, and so carried on their works that it became impossible to identify the trial crops with the seed in bulk, whereby the seedsman was unable to warrant his seeds, which were in consequence depreciated in value 50 per cent. The arbitrator having included in his award a sum in respect of such depreciation:—Held, that this damage was too remote, and could not be recovered. *Clarke* v. *Wandsworth District Board of Works, In re*, 17 L. T. 549.

Goods on Premises.]—The occupier of a house and premises, injuriously affected by the execution of the works of a railway company in exercise of the powers given by act of parliament, is entitled to compensation for damage done to his goods in the house by reason of the exercise of such powers. *Knock* v. *Metropolitan Ry.*, 38 L. J., C. P. 78; L. R. 4 C. P. 131; 19 L. T. 239; 17 W. R. 10.

Value, of what Interest.]—When land, subject to restrictions as to its use, is taken for a public object under compulsory powers, the amount of compensation to the person interested therein is to be assessed with reference to the value of his interest therein, and not with reference to its value to the persons taking it. *Stebbing* v. *Metropolitan Board of Works*, 40 L. J., Q. B. 1; L. R. 6 Q. B. 37; 23 L. T. 530; 19 W. R. 73.

A declaration stated that, by their act, a railway company was not to interfere with a church, or with the yard attached thereto, without the consent of the bishop of the diocese, and payment by the company to the defendants of a sum to be agreed upon between the defendants and the company, in ascertaining which

regard should be had to the cost of a site for a new church and to the value of the yard; that, on payment by the company to the defendants of the sums so to be agreed upon, the church and yard should vest in the company, and the sum so paid should be employed by the defendants in purchasing a new site and paying the plaintiff for the value of the yard. It averred that the sum agreed upon was 7,732*l.* 17*s.*, and that it was paid by the company to the defendants, and thereupon the church and yard vested in the company; whereupon the bishop gave his consent that the sum was sufficient to purchase a new site, and also to pay the plaintiff the value of the yard, 2,000*l.*, of which the defendants had notice and were requested to pay. Breach, non-payment of the value. The defendants, before action, offered the plaintiff a sum which they had determined to be the value of the yard, which was consecrated ground, and, as such, its value to the plaintiff was less than it would be to the company when applied to secular uses. The judge directed the jury that the act did not make the determination of the defendants conclusive on the plaintiff, and that in estimating their damages they were at liberty to value the ground as applicable to secular uses:—Held, no misdirection. *Hilcoat* v. *Canterbury and York (Archbishops)*, 10 C. B. 327; 19 L. J., C. P. 376.

Held, also, in arrest of judgment, that the declaration sufficiently disclosed the duty of the defendants under the statute, and stated a good breach. *Ib.*

Where streams of water are taken by the Barbados Water Supply Company under the compulsory powers conferred on them by the Water Supply Act, 1886, the owner of those streams is entitled to compensation, notwithstanding that he has made no use of them prior to their being so taken; and the amount of such compensation must be based upon the value of the rights of property of which the owner is deprived, and not upon the mere value of the advantages which he had derived from user in the past. *Trent-Stoughton* v. *Barbados Water Supply Co.*, 62 L. J., P. C. 123; [1893] A.C. 502; 1 R. 403; 69 L. T. 164—P. C.

In respect of Goodwill.]—The loss of trade occasioned by the obstruction of a highway during the execution of the works of a railway company is not an injurious affection of the tradesman's interest in his premises which entitles him to compensation. *Ricket* v. *Metropolitan Ry.*, 36 L. J., Q. B. 205; L. R. 2 H. L. 175; 16 L. T. 542; 15 W. R. 937.

—— **Public-house.**]—A railway company in pursuance of their act of parliament, served notice upon the yearly tenant of a public-house of their intention, after the expiration of six months from the date thereof, to enter upon and take the premises in his occupation. The company nevertheless did not take possession at the expiration of the specified period, and the tenant continued his business on the premises for a further space of two years, but at a reduced rate of profits, the company having by virtue of their powers demolished the surrounding neighbourhood. At the end of two years the tenant received a summons from a metropolitan police magistrate to appear for the purpose of having the amount of compensation due to him assessed. On the hearing of the summons, the tenant, in addition to the usual items of compensation, claimed in respect of reduced profits of trade consequent upon the demolition by the company of the surrounding neighbourhood from the time of the expiration of the six months' notice to the date of the hearing of the summons:—Held, that he was not so entitled, the claim being one which, in the absence of statutory powers, could not have been made the subject of an action, and the keeping on of the business at a reduced rate of profits, after he might have compelled the company's acceptance of the premises being his own voluntary act. *Reg.* v. *Vaughan*, 38 L. J., M. C. 49; L. R. 4 Q. B. 190; 17 W. R. 115.

Under a dock act, persons having an estate or interest, not less than from year to year, in houses, &c., who shall be injured in such estate or interest, by any of the works authorised by the act, were to be compensated by the dock company:—Held, that the company was not liable for compensation to the owner of a house occupied as a tavern, the pecuniary value of which was lessened by reason of a destruction of the neighbourhood by the works, duly authorised, of the company, where the house, though less valuable for a tavern or a shop, was not rendered less valuable as a private residence. *Rex* v. *London Dock Co.*, 6 N. & M. 390; 5 A. & E. 163; 2 H. & W. 267; 5 L. J., K. B. 195.

Peculiar and Valuable Rights.]—The conservators of the river Thames having under their special acts vested in them the soil and foreshore of the river Thames with power to grant licences, to build quays, jetties, wharves, and other conveniences, had notice served on them by the Tilbury and Southend Railway Company under one of their acts for the purpose of acquiring compulsorily a portion of the foreshore in Essex belonging to the conservators for a wharf. The matter was referred to two arbitrators and an umpire under the Lands Clauses Acts, and the umpire stated in writing previous to commencing his arbitration that the principle of compensation upon which he should proceed was that he would be guided by the provisions of the Lands Clauses Acts. He awarded a certain sum to the conservators, and the award being objected to as void by the railway on the ground that the arbitrator had based it on the principle of giving compensation under the special acts of the conservancy, and not on the Lands Clauses Acts:—Held, that the arbitrator was bound to assess the compensation in accordance with the provisions of the Lands Clauses Acts, and had in fact done so. That he was bound to take and had rightly taken into consideration the peculiar and valuable rights of the conservators under their special acts. That even assuming the conservators' witnesses had given evidence as to value based on a wrong principle, there was nothing to bind the court to hold the arbitrator had based his decision on that principle, and that consequently specific performance with payment of the sum awarded (subject to an inquiry as to title) ought to be granted. *Thames Conservators* v. *London, Tilbury and Southend Ry.*, 3 R. 178; 68 L. T. 21.

Reversionary Interest in Licensed Premises—Evidence of present Market Value of Claimant's Interest.]—In estimating the amount of compensation under the Lands Clauses Acts to be paid to the reversioner of licensed premises, let on lease with twenty-six years unexpired, evidence to prove the present market value of the claimant's reversionary interest in the premises

as licensed premises is admissible, and need not be confined to the estimated rental value of the premises as a house and shop apart from the question of whether, when the reversion falls in, they would then be licensed premises. *Belton* v. *London County Council*, 62 L. J., Q. B. 222; 5 R. 230; 68 L. T. 411; 41 W. R. 315; 57 J. P. 185.

Outlay on Repairs made after Notice of Provisional Order—Arbitrator not Appointed.]—The owner of houses in a dilapidated condition, whilst repairing them was informed that a provisional order had been made enabling a public body to take the houses. The owner refused to stop the repairs, the act was afterwards obtained and an arbitrator appointed:—Held, that the owner was entitled to be compensated for the outlay made by him between the date of the notice to him and the appointment of the arbitrator. *Higgins* v. *Dublin Corporation*, 28 L. R., Ir. 484.

Set-off of Advantages.]—A company cannot reduce the damages to be paid to a householder in virtue of the increased value which their works confer upon his house. *Senior* v. *Metropolitan Ry.*, 2 H. & C. 258; 32 L. J., Ex. 225; 9 Jur. (N.S.) 802; 8 L. T. 544; 11 W. R. 836.

Lease to Testator—Executor—Partners.]—A testator directed that his sons, with whom he had been in partnership, might hold, use, occupy, and enjoy certain leasehold premises so long as they might carry on business therein, they paying the rent. The premises were required by a public body for improvements under an act of parliament giving them power compulsorily to purchase lands and premises, and they had given notice to purchase. The executor claimed compensation for the interest which his testator's estate had therein, and the sons also claimed compensation for the compulsory loss of their business:—Held, that the executor was entitled to a gross sum in respect of the value of the testator's lease subject to a deduction of the value of the interest of the sons in the premises, in consequence of their being compelled to cease carrying on their business. *Penny* v. *Penny*, 37 L. J., Ch. 340; L. R. 5 Eq. 227; 18 L. T. 13; 16 W. R. 671.

In respect of subsequent Injuries—When excluded by Agreement.]—An owner sold land to a railway company for the construction of their line, and agreed with them that the sum paid to him should be not only the purchase-money for such land, but also for damage by severance and injury to, and for otherwise injuriously affecting his adjoining lands:—Held, that the agreement included all that he could recover under the Lands Clauses Act, and that he was precluded from afterwards claiming compensation for damage subsequently done to his adjoining lands by the subsidence of the soil consequent on the company making their line through the land they had so bought from him, such damages being reasonably capable of being foreseen when the agreement was made. *Todd* v. *Metropolitan District Ry.*, 24 L. T. 435; 19 W. R. 720.

Prospective or Contingent Injury.]—A claimant cannot recover compensation in respect of an injury which is merely prospective and does not exist at the time of making the claim. *Reg.* v. *Poulter*, 57 L. J., Q. B. 138; 20 Q. B. D. 132; 58 L. T. 534; 36 W. R. 117; 52 J. P. 244—C. A.

A railway company took land on which cotton mills would probably have been built; the owner had other land on which he had built a reservoir from which water might be supplied to such cotton mills when built. In proceeding under the Lands Clauses Act to ascertain the compensation, the umpire received evidence as to the profits which might have been derived from supplying water to the mills when built, and awarded compensation for the loss of those prospective profits:—Held, that the umpire was right in receiving the evidence, and in awarding such compensation. *Ripley* v. *G. N. Ry.*, L. R. 10 Ch. 435; 31 L. T. 869; 23 W. R. 685.

Anticipated damage from the noise and smoke of trains does not appear to be a proper subject of estimate for compensation under the railway statutes. *City of Glasgow Union Ry.* v. *Hunter*, L. R. 2 H. L. (Sc.) 78.

Anticipated damage from the noise or smoke of trains does not appear to be a proper subject of estimate for compensation under the statutes relating to railways. *Reg.* v. *Metropolitan Board of Works*, 10 B. & S. 391; 38 L. J., Q. B. 201; L. R. 4 Q. B. 358; 17 W. R. 1094.

In 1845, a landlord received, under an arbitration, compensation for land, and "in respect of damages which might be sustained by reason of making a railway":—Held, that he was not precluded from insisting on a further compensation for future unforeseen damages subsequently sustained. *Lancashire and Yorkshire Ry.* v. *Evans*, 15 Beav. 322.

A company was empowered to take land (with an exception of mines) for a railway, paying the value of the lands and making compensation for damages sustained by reason of the execution of the works, and for damage, loss, or inconvenience sustained by reason of the execution of any of the powers of the act; such value and compensation to be fixed by agreement or assessed by a jury; mines to be worked by the owner, so that no damage be thereby done to the railway, and in case of damage the owner to repair it at his own expense, or the company to repair in case of neglect or refusal, and recover the expenses from the owner:—Held, that the owner of land taken by the company, and for which compensation was paid, could not, upon afterwards discovering that a mine, to which he was entitled, could not be worked without doing damage to the railway, claim further compensation in respect of the loss sustained thereby. Compensation in respect of such contingent loss should have been claimed at the time of the original agreement or assessment. *Rex* v. *Leeds and Selby Ry.*, 5 N. & M. 246; 3 A. & E. 683.

Action by the lessee of lands under C. against a railway company for constructing their railway across the lands of other persons without leaving sufficient opening for the passage of flood waters, whereby they were obstructed and penned up, and forced upon his lands. Plea, that before he had anything in the lands now in his occupation, the company gave notice to C. to purchase lands of his adjoining to those now of the lessee, and that it was referred to an arbitrator to fix the amount of purchase-money, and of compensation for injury to the lands and other estates of C. by severance or otherwise, and to determine what bridges, arches, culverts, &c., should be made:—Held, that the compensation awarded under such reference related only to damage, known or contingent, by reason of the construction of the railway on the lands purchased of C., and to other damage arising from the construction of the rail-

way at other places, which was apparent and capable of being ascertained and estimated at the time when the compensation was awarded, and did not embrace also all contingent and possible damages which might arise afterwards by the works of the company at other places. *Lawrence* v. *G. N. Ry.*, 6 Railw. Cas. 656; 16 Q. B. 643; 20 L. J., Q. B. 293; 15 Jur. 652.

An arbitrator is not bound to award compensation in respect of contingent future damage suggested as likely to arise from the execution of works to be done by the promoters, unless it clearly appears that such damage must necessarily arise. If such damage in fact arises afterwards, the remedy for the party damaged is under s. 68. *Ware* v. *Regent's Canal Co.*, 7 Railw. Cas. 780; 9 Ex. 395; 23 L. J., Ex. 145.

Second Inquiry.]—A company being authorised to construct a tunnel to run in part underneath land on which was erected a manufactory, with other buildings, it was agreed between the company and the owner that the amount to be paid to him for the right to construct, and for ever maintain, the tunnel underneath the hereditaments and premises, and for the purchase of the site of the tunnel, and in full compensation for all damage or injury to be sustained by reason thereof, should be left to arbitration. The arbitrators awarded a sum to be paid to the owner "as compensation for the right to construct, and for ever maintain, the tunnel underneath the hereditaments and premises, and as purchase-money for the site of the tunnel, and in full compensation for all damage or injury sustained by reason of the construction thereof." By deed the owner, in consideration of the sum awarded, granted to the company "the site of, and full liberty to bore, dig out, excavate, and construct the tunnel underneath the land and buildings thereon, together with full liberty at all times thereafter to use, enjoy, uphold, maintain and repair the tunnel, and to hold the liberty or privilege granted henceforth for ever, for the purposes of the act of parliament relating to the railway, freed and discharged from all claims and demands whatsoever of or by the owner. Subsequently, serious injuries were from time to time sustained by the superincumbent buildings, in consequence of the subsidence of the surface of the land, such subsidence being caused by the construction of the tunnel in a loose soil, and by the vibration resulting from the passing of trains, or by one of such causes:—Held, by Cockburn, C. J., that questions arising upon such injuries as those complained of were determinable upon the provisions in respect of compensation contained in 8 & 9 Vict. c. 18, s. 68; and that the act contains no provision for a second inquiry in case of future damage arising, not contemplated by the parties at the time of the assessment of compensation, which must be ascertained at once and finally. *Croft* v. *L. & N. W. Ry.*, 3 B. & S. 436; 32 L. J., Q. B. 113; 9 Jur. (N.S.) 962; 7 L. T. 741; 11 W. R. 360.

But by Crompton and Mellor, JJ., that the damages were such as must have been foreseen at the time of the arbitration; and whether the question turned upon the construction of the award and conveyance or upon the statute, the owner was equally debarred from recovering further compensation. *Ib.*

"Lands held Therewith."]—Where the lands taken and the lands injuriously affected are held by the same owner, so that the unity of ownership conduces to the advantage of the property as one holding, the lands injuriously affected are held with the lands taken within the meaning of ss. 49 and 63 of the Lands Clauses Act, 1845. *Essex* v. *Acton Local Board*, 58 L. J., Q. B. 594; 14 App. Cas. 153; 61 L. T. 1; 38 W. R. 209; 53 J. P. 756—H. L. (E.)

Damage by Severance.]—Where part of a field available for building purposes had been taken by a railway company, so as to detach and leave without practicable access the larger portion of the field:—Held, that a jury was rightly directed in assessing compensation for the severance, to consider the access to the severed portion as cut off, as such access could not be afforded to building land by accommodation works, which the company, under 8 & 9 Vict. c. 20, ss. 68, 69, might be ordered to make; and the jury ought therefore to exclude these works from their consideration. *Reg.* v. *Brown*, 8 B. & S. 456; 36 L. J., Q. B. 322; L. R. 2 Q. B. 630; 16 L. T. 827; 15 W. R. 988.

A railway company's private act, which incorporated the Lands Clauses Act, 1845, and Part I. of the Railways Clauses Act, 1845, empowered them to take compulsorily portions only of houses or manufactories for the purposes of the act, without being compellable by the owners to purchase the whole, or any greater portions, if such portions could in the opinion of the jury, arbitrators, or other authority to whom the question of disputed compensation should be submitted, "be severed from the remainder of such properties without material detriment thereto." Under the private act the company took a portion of a manufactory across which lay the only access for vehicles from a public highway to the remainder of the manufactory. The portion of land was required merely for building a railway viaduct, and a roadway to the remainder of the manufactory from the highway under one of the arches of the viaduct would have given practically the same access to the manufactory as was enjoyed before the severance. Before the umpire to whom the question of compensation was submitted, the company undertook to grant a perpetual right of way under the arch to the owners of the remainder of the manufactory, and relied upon this undertaking and their liability to construct accommodation works under s. 68 of the Railways Clauses Act, 1845, for the purpose of shewing that the severance of the portion of land they required would cause no material detriment to the remainder. Upon a special case being stated by the arbitrator:—Held, that in considering whether the severance would cause any material detriment to the remainder of the property, the umpire was entitled to take into consideration the liability of the company under s. 68 to make and maintain such accommodation works as should be necessary for making good the interruption to the use of the land caused by the severance. *Gonty and Manchester, Sheffield, and Lincolnshire Ry., In re*, 65 L. J., Q. B. 625; [1896] 2 Q. B. 439; 75 L. T. 239; 45 W. R. 83—C. A.

Held, also, by Lord Esher, M.R., and A. L. Smith, L.J., that the company could in law carry out their undertaking, and that therefore the umpire should take that undertaking also into consideration. *Ib.*

The plaintiff had constructed a reservoir on part of his land, the only use of which was to

supply with water mills and other buildings which might be erected on the rest of his land which was suitable for building purposes. A railway company gave notice to treat for a large portion of this building land, and the amount to be paid to the plaintiff for purchase-money, compensation and damage was by agreement referred to arbitration. At the arbitration he claimed compensation for the loss he would sustain by reason of his losing the sale of the water from his reservoir to buildings that might have been erected on the land taken by the company, and in support of this claim he gave evidence as to the profits he expected to realise on this account:—Held, that the land with the reservoir upon it was "injuriously affected" by the severance, that the arbitrators were justified in considering such claim and in receiving such evidence in support of it, and that the award made by them was valid. *Ripley* v. *G. N. Ry.*, L. R. 10 Ch. 435; 31 L. T. 869; 23 W. R. 685.

A volunteer corps obtained leases of different plots of land for the erection of a rifle range of 800 yards. Immediately behind the butts was a field occupied by A., and beyond that some marsh land, which were required by the rifle corps for the purpose of making provision for the safety of the public during the time the butts were in use. The corps obtained a lease of this land, but only made a verbal agreement with A. for the use of his land during the rifle practice, in consideration of an annual payment of 49*l*. A company under their compulsory powers took portion of the marsh land occupied by the corps, and so used it as to put a stop to the use of the rifle range. At an inquisition under the Lands Clauses Act, 1845, the jury assessed the value of the land taken, and damage for the injury to the rifle range:—Held, that there might be an injury from severance within the meaning of the act, although the premises were not immediately contiguous, and that the fact that the corps had only a precarious interest in the field only affected the quantum of compensation to be awarded to them. *Holt* v. *Gaslight and Coke Co.*, 41 L. J., Q. B. 351; L. R. 7 Q. B. 728; 27 L. T. 442.

E. SETTLING AMOUNT, AND PRACTICE THEREON.

1. Notice of Claim.

What Sufficient.]—A notice should state the quantity as well as the quality of the estate or interest of the claimant. *Healey* v. *Thames Valley Ry.*, 5 B. & S. 769; 34 L. J., Q. B. 52; 10 Jur. (N.S.) 1182; 11 L. T. 268; 13 W. R. 44.

An occupier of a bakehouse and shop, having sustained loss in his trade by reason of the works of a railway company, served the company with a notice, stating that he was the occupier of the bakehouse and shop, and that he used the premises for carrying on his business of a baker, and that in consequence of the works of the company, the bakehouse and shop had been injuriously affected, and loss and damage had arisen to him, in his business, by preventing the access of customers to the shop. The notice did not state what interest he had in the bakehouse and shop:—Held, that, as he claimed only as an occupier for loss of trade, it was not necessary for the notice to state what interest he had in the shop, and that the notice was sufficient. *Cameron* v. *Charing Cross Ry.*, 16 C. B. (N.S.) 430; 33 L. J., C. P. 313; 10 Jur. (N.S.) 635; 10 L. T. 381; 12 W. R. 803.

In 1848 a landowner gave a railway company notice for a jury to assess damages which he alleged he had suffered. In 1849 he made a claim for further subsequent damages, and in 1850 gave notice for an arbitrator to assess the whole damages:—Held, that this was not irregular, and that the first notice had not exhausted all the statutory powers. *Lancashire and Yorkshire Ry.* v. *Evans*, 15 Beav. 322.

The court will not refuse a mandamus to enforce proceedings under the Lands Clauses Act, simply because the claimants have included distinct joint and separate claims in the same formal notice. *Reg.* v. *East London Ry.*, 17 L. T. 291.

Service.] — A company empowered to take lands compulsorily, wishing that notice should be served at its office or upon its officers, and not upon its solicitors, must state such wish clearly and at once. It must not lie by till an award is made, and then seek to set aside the award as irregular. *Reg.* v. *Metropolitan Ry.*, *Knock*, *Ex parte*, 17 L. T. 291.

The owner's messuages being injuriously affected by the works of "The Blackburn Railway Company," he served the secretary at their office with a notice containing the particulars required by the statute, but addressed to "The Blackburn and Clitheroe Railway Company":—Held, that the notice was sufficient. *Eastham* v. *Blackburn Ry.*, 9 Ex. 758; 23 L. J., Ex. 199; 2 W. R. 377.

When no Claim made.]—The owner of property required for railway purposes does not lose his right to have the value assessed by a jury under s. 23 of the Lands Clauses Act, 1845, because he has made no claim, and because the company has proceeded under s. 85. They must have actually paid or tendered the money, or the owner may claim to go on under s. 23 or s. 68. And if the assignee of a bankrupt mortgagor will not concur, that is ground for proceeding under s. 110. *Reg.* v. *Metropolitan Ry.*, 13 L. T. 444.

Waiver of.]—Where parties appear, and do not protest for want of notice, the defect will be held to be waived. *Taylor* v. *Clemson*, 11 Cl. & F. 610; 8 Jur. 833.

2. How Determined.

a. By Jury.

i. *Compelling Company to issue Warrant.*

Mandamus.]—The court will not grant a mandamus to a railway company to summon a jury to assess compensation for injury done to property, even where the injury has been done two years, and there appears to have been delay on the part of the company, if works are still in progress by which the property will be still further injured, and it does not appear that the company is acting malâ fide. *Parkes*, *Ex parte*, 9 D. P. C. 614.

Commissioners having given notice to treat to an owner of lands proposed to be taken, cannot withdraw therefrom, and therefore the owner is entitled to a mandamus to compel them to issue their warrant to summon a jury to assess the

value. *Birch* v. *St. Marylebone Vestry*, 20 L. T. 697; 17 W. R. 1014.

By a railway act it was provided, that all parties with whom the company might have any dispute should, at their own costs, before the company was obliged to issue their warrant to summon a jury, enter into a bond to prosecute their complaint and pay their proportion of costs, and in case of the warrant being issued without such bond having been entered into, the company might give notice, requiring the same to be done before commencing the inquiry. Certain premises having been injured by floods occasioned by the company's works, on an application by the owners for a mandamus to summon a jury to assess damages, it was objected that the damage resulted from acts done partly by the company, and partly by the applicants themselves, and that the bond required by the act had not been entered into previously to the application. It did not appear that there had been any demand and refusal:—Held, that there was sufficient doubt on the facts to warrant the issuing a mandamus, and that the entering into a bond, unless required by the company, was not a condition precedent to such an application. *Reg.* v. *North Union Ry.*, 1 Railw. Cas. 729.

A neglect to issue a warrant after a demand made upon the solicitors of the company, is a sufficient refusal to entitle the claimant to the writ. *Ib.* S. P., *South Yorkshire, Doncaster and Goole Ry., In re, Senior, Ex parte*, 7 D. & L. 36; 18 L. J., Q. B. 333; 14 Jur. 1093.

A company gave notice to landholders to treat for certain portions of land. After some discussion, the question of compensation was referred to arbitration, which, however, was never completed:—Held, that the remedy of the landholders was by mandamus to compel the summoning of a jury, and not by bill in chancery. *Lind* v. *Isle of Wight Ferry Co.*, 1 N. R. 13; 7 L. T. 416.

When a railway company has given notice to a landowner that they required his land for the purposes of their undertaking, and the case is one entitling the landowner to have the amount of compensation assessed by a jury, but the company has neglected to issue their warrant to the sheriff to summon a jury for that purpose within a reasonable time after they were required to do so, the landowner, if he is personally interested in the warrant being issued, and has sustained damage, or may be damaged, by its not being issued, has a right to proceed by an action for a mandamus to the railway company to issue their warrant. *Fotherby* v. *Metropolitan Ry.*, 36 L. J., C. P. 88; L. R. 2 C. P. 188; 12 Jur. (N.S.) 1005; 15 L. T. 243; 15 W. R. 112.

When an occupier of premises which a railway company required, has acted on their notice and removed to other premises, he is entitled to maintain an action of mandamus to compel the company to issue their warrant to the sheriff to assess compensation, if the company after the expiration of such notice neglects to take any steps for settling the amount of compensation. *Morgan* v. *Metropolitan Ry.*, 38 L. J., C. P. 87; L. R. 4 C. P. 97; 19 L. T. 655; 17 W. R. 261—Ex. Ch.

ii. *Precept to Sheriff or Coroner.*

Interest of Sheriff.]—The interest which at common law disqualifies an officer from acting in a judicial inquiry must be direct and certain, and not merely remote or contingent; and the same principle must be applied to the Lands Clauses Act, s. 39. *Reg.* v. *Manchester, Sheffield and Lincolnshire Ry.*, 36 L. J., Q. B. 171; L. R. 2 Q. B. 336; 16 L. T. 173; 15 W. R. 676.

Where, therefore, at the time of the summoning of a jury and the taking of an inquisition before the sheriff as to the amount of compensation to be paid for land taken by a railway company under the powers of their act of parliament, there was an executory agreement not yet carried out, by which that company would ultimately become amalgamated with another railway company, and the sheriff was a shareholder in the latter company:—Held, that he was not interested in the matter in dispute, so as to invalidate the proceedings. *Ib.*

The coroner should summon a jury to take an inquisition, if the sheriff is interested in the transaction (as being a shareholder in the company requiring the land), and a certiorari will issue to bring up the inquisition, although by s. 145 no proceeding shall be quashed for want of form, nor shall the same be removed by certiorari. *Reg.* v. *L. & N. W. Ry.*, 9 L. T. 423; 12 W. R. 208. S. P., *Reg.* v. *Warwickshire (Sheriff)*, 3 W. R. 164.

Interest of Under-sheriff.]—The promoters may properly issue their warrant to the sheriff to summon a jury, though the under-sheriff is interested as a shareholder in the company. The interpretation clause, s. 3, does not in such case incorporate the word "under-sheriff" into the word "sheriff," as used in the above section. *Worsley* v. *South Devon Ry.*, 16 Q. B. 539; 20 L. J., Q. B. 254; 15 Jur. 970.

In such a case the sheriff should either take the inquisition in person or appoint some disinterested party. *Ib.*

Waiver of Protection.] — The direction in respect of the interest of the sheriff in s. 39 of the Lands Clauses Act, 1845, is introduced for the protection of the party against whom the interest would operate, and he may therefore waive the protection if he so elects. *Baddeley, Ex parte*, 5 D. & L. 575; 5 Railw. Cas. 542.

Where the sheriff is interested in the company as a shareholder, the objection is waived by appearing before the sheriff and jury, and allowing the inquisition to proceed and judgment to be given. *Corrigall* v. *London and Blackwall Ry.*, 2 D. (N.S.) 851; 3 Railw. Cas. 411; 5 Man. & G. 219; 6 Scott (N.R.) 241; 12 L. J., C. P. 209. See *Reg.* v. *Warwickshire (Sheriff)*, 3 W. R. 164.

iii. *Summoning Jury.*

When Notice required.] — Sect. 38 of the Lands Clauses Act, 1845, applies only to cases where the promoters of an undertaking are about to take or injuriously affect land in the possession of the claimant, and in such case they are bound to give the claimant ten days' notice of their intention to cause a jury to be summoned to assess compensation; but such notice is not required where the promoters have already taken possession of, or injuriously affected land, but for which no compensation has been made. *Railstone* v. *York, Newcastle and Berwick Ry.*, 15 Q. B. 404; 19 L. J., Q. B. 464; 14 Jur. 1021. But see *Richardson* v. *S. E. Ry.*, 11 C. B. 154.

The Lands Clauses Act, s. 38, which provides,

that before the promoters of an undertaking shall issue their warrant for summoning a jury for settling questions of compensation, they shall give not less than ten days' notice to the owner of such their intention, and state therein the sum they are willing to offer for the interest in such lands, damage, &c., is not applicable to, or incorporated with s. 68, which provides for the case of lands taken or injuriously affected, and in respect of which the promoters of the undertaking have made no satisfaction to the owner. *Hayward* v. *Metropolitan Ry.*, 4 B. & S. 787; 33 L. J., Q. B. 73; 10 Jur. (N.S.) 418; 9 L. T. 680; 12 W. R. 577.

Upon the construction of ss. 18, 21, 23 and 92 of the Lands Clauses Act, after a notice under s. 18 to take part of a manufactory, and a counter-notice under s. 92, it is not necessary that there should be a formal notice by the company under s. 18, before summoning a jury under s. 23; but under s. 21, the company must give a reasonable opportunity to the landowner to agree with them before causing a jury to be summoned. *Schwinge* v. *London and Blackwall Ry.*, 3 Sm. & G. 30; 24 L. J., Ch. 405; 1 Jur. (N.S.) 368; 3 Eq. R. 536; 3 W. R. 260.

Held, also, that the opportunity offered by a subsequent proposal to treat for the purchase of the whole was such a reasonable notice as justified the company giving a notice of summoning a jury. *Ib.*

Second Notice.]—A., having given notice to a railway company that his premises had been injuriously affected by the execution of their works, and that he demanded compensation and an assessment before a jury, the company issued their warrant, and a jury was summoned, who found that the claimant was not entitled to any compensation. He thereupon obtained a rule to quash the inquisition and the verdict and judgment thereon, and gave the company a fresh notice, and the company not issuing another warrant, he brought an action:—Held, that the original warrant remaining unimpeached, the sheriff was bound to go on under it, by summoning a fresh jury, and that the company was in no default. *Horrocks* v. *Metropolitan Ry.*, 19 C. B. (N.S.) 139.

—— **Special Jury.**]—The service of a notice of an intention to try by a special jury under s. 54, is not a waiver of a notice previously given under s. 68, so as to entitle the company to an extension of the period of twenty-one days for issuing their warrant. *Glyn* v. *Aberdare Valley Ry.*, 6 C. B. (N.S.) 359; 28 L. J., C. P. 271; 5 Jur. (N.S.) 1011.

Company not Precluded from Questioning Right to Recover.]—By summoning a jury to assess the amount of compensation claimed by a party under s. 68, the company is not precluded from questioning the right of the claimant to any compensation whatever. *East and West India Docks Co.* v. *Gattke*, 3 Macn. & G. 155; 6 Railw. Cas. 371; 20 L. J., Ch. 217; 15 Jur. 621.

Land how described in Precept.]—When a company empowered by parliament has given notice to an owner of land to treat for the purchase of a part of it, but the owner and the company cannot agree upon the terms, and the company, therefore, issue a precept to the sheriff to summon a jury to assess the value; the part of the land which is described in the precept as being that of which the jury are to assess the value, must be neither less nor more than that for the purchase of which the owner has already been required by the notice to treat. *Stone* v. *Commercial Ry.*, 4 Myl. & C. 122; 1 Railw. Cas. 375; 3 Jur. 946.

Form of Warrant to Jury—Notice and Counter-notice.]—The Great Eastern Railway Act, 1882, contained a clause common to most railway acts of recent years, providing that, notwithstanding s. 92 of the Lands Clauses Act, the company might take a portion of the lands, buildings and manufactories in the schedule without being compelled to take the whole, "if such portion can, in the judgment of the jury, arbitrators, or other authority assessing or determining the compensation under that act, be severed from such properties without material detriment thereto." The company gave to the plaintiffs the usual notice to treat for a portion of the premises occupied by them as a confectionery manufactory. The plaintiffs gave a counter-notice requiring the company to take the whole. The company issued a warrant to the sheriff to summon a jury to determine the amount of compensation to be paid by them for the portion comprised in their original notice. The plaintiffs gave the company notice that they should raise the question whether that portion could be severed without material detriment to the property. A dispute having arisen whether in this state of things the company would be bound to take the whole if the jury decided against them on the question of severance, the plaintiffs brought an action and moved for an injunction to restrain the company from proceeding further on their warrant, unless and until they should have consented to take the whole of the property if the jury decided the portion could not be severed without material detriment:—Held, that the company could not be deprived of their right, if the jury decided against them, to abandon their notice to treat altogether, but that the warrant should have raised two issues: (1) whether the portion could be severed without serious detriment to the property; (2) if so, the amount of compensation to be paid by the company, including damage for severance. *Morrison* v. *G. E. Ry.*, 53 L. T. 384.

Semble, where a valid notice has been given to take part of a house or manufactory, and on that a valid counter-notice has been given to take the whole, the notice and counter-notice will be treated as constituting one notice, for the purpose of enabling the jury to assess the value of the property forming the subject-matter of the notice and counter-notice. *Pinchin* v. *London and Blackwall Ry.*, 5 De G. M. & G. 851; 24 L. J., Ch. 417; 1 Jur. (N.S.) 241; 3 Eq. R. 433; 3 W. R. 125.

—— **Amount must not be ascertained by several Juries.**]—Where, under 57 Geo. 3, c. xxix., notice had been served on the owners in fee of four houses requiring them to treat for the sale to the commissioners of sewers, the commissioners will not be allowed to summon a jury to assess the value of one of the houses separately. *Ecclesiastical Commissioners* v. *Sewers Commissioners*, 14 Ch. D. 305; 28 W. R. 824.

—— **Where there are several Claimants or Different Interests.**]—Under the London (City)

Improvement Acts the corporation is authorised to take certain lands, and the acts provide that every person claiming compensation shall deliver a written account of his claim, and that, in the event of the corporation and the claimant not coming to an agreement, the lord mayor shall, in every such case, issue his warrant to the sheriffs to summon a jury to assess the compensation to be paid for either the entirety of the lands taken, or any share, estate or interest therein, or charge thereon, "provided that in such inquiry the persons claiming compensation shall always be deemed to be the plaintiffs, and entitled to the same rights and privileges as plaintiffs in actions are entitled to." The lessee of two houses had granted several underleases of parts thereof, and the under-lessees had again granted inferior interests. The lord mayor issued a warrant to the sheriffs to summon a jury to assess the compensation payable to the lessee and under-lessees, who were all named together in the warrant:—Held, that each claimant of a separate interest was entitled to have his compensation assessed separately from the claims of any other claimant; and that as this could not be done on the warrant issued, the court would restrain the corporation from proceeding upon it. *Abrahams* v. *London Corporation*, 37 L. J., Ch. 732; L. R. 6 Eq. 625; 18 L. T. 811.

But where under the same acts a person has several distinct interests in one property, or in several distinct properties, taken under the powers of the act, he is not entitled to object to having the compensation for all such interests assessed by one jury and in one trial. *Starr* v. *London Corporation*, L. R. 7 Eq. 236; 20 L. T. 937.

—— **In whose Names.**]—By a local drainage act the lords or ladies of three manors (or, in his, her or their absence, their agents, appointed by writing under his, her or their hands for each of the manors, and which appointments may be made according to a form given in a schedule, or as near thereto as circumstances will admit) were appointed commissioners for executing the act. No person shall be capable of acting as a commissioner, or as an agent of a commissioner, until he shall have made a declaration in the words or to the effect set forth in the schedule. In case any commissioner shall act before he shall have made the declaration, he shall forfeit 50*l*. No act of the commissioners shall be valid, unless at a meeting to be holden by virtue of the act. The commissioners were empowered to take lands for the purposes of the act; and the sections for that purpose were similar to those contained in the 8 & 9 Vict. c. 18, subsequently passed. The three lords of the manors separately appointed the defendants their agents, not having previously made the declaration required. The defendants required to take a certain quantity of the plaintiff's land. They gave the plaintiff a notice in writing, as required by the act. The plaintiff refusing to treat, they issued a warrant to the sheriff to summon a jury to assess the sum to be paid to him for the purchase of the land. The notice and warrant were in the defendants' names as commissioners. The jury assessed the price. The plaintiff refusing to receive the price, the defendants paid it into a bank, under the authority of the act enabling them so to do, and entered on the land. In an action against them for so doing:—Held, first, that the defendants, by the appointment, were themselves commissioners under the local act; and that the notice and warrant were properly issued in their names. *Ostler* v. *Cooke*, 18 Q. B. 831; 22 L. J., Q. B. 71; 17 Jur. 370—Ex. Ch.

Held, secondly, that the lords of the manors, in appointing the defendants to be their agents, did not act as commissioners, and therefore it was not necessary that they should have made the declaration required, and that, at any rate, the omission would not make the appointments void. *Ib.*

Postponement of Execution of Precept.]—A precept having, at the instance of the corporation of London, issued under an improvement act, to the recorder, as judge of the Mayor's Court, to issue his warrant to summon a jury for three days certain, to assess compensation for land required by the corporation, which the owner disputed their right to take, the recorder, after a postponement by consent until after the day named, made an order, at the instance of the owner of the land, further postponing the execution of the precept until a more distant day; prior to which the corporation applied, either for a mandamus to the recorder to execute the precept, or for a certiorari to bring up his order for postponement, for the purpose of its being quashed:—Held, first, that as the day named in the precept had passed, a certiorari was the proper remedy. *Galloway* v. *London Corporation*, 12 Jur. (N.S.) 182.

Held, secondly, that the order for postponement was bad, as the recorder's duty was to execute the precept, and he had no power to put off its execution. *Ib.*

Reasonable Time.]—The authorities of the city of London, seeking to take property under powers given by 10 & 11 Vict. c. cclxxx., respecting which they have given notice to treat, are bound to summon a jury within a reasonable time after they have received particulars of the claim. Nor is it any reason for refusing or delaying to do so, that the only interest in the lands sought to be taken is a residue of a few months in an unexpired term. *Reg.* v. *London Corporation, Mathew, Ex parte*, 16 L. T. 673.

iv. *Jurisdiction of Jury.*

Locality of Lands.]—A jury of a city awarded compensation to a landowner, in respect of the works of a railway company, by which he alleged that his land was injuriously affected. The land was divided from the railway works by a river. The land was in the city; the works were not. The mode in which the works injuriously affected the land was, that they obstructed the access to a ferry over the river, and appurtenant to the land:—Held, that as the land lay in the city, the inquisition was rightly taken there. *Reg.* v. *G. N. Ry.*, 14 Q. B. 25; 6 Railw. Cas. 246; 19 L. J., Q. B. 25; 14 Jur. 128.

Claim over £50.]—A claim for compensation is properly submitted to a jury whenever the amount claimed exceeds 50*l*. *Read* v. *Victoria and Pimlico Ry.*, 1 H. & C. 826; 32 L. J., Ex. 167; 9 Jur. (N.S.) 1061; 11 W. R. 1032.

Words of Warrant—Damage (if any).]—By a railway act for settling differences between a company and owners of land, the company should issue a warrant commanding the sheriff to empannel a jury, which jury should "inquire

of, assess and give a verdict for the sum of money to be paid, by way of satisfaction or compensation for the damages sustained" from the company's works. It also provided that no proceedings had in pursuance of the act should be quashed or vacated for want of form, or removed by certiorari. The company issued a warrant to the sheriff, commanding him to empannel a jury "for the purpose of inquiring of, assessing and giving a verdict for the sum of money (if any) to be paid to C., by way of satisfaction or compensation for the damages (if any) which shall have been done." The jury found that C. "had not sustained any damage; therefore, it was considered that no damages or sum of money be assessed":—Held, first, that the jury, even though the words "if any" had not been in the warrant, would still have been authorised to find that there was no damage; and consequently, secondly, that the words in the warrant did not vary the duty imposed upon the jury, or prevent the warrant from being in pursuance of the act; and therefore, thirdly, that the proceedings were within the jurisdiction conferred by the act, and no certiorari lay. *Reg.* v. *Lancaster and Preston Junction Ry.*, 6 Q. B. 759; 3 Railw. Cas. 724; 14 L. J., Q. B. 84; 9 Jur. 303.

Partial Excess of—Certiorari.]—But where a jury awarded not only the purchase-money to be paid for land required by a railway company, and compensation for severance, but also an additional sum, which appeared to be given in respect of expense to be incurred by the landowner in building a bridge between the severed portions:—Held, that as to the last-mentioned item, there was excess of jurisdiction; because it was for the justices, under ss. 68, 69 of the Lands Clauses Act, to enforce the making of a proper communication between the severed parts of the land, at the expense of the company; and that in consequence of such partial excess of jurisdiction, a certiorari might issue, at the instance of the company, to remove the whole proceedings, although the right to a certiorari was taken away. *Reg.* v. *South Wales Ry.*, 13 Q. B. 988; 6 Railw. Cas. 197; 18 L. J., Q. B. 310; 13 Jur. 1095.

Question of Title—Prohibition.]—Under 9 & 10 Vict. c. 38, for making Battersea Park, the commissioners of woods and forests gave notice to C. that they required three pieces of land described in the schedule to the act as his property and in his occupation. There being a dispute as to the amount of compensation, the commissioners issued their warrant for summoning a jury to ascertain what recompense should be made to C. for the value of the lands therein mentioned (describing them fully as in the schedule), and of the estate and interest of C. therein. By s. 27, the jury is to assess the value of the fee-simple, and then to apportion the values of the respective interests therein; and by s. 45, persons in possession are to be deemed entitled until the contrary is shown. At the trial, the claimant called several witnesses to the value of the land, who assessed it at 7,000*l.* On the part of the commissioners no witness was called, but an adverse right to part of the land was set up, as existing either in the Crown or the city of London, because it was situated between high and low water marks of the river Thames. The jury was directed to estimate not simply the value of the land taken and described in the notice and warrant, but the value of the land and of the claimant's estate and interest in it with reference to the question of his title to the part to which it was suggested he was not entitled. The jury, under these circumstances, gave their verdict for 750*l.*, which was the proved value of the residue only of the land:—Held, that the duty of the jury was only to estimate the value of the property taken, and the estate and interest if it appeared to be divided among several persons, and that they had no power to decide whether the title was in the claimant; and a prohibition to restrain the recording of the verdict was granted. *Chabot* v. *Morpeth (Lord)*, 15 Q. B. 446; 17 L. J., Q. B. 336; 12 Jur. 1023.

Sect. 79 of the Lands Clauses Act contains only a direction to the Court of Chancery, and is not intended to guide a jury upon the trial of an issue. *Sunderland Freemen and Stallingers, Ex parte*, 1 Drew. 184; 16 Jur. 370.

House within Fifty Feet of Railway.]—By a railway act it was enacted, that if any house which shall be situated within fifty feet from the railway shall be deteriorated in value, and the owner shall require the company to purchase the same, it shall be lawful for them to treat for such purpose or for the amount of compensation to be paid for damage, and, in case of disagreement, the amount of compensation to be settled by a jury, provided that no party shall be entitled to receive compensation unless the jury shall determine that the property has been deteriorated. A house, of which a very large proportion was within fifty feet of the railway, was required by the company. The owner of the house sent a precept to the sheriff, under the provisions of one of the company's acts, describing his house as within fifty feet of the railway, and requiring him to summon a jury to determine whether his house was deteriorated and whether he was entitled to have compensation made, and, if so, then to assess the amount. The sheriff summoned a jury accordingly, and on its appearing that part of the house was beyond the fifty feet, refused to hear further evidence, and directed the jury to find that the claimant was not entitled to compensation:—Held, although the precept seemed to refer to the jury the question whether the house was within the fifty feet, and the jury had no jurisdiction to determine anything but the question of deterioration and the amount of compensation, that, notwithstanding the question so improperly raised by the precept, the claimant was entitled to a mandamus directing the sheriff to execute the precept, so far as it was properly conceived. *Walker* v. *London and Blackwall Ry.*, 3 Q. B. 744; 3 G. & D. 549; 3 Railw. Cas. 396; 12 L. J., Q. B. 88; 7 Jur. 323.

Inquiry as to Legal Rights.]—A jury summoned to assess the compensation due to a claimant for lands injuriously affected by the works of a public company, has no jurisdiction to inquire into the legal rights of the claimant. The only question the jury has to determine is whether the lands have been injuriously affected; their jurisdiction is limited to assessing the amount of compensation. *Horrocks* v. *Metropolitan Ry.*, 4 B. & S. 315; 32 L. J., Q. B. 367; 10 Jur. (N.S.) 204; 8 L. T. 663; 11 W. R. 910. S. P., *Reg.* v. *L. & N. W. Ry.*, 3 El. & Bl. 443; 23 L. J., Q. B. 185; 18 Jur. 993.

A jury has no jurisdiction to try whether the

claimant is entitled to the interest he claims, but only to assess the value of the interest claimed. *Brandon* v. *Brandon*, 2 Dr. & Sm. 305; 34 L. J., Ch. 333; 11 Jur. (N.S.) 30; 11 L. T. 658; 13 W. R. 251.

A jury cannot determine what interest a claimant has, but can only determine the value of the interest he claims. *Cooper, Ex parte, North London Ry., In re*, 2 Drew. & Sm. 312; 34 L. J., Ch. 373; 11 Jur. (N.S.) 103; 11 L. T. 661; 13 W. R. 364.

Construction of Act.]—The jury have jurisdiction to construe the act upon the point whether the claim made is within its provisions. *East and West India Docks* v. *Gattke*, 3 Mac. & G. 155; 6 Railw. Cas. 371; 20 L. J., Ch. 217; 15 Jur. 261.

Directing Works.]—An act directed a compensation jury to assess the sum to be paid for the lands, or the recompense to be made for damages or losses sustained by cutting lands, &c.; a jury having found that 56*l.* was the proper sum to be paid for the land to be purchased, and for the recompense to the owner for the damage he might sustain, also directed the trustees to erect a hedge on the owner's land at their own expense:—Held, that, as it did not appear that less compensation-money was awarded on that account, the inquisition was not void. *Reg.* v. *South Holland Drainage Trustees*, 1 P. & D. 79; 8 A. & E. 429; 8 L. J., Q. B. 64.

Where taking temporary.] — The 43 Geo. 3, c. 55, s. 10, enabled a jury to assess compensation to the owner or person interested in land, which was taken possession of by government; which compensation was to be made "for the possession or use thereof," during the time for which the same should be required for the public service:—Held, that the assessment of a compensation only in gross, and without reference to time, as by an annual rent, was bad, because of the uncertainty of the period for which the land would be required, of which no probable average estimate could be formed pending the exigency. *Bingham* v. *Serle*, 5 East, 534; 2 Smith, 129.

Parties—Mortgagees—Mortgaged Property.]—Mortgagees of lands, compulsorily taken by a railway company, are entitled to be parties to an assessment of the value, and an inquiry before a jury, taken as between the company and the mortgagors (who were in occupation), will not bind the mortgagees. *Martin* v. *L. C. & D. Ry.*, 35 L. J., Ch. 795; L. R. 1 Ch. 501; 12 Jur. (N.S.) 775; 13 L. T. 355; 14 W. R. 24.

v. *Verdict.*

Not Conclusive as to Right to Recover.]—In an action on a verdict and judgment obtained in an inquisition before a sheriff's jury, the inquisition is not conclusive evidence that the claimant is entitled to compensation. *Chapman* v. *Monmouthshire Ry. and Canal Co.*, 2 H. & N. 267; 27 L. J., Ex. 97.

After compensation awarded by a jury, the party against whom such compensation has been adjudged, may, nevertheless, in an action against him for the amount and costs, plead that the lands in respect of which the compensation was allotted were not injuriously affected. *Read* v. *Victoria and Pimlico Ry.*, 1 H. & C. 826; 32 L. J., Ex. 167; 9 Jur. (N.S.) 1061; 11 W. R. 1032.

By a canal act, commissioners were appointed for carrying out the purposes of the act, who were directed, in case of a dispute between them and the proprietors of land adjoining the canal, concerning the amount of compensation to be paid to the latter for damages sustained by the execution of the powers of the act to take measures for summoning a jury, for whose verdict as to the amount of compensation they should give judgment. It was then declared that the verdict of the jury and the judgment of the commissioners should be binding and conclusive to all intents and purposes:—Held, that the verdict of the jury was conclusive only as to the amount, and not as to the right of the claimant to compensation, which might be elsewhere contested. *Barber* v. *Nottingham and Grantham Ry.*, 15 C. B. (N.S.) 726; 33 L. J., C. P. 193; 10 Jur. (N.S.) 260; 9 L. T. 829; 12 W. R. 376.

Conclusive as to Amount.] — A declaration stated that the plaintiff was possessed of a tanyard and premises, and that the same had been injuriously affected by the execution of works authorised by an act of a railway company, and set out the warrant to the sheriff and the inquisition before him, under s. 68 of the Lands Clauses Act, 1845, and that the jury settled the amount of the compensation, and the sheriff gave judgment thereupon. Pleas, that the tanyard and premises were not injuriously affected, that the plaintiff was not entitled to compensation; and that the claim made by the plaintiff was in respect of the interruption of the flow of water, and that he was not entitled, as of right, to the flow and use of the water as claimed by him. After verdict for him:—Held, that the tanyard and premises having been injuriously affected to some extent, the company could not dispute the amount of compensation awarded by the jury, and therefore the pleas were bad. *Mortimer* v. *South Wales Ry.*, 1 El. & El. 375; 28 L. J., Q. B. 129; 5 Jur. (N.S.) 784; 7 W. R. 292. *And see preceding case.*

Separate Assessments.]—In an action by the plaintiff to recover the amount assessed by a jury for the purchase of a house required by the company, and for compensation, the declaration, after stating all the necessary facts preceding the holding of the inquisition, to entitle the plaintiff to the amount, alleged that the jury found that the plaintiff's house was deteriorated in value by the construction of the railway, and gave a verdict for 250*l.* to be paid for the purchase of his interest, and also by way of compensation for damage, but that the company had refused to pay this sum. Plea, that at the inquisition the plaintiff adduced evidence not only of damage in respect of goodwill, but also in respect of damage to the dwelling-house, by reason of the construction of the railway, and that the verdict proceeded in respect of both classes of damage, whereby the inquisition was void:—Held, that the mere fact of the reception of evidence in respect, first, of the purchase of the house; secondly, of damage to the goodwill; and, thirdly, of damage by reason of the construction of the railway, did not vitiate the verdict, because such evidence of damage by the construction of the railway might have been given to show the deterioration of the house which was necessary to give jurisdiction to the sheriff and jury. *Corrigall* v. *London and Blackwall Ry.*, 3 Railw. Cas. 411; 5 Man. & G. 219; 6 Scott (N.R.) 241; 2 D. (N.S.) 851; 12 L. J., C. P. 209.

Held, also that the statute was directory only,

in requiring a separate assessment of damage in respect of the value and of loss sustained, and not compulsory; and that the general finding of the jury was therefore good. *Ib.*

A dock act provided, "that if the dock company cannot agree with any party for the purchase of lands, a jury shall be summoned who shall deliver their verdict for the sum of money to be paid for the purchase of the lands required; and also the sum of money to be paid for the injury done to the lands of such party by the severance of such lands from the lands required; and also the sum of money to be paid by way of compensation for the damage occasioned to any such lands by the execution of the works, whether for damage sustained before the inquiry or for future damage, either temporary or permanent; the sums of money to be paid for the injury done by severance, or by way of compensation for any such damage, to be assessed separately from the value of the lands." A jury assessed compensation as follows:—"400*l.* for the purchase of J.'s interest in his brewhouse (the lands required); 300*l.* as a compensation for the damage which he will sustain by reason of his having to give up his premises as a brewer until he can obtain suitable premises in which to carry on his trade as a brewer":—Held, that the latter part of the finding of the jury was warranted by the authority given them to award the sum to be paid by way of compensation for the damage occasioned to any lands by the execution of the works. *Jubb* or *Reg.* v. *Hull Dock Co.*, 9 Q. B. 443; 3 Railw. Cas. 795; 15 L. J., Q. B. 403; 11 Jur. 15.

Where an assessment of compensation had been made to a claimant under 3 & 4 Will. 4, c. xlvi. (Greenwich Railway Act), in one entire sum, and he was possessed of a leasehold interest as well as other subjects of compensation, the court refused an application on behalf of the company for another assessment to be made, on the ground that as the value of the leasehold property was not assessed separately according to the act, it could not be known what would be the proper ad valorem stamp duty to be affixed to the deed of assignment; the court saying that the difficulty would be obviated by putting on the deed a stamp applicable to the whole sum assessed, and reciting all the circumstances of the case. *London and Greenwich Ry., In re*, 2 A. & E. 678; 4 N. & M. 458; 1 H. & W. 81; 4 L. J., K. B. 103.

Where a verdict was for "severance and level crossing," but without distinguishing how much was for severance and how much for level crossing, it being impossible to reduce the verdict quoad the level crossing alone, it was set aside in toto. *Caledonian Ry.* v. *Ogilvy*, 2 Macq. H. L. 229.

Lands not specifically Described.]—Commissioners were empowered by a local drainage act to take lands for the purposes of the act, and the sections for this purpose were similar to those contained in the Lands Clauses Act, 1845. The commissioners required three acres, one rood, twenty-five perches of the plaintiff's land. They gave him notice in writing, describing by metes and bounds the specific acres, roods and perches, and containing the particulars required by the act. The plaintiff refusing to treat, they issued a warrant to the sheriff to summon a jury to assess the sum to be paid to him for the purchase, but the warrant did not recite or refer to the notice, and did not describe what three acres, one rood, twenty-five perches were required. The plaintiff had two hundred acres of land in the district of the commissioners. A jury assessed the price of the three acres, one rood, twenty-five perches pointed out to them, which were in fact the same land described in the notice. The inquisition recited the warrant but not the notice, and did not show specifically in respect of which three acres, one rood, twenty-five perches of the plaintiff's land the price was assessed. The plaintiff refusing to receive the price, the commissioners paid it into a bank as the act required, and entered on the land. In an action against them for so doing:—Held, that the inquisition was not void because it did not show specifically in respect of which three acres, one rood, twenty-five perches of the plaintiff's land the price was assessed; and it was sufficient that in fact the land decribed in it was the same as that shown to the jury. *Ostler* v. *Cooke*, 18 Q. B. 831; 22 L. J., Q. B. 71; 17 Jur. 370—Ex. Ch.

Several Owners.]—Where a jury is empannelled under the General Turnpike Act (3 Geo. 4, c. 126) to assess the value of the land taken by the trustees belonging to B., C., D. and E. respectively, who are separately interested as lessees, the jury must find, and the inquisition must specify, the sum to which each is entitled. *Rex* v. *Norwich and Watton Road Trustees*, 1 N. & P. 32; 5 A. & E. 563; 2 H. & W. 385; 6 L. J., K. B. 41.

A defect in the inquisition cannot be remedied by any subsequent proceedings. *Ib.*

Damage awarded contingently.]—Where a jury returned a verdict upon a claim for compensation in respect of an obstruction of a right of way, negativing the evidence of the right, and therefore finding that the claimant had sustained no damage, but awarded contingently 150*l.* for compensation in case they were compelled to assume that the claimant was entitled to the right of way:—Held, that the prior part of the finding could not be rejected as surplusage, so as to make it a verdict for 150*l.* *Reg.* v. *L. & N. W. Ry.*, 3 El. & Bl. 443; 23 L. J., Q. B. 185; 18 Jur. 993.

What must be Stated—Subscription of Capital.]—The Bristol and Exeter Railway Act (6 & 7 Will. 4, c. xxvi.), s. 25, enabled the company, in case any person whose lands should be required for the purpose of the act, should, for twenty-one days after notice in writing given to him, neglect or refuse to treat, or should not agree with the company for the sale of his interest, to issue a warrant under their common seal, or under the hands of three, at least, of the directors, to the sheriff of the county in which the lands should be, commanding him to summon and return a jury, who shall inquire of, assess, and give the amount of money to be paid for the purchase of such lands, and for compensation for damages thereto; and that the sheriff should accordingly give judgment for such purchase-money, which should be binding and conclusive upon all persons, fourteen days' notice being given of the time and place of the inquiry. A subsequent clause enacted, that the whole of the sum therein mentioned as the probable expenses of making the railway, should be subscribed for before any of the powers given by the act, in relation to the compulsory taking of land for the purpose of the railway, should be put in force. An inquisition recited, that notice had been given

to the party that his lands were required by the company for the purposes of the act, and that he had not, within twenty-one days afterwards, agreed with the company for the sale of them; and also, that fourteen days' notice had been given of the time and place of the inquiry before the sheriff:—Held, in ejectment by this party against the company for these lands, subsequently taken by them under the act, that the inquisition was sufficient in form, and that it need not set forth that the whole capital had been subscribed; and that, if this was the fact it should come by way of answer from the plaintiff. *Doe* d. *Payne* v. *Bristol and Exeter Ry.*, 6 M. & W. 320; 9 L. J., Ex. 232.

—— **Refusal to Treat.**]—By a local act, trustees were authorised to take lands for the improvement of a harbour, and in case of disagreement with the landowner as to the price to be paid him, or of his refusal to treat, to direct a sheriff to summon a jury, by whom the price was to be assessed. If the jury gave a greater sum than that offered by the trustees, or the same sum, they were to pay all the costs; if a less sum, the costs to be paid equally by both parties; and in the former event to be recovered by a distress warrant from a magistrate:—Held, that it belonged to the trustees to have the inquisition properly drawn up, and that therefore they could not object to the sum awarded by it, or have it brought up by certiorari to quash it, on the ground that it did not state the disagreement, or the refusal to treat, so as to show that the jury had jurisdiction, and that it did not state the proportion of the sum assessed to the sum offered, so as to ascertain which party was to pay the costs. *Reg.* v. *Swansea Harbour Trustees*, 1 P. & D. 512; 8 A. & E. 439; 8 L. J., Q. B. 69.

—— **And Service of Notice.**]—An act authorised a railway company to take lands necessary for the works, on payment or tender of such sums of money as should have been agreed upon, or awarded by a jury, and enacted that, if any such person should not agree with the company as to the amount of purchase-money, or should refuse to accept such purchase-money as should be offered by the company, or should, for twenty-one days after notice to him in writing, neglect or refuse to treat, or should not agree with the company for the sale of his interest, the company might issue a warrant to the sheriff to summon a jury to assess the sum to be paid for the purchase of the lands, and the sheriff should give judgment for such sum. The company issued a warrant purporting to be pursuant to the powers given by the act, and requiring the sheriff to summon a jury to assess the value of an owner's land. The jury was summoned, and assessed the value: the owner of the land attending, and protesting that the company had no right to take his lands, as not being described in the schedule to the act. An inquisition was recorded, purporting to be taken, "pursuant to the act, on the oaths of jurors duly empannelled," in pursuance of the warrant to the inquisition annexed, who assessed the sum to be paid for the property particularised in the warrant, and authorised by the act to be taken for the railway; whereupon the sheriff, in pursuance of the act, gave judgment for that sum. Neither the warrant nor inquisition stated that the owner had refused to treat, or had not agreed with the company, for the sale of his land, nor that the company had served on him the notice required by the act to be given; but it appeared aliunde that he did not agree with the company, and that he had received the requisite notices:—Held, first, that sufficient facts were stated in the inquisition and warrant to show the jurisdiction of the sheriff and jury. *Taylor* v. *Clemson*, 11 Cl. & F. 610; 8 Jur. 833. Affirming 3 Railw. Cas. 65; 2 G. & D. 346; 2 Q. B. 978; 11 L. J., Ex. 447—Ex. Ch.

Held, secondly, that the empannelling a jury, and an assessment by them, being facts inconsistent with an agreement, necessarily implied non-agreement; and no inquisition is defective for not stating a fact that is necessarily implied by those that are stated. *Ib.*

Held, thirdly, that notice was waived by the parties appearing not protesting for want of notice. *Ib.*

Verdict by Consent.]—When a jury is summoned to ascertain the value of an interest claimed, and it is agreed by counsel that a verdict shall be taken for a fixed sum, that only represents the sum claimed without reference to the right to the interest, and such sum includes damage for severance, loss of trade, &c. *Hayne, In re*, 12 L. T. 200; 13 W. R. 492.

Interest Payable.]—The 8 & 9 Vict. c. 18, s. 85, makes 5*l.* per cent. interest payable on a sum recovered, under s. 68, for neglecting to issue a warrant to the sheriff within twenty-one days after notice that the proprietor wishes to have the question of compensation settled by a jury. *Aberdare Ry., In re*, 8 W. R. 603.

A sheriff's jury, in awarding compensation to a landowner against a railway company in 1864, found that so far back as 1852 he was entitled to 5,272*l.*, saying nothing as to interest. The order of the court below, adding to the principal twelve years' interest, was reversed. *Caledonian Ry.* v. *Carmichael*, L. R. 2 H. L. (Sc.) 56.

vi. *Setting aside Verdict.*

Tribunal not qualified.]—The court will not set aside a verdict on an inquisition to determine the compensation for land taken on the ground that some of the jurymen were not qualified to act as jurors, the remedy in such case being by challenge. *Chelsea Waterworks Co., In re*, 10 Ex. 731; 3 C. L. R. 329; 24 L. J., Ex. 79; 1 Jur. (N.S.) 143; 3 W. R. 174.

When the parties in a claim for compensation for lands appear and take the verdict of a jury, and at the time make no objection to the supposed defect in the constitution of the tribunal, though they had full knowledge of it, the court will not grant a certiorari to bring up the inquisition, in order that the same may be quashed on the ground of such defect, but will leave the parties objecting to take advantage of it in some other proceeding. *Emanuel Hospital* v. *Metropolitan District Ry.*, 19 L. T. 692.

Length of Notice—Waiver.]—Where a compensation jury can only be empannelled after forty days' notice in writing to the party interested, it is not competent to him, after expressly waiving his right to notice, to apply to quash the inquisition, on the ground of its not setting out such notice, or the waiver of it. *Reg.* v. *South Holland Drainage Trustees*, 1 P. & D. 79; 8 A. & E. 429; 8 L. J., Q. B. 64.

Error apparent — Excess of Jurisdiction — Misdirection.]—The court will not grant a certiorari to remove an inquisition to assess the value of land compulsorily taken, unless for error apparent on the face of the inquisition, or for clear excess of jurisdiction. Misdirection of the judge, or a verdict against evidence, is not sufficient. *Reg.* v. *Halifax Local Board*, 14 L. T. 447.

When a jury has taken into consideration, in awarding compensation, one claim, among others, as to which the jury had no jurisdiction, a certiorari lies, although such excess of jurisdiction does not appear upon the face of the proceedings, and such excess of jurisdiction may be shown upon affidavit. *Penny* v. *S. E. Ry.*, 7 El. & Bl. 660 ; 26 L. J., Q. B. 225 ; 3 Jur. (N.S.) 957 ; 5 W. R. 612.

Under the Railway and Lands Clauses Acts, where the sheriff and jury in awarding damages go beyond their authority, the power of setting matters right is not excluded. *Caledonian Ry.* v. *Ogilvy*, 2 Macq. H. L. 229.

Money spent bonâ fide on land is not conclusive evidence as to the value of the land ; it is only evidence to be taken into consideration in ascertaining the value, and may be regarded or disregarded when the land is taken compulsorily. At the hearing of an inquisition held for the purposes of ascertaining and determining the value of the land taken under the Lands Clauses Act, 1845, the high bailiff used somewhat loose language, which might lead one to infer that he told the jury to disregard the amount spent bonâ fide by the claimants on the land and premises in question :—Held, that the fact was not sufficient in itself to entitle the claimants to a writ of certiorari to bring up the inquisition that it may be quashed, inasmuch as the jury had had all the facts before them, and had had an opportunity of viewing the land, before giving their verdict. *Streatham Estates Co.* v. *Public Works Commissioners*, 52 J. P. 615.

The court will not grant a rule for a second precept for summoning a jury to assess compensation for damages sustained by an occupier of lands by reason of the carrying into execution of a railway act, where another inquisition had been already taken, the verdict and judgment on which were rendered conclusive, and where the certiorari was taken away, even though it was sworn that evidence had been improperly rejected. and that the amount of compensation allowed by the first inquisition was greatly inadequate. *Reg.* v. *Eastern Counties Ry.*, 2 D. (N.S.) 945 ; 3 Railw. Cas. 466 ; 12 L. J., Q. B. 271 ; 7 Jur. 628.

Against Weight of Evidence.]—Where in an action for compensation in respect of land compulsorily taken for public purposes the jury, after hearing the conflicting evidence of experts as to the existence of payable coal thereunder, assessed damages in respect thereof :—Held. that their verdict, being one which a jury could reasonably find, could not be set aside as against the weight of evidence. *Brown* v. *Railways Commissioner*, 59 L. J., P. C. 62 ; 15 App. Cas. 240 ; 62 L. T. 469—P. C.

There is no rule which imposes upon a plaintiff, in order to sustain such verdict, the burden of proving by costly experiments the mineral contents of his land ; nor does it follow that because a seam of coal is not presently workable at a profit no compensation is to be given for it if it is likely to prove profitable in the future. *Ib.*

Delay in Applying.] — Application having been made to the High Court of Justice for a writ of certiorari, to bring up and quash the proceedings upon an inquisition before the sheriff as to the amount of compensation to be awarded to a claimant under the Lands Clauses Consolidation Act, 1845, on the ground that the jury in assessing the compensation had taken into consideration matters which were not legally the subject of compensation ; it was proved that the applicants for the writ had allowed five months to expire without taking any objection to the proceedings :—Held, that as the time allowed for setting aside an award made under the provisions of the above-mentioned act had expired before the application was made, the writ of certiorari ought not to be granted. *Reg.* v. *Sheward* or *Steward*, 49 L. J., Q. B. 716 ; 9 Q. B. D. 741—C. A. Affirming 42 L. T. 363 ; 28 W. R. 506.

vii. *Recording Verdict.*

Effect of.]—Where a provision similar to s. 50 was introduced into a railway act passed before the Lands Clauses Act, under which the verdict of a compensation jury had never been recorded :—Held, that parol evidence might be given of their finding, and of the grounds on which it proceeded. *Manning* v. *Eastern Counties Ry.*, 12 M. & W. 237 ; 3 Railw. Cas. 637 ; 13 L. J., Ex. 265.

By 9 & 10 Vict. c. 38, authorising the commissioners of woods and forests to form a park at Battersea-fields, they are empowered to take lands for that purpose, and in case of disagreement with the landowner, the value is to be assessed by a jury. By s. 23, after the jury has ascertained the amount, the sheriff shall thereupon order the sum to be paid by the commissioners to the landowner, the verdict or inquisition and order to be final, binding and conclusive. By s. 30, the judgments and verdicts are to be entered in the office of land revenue records and enrolments, and to be afterwards deposited with the clerk of the peace, and to be deemed records. A declaration in prohibition alleged that upon an inquisition taken before the sheriff on a disagreement between plaintiff and the commissioners as to the price to be paid to him for land required, the sheriff had directed the jury to exclude from their valuation all of the land to which the plaintiff's title could be impeached, and had thereby misdirected them as to the proper mode of estimating the amount to be paid ; that the jury gave a verdict for an amount mentioned, and the sheriff gave judgment, and ordered payment of that amount to the plaintiff ; that the commissioners and sheriff were proceeding to enter and record the verdict and judgment, and to use, act upon and make them available ; and the declaration then prayed that the sheriff and commissioners might be prohibited from entering and recording the verdict and judgment, and from further proceeding for the purpose of using. acting upon, or otherwise making them available :—Held, that the declaration was bad, that no excess of jurisdiction was shown, that the verdict and judgment were binding and conclusive, and that the recording them was not a condition precedent to their validity ; that the sheriff, after ordering payment of the sum assessed, was functus officio, and that the payment of the money into the Bank of England was an act belonging to the executive government, and not the subject of prohibition. *Chabot* v. *Morpeth* (*Lord*), 15 Q. B. 446 ; 17 L. J., Q. B. 336 ; 12 Jur. 1023.

Where a company is authorised to purchase land for the purposes of the act, which directs that, in case of differences with the landowners, a compensation jury shall be empannelled, and that the verdict shall be made a record of quarter sessions; if the company takes possession after payment of the sum assessed, no conveyance is necessary, the record of quarter sessions being available as a title. *Bruce* v. *Wilkes*, 3 P. & D. 220; 11 A. & E. 463; 9 L. J., M. C. 43.

viii. *Costs of Inquiry.*

Solicitors and Surveyors.]—A railway act provided for summoning a jury to assess compensation in case of disagreement respecting the purchase of land, and that the party claiming compensation should be the plaintiff, and have all such rights and privileges as plaintiffs in actions are entitled to:—Held, that a claimant was not entitled to the costs of the attorney's letters and attendances, nor to the expenses of plans, &c., paid to surveyors not called as witnesses. *Reg.* v. *Warwickshire* (*Sheriff*), 2 Railw. Cas. 661.

A company for effecting improvements in a town was empowered by statute to take lands, upon giving notice and making compensation, the amount of which compensation, if not agreed upon, was to be ascertained by a jury; and it was provided that in case the jury should assess the damages at more than was offered, the company should pay "the costs of the notices and precepts, and costs of summoning the jury and witnesses, and also of the inquest":—Held, that a party whose property was assessed at more than the sum offered was entitled to his general costs attending the trial, but not to the expenses of surveying. *Rex* v. *York JJ.*, 3 N. & M. 685; 1 A. & E. 828.

Where no Direction as to.]—A private act gave compensation to the owners of land over which a water company laid their works, and also gave them the costs of assessing the compensation by a jury; by a subsequent clause compensation was given to other persons sustaining damage by the works of the company, but nothing was said as to the costs incident to the jury:—Held, that a person who had had compensation assessed by a jury under the latter clause was not entitled to those costs. *Turner*, *Ex parte*, 1 W. W. & H. 305.

Where a local act was silent as to the costs of holding an inquisition for the purpose of assessing compensation against a railway company for taking land:—Held, that the claimant was not entitled to recover them. *Corrigall* v. *London and Blackwall Ry.*, 5 Man. & G. 219; 3 Railw. Cas. 411; 12 L. J., C. P. 209.

Of Trial.]—Where a railway act authorised the company to take lands of individuals, making compensation for the same, and enacted, that if disputes should arise as to the price, the value was to be settled by a jury; and in case the jury should give a greater sum than had been offered by the company, "all the costs of summoning the jury and the expenses of witnesses," were to be defrayed by the company; but if the jury should give the same or less sum than had been offered, one moiety of the costs and expenses was to be defrayed by the party to whom the lands belonged: and a subsequent clause enacted, that the party with whom the company should have any dispute, should enter into a bond to pay his "proportion of the costs and expenses of summoning and returning such jury, and taking such verdict, and of the summoning and attendances of witnesses," in case any part of such costs should fall upon him:—Held, that the words, "the costs of taking such verdict," did not mean the costs of trial; and that the fees of counsel, and the costs of the attorney respecting the preparing for and attendance at the trial, were properly disallowed. *Rex* v. *Gardner*, 1 N. & P. 308; 6 A. & E. 112; W. W. & D. 7; 6 L. J., K. B. 130; 1 Jur. 181.

—— **Of Useless or Abortive Proceedings.**]—Land was taken by a railway company. The company, wishing to take possession, paid a sum of money into the bank under the Lands Clauses Act, s. 85, and proceedings were taken to summon a jury. An agreement was then come to, fixing the price for the land, and the company agreed to pay all such costs, charges and expenses as they were liable to pay under the Lands Clauses Act, or otherwise:—Held, that they were liable to pay the costs of the vendors in the proceedings to summon a jury. *Morris*, *Ex parte*, 40 L. J., Ch. 543; L. R. 12 Eq. 418; 25 L. T. 20; 19 W. R. 943.

An inquisition for assessing compensation under the Lands Clauses Act was removed by certiorari into the queen's bench division, and there quashed, on the ground that the under-sheriff had misdirected the jury. A further inquiry was then held on the same warrant by the sheriff, and compensation was duly awarded to the claimants by the jury:—Held, that the claimants were entitled as well to the costs of and incidental to the abortive inquiry, as to the costs of and incidental to the inquisition which resulted in a good verdict. *Reg.* v. *North London Ry.*, 51 L. J., Q. B. 241; 30 W. R. 272.

—— **Mistake of Sheriff.**]—A jury having been summoned by the sheriff at the instance of a party who claimed compensation for an alleged injury to his premises, the sheriff was of opinion that the claim was not warranted by the act, and dismissed the jury. A mandamus was subsequently made absolute, commanding the sheriff to summon another jury, on the ground that his decision was wrong:—Held, that, the mistake being in the sheriff, the party was not entitled to costs against the company. *Walker* v. *London and Blackwall Ry.*, 7 Jur. 1154.

—— **National Defence Act.**]—A person whose land has been valued by a jury, and sold under the National Defence Act (5 & 6 Vict. c. 94), is not entitled to the expenses and costs which he has necessarily incurred in bringing the matter to trial. *Laws*, *In re*, 1 Ex. 441; 4 D. & L. 688; 17 L. J., Ex. 126.

Previous Offer—Time for.]—In a claim for compensation, the parties to the undertaking must make an offer ten days previously to trial, in order to save half the costs, in the event of the jury giving a less sum than they offered. *Metropolitan Ry.* v. *Turnham*, 14 C. B. (N.S.) 212; 32 L. J., M. C. 249; 8 L. T. 280; 11 W. R. 695.

When lands are taken for, or injuriously affected by the execution of the works of a company, and the party claiming compensation desires to have the amount settled by a jury,

the costs of the inquiry are regulated by s. 51 of the Lands Clauses Act, and the offer of the company may be made when notice of the time and of the place of holding the inquiry is given by them to the party under s. 46, that is, ten days before the inquiry. *Hayward* v. *Metropolitan Ry.*, 4 B. & S. 787 ; 33 L. J., Q. B. 73 ; 10 Jur. (N.S.) 418 ; 9 L. T. 680 ; 12 W. R. 577.

Where, on an inquiry held before the sheriff and a jury, the promoters have offered the same or a less sum than that which the jury awards, unless that offer has been made before the issue of the warrant for summoning a jury, the promoters are not entitled to any costs of the inquiry. *Pearson* v. *G. N. Ry.*, 18 W. R. 259. *See also* infra, col. 1581.

—— **Unconditional.**]—An offer of compensation in respect of lands injuriously affected by the execution of works, must be an unconditional offer of compensation for the injury done, and is bad if it is an offer of a lump sum for compensation and costs. *Balls* v. *Metropolitan Board of Works*, 35 L. J., Q. B. 101 ; L. R. 1 Q. B. 337 ; 12 Jur. (N.S.) 183 ; 13 L. T. 702 ; 14 W. R. 370.

—— **Separate Sums.**]—The promoters may offer separate sums for compensation in respect of property injuriously affected, and for damage to business. *Hayward* v. *Metropolitan Ry.*, 4 B. & S. 787 ; 33 L. J., Q. B. 73 ; 10 Jur. (N.S.) 418 ; 9 L. T. 680 ; 12 W. R. 577.

—— **Amendment.**]—On the 10th of June, H. gave notice to a railway company, claiming compensation for structural damage, and also for loss of business occasioned by the carrying on of the company's works. On the 30th of June the company offered 70*l.* for structural damage and 30*l.* for loss of business. On the same day, this offer being refused, they issued their warrant to summon a jury. On the 2nd of July they made a second offer, viz., 100*l.* for structural damage and 50*l.* for loss of business. This also was declined, and the inquisition was held, and the jury gave 50*l.* for structural damage, and 100*l.* for loss of business :—Held, that the company were not bound by their first offer, but might make an amended offer of a larger amount : and that the jury having given the same sum as the amount of the amended offer, the claimant was not entitled to costs. *Ib.*

By s. 38 of the Lands Clauses Act, 1845, promoters, before issuing their warrant for causing a jury to be summoned in cases of disputed compensation, shall give not less than ten days' notice of their intention to summon a jury to the other party, and in such notice shall state what sum of money they are willing to give for the interest in the lands sought to be purchased from him, and for the damage to be sustained by him by the execution of the works ; and by s. 51, on every such inquiry before a jury where the verdict of the jury shall be given for a greater sum "than the sum previously offered" by the promoters, all the costs of the inquiry shall be borne by the promoters, but if the verdict be given for a less sum, the costs shall be borne equally between the parties in the manner specified in that section. In a proceeding to take and purchase the claimant's lands under the Lands Clauses Act, 1845, the promoters, on the 9th of March, gave him the notice required by s. 38, and stated that they were willing to give him 600*l.* as and for purchase-money and compensation. On the 19th of March the promoters served a second notice upon the claimant that they were willing, and thereby offered to pay 900*l.* as purchase-money and compensation. This notice did not refer to the previous one. Neither offer was accepted by the claimant, and on the 29th of March the promoters issued their warrant for causing a jury to be summoned, who assessed the sum to which the claimant was entitled at 750*l.* :—Held, first, that in cases to which s. 38 was applicable, the words "the sum previously offered" in s. 51 applied only to an offer made under s. 38 ; secondly, that the promoters were not entitled to rely upon their second offer of 900*l.* as an offer made under s. 38, and that the costs of the inquiry must, therefore, be borne by them. *Reg.* v. *Manley Smith*, 53 L. J., Q. B. 115 ; 12 Q. B. D. 481 ; 32 W. R. 275.

—— **Withdrawal of Offer—Acquiescence by Claimants.**] — A notice to treat having been given with reference to the purchase of land for the purposes of street improvements in Sheffield, of which the corporation were the promoters, an offer, which exceeded the amount ultimately awarded by arbitration under the Lands Clauses Act, 1845, was made by the town-clerk on the instructions of some of the members of the improvement sub-committee of the corporation. The offer was rejected, and on the day on which the umpire in the arbitration signified his acceptance of the post it was withdrawn in writing by the town-clerk before it had been brought to the attention of the corporation ; the withdrawal was acquiesced in by the owners of the property :—Held, that the owners were entitled to recover their costs of the arbitration from the corporation under s. 34 of the Lands Clauses Act, 1845. *Foster* v. *Sheffield Corporation*, 14 R. 450 ; 72 L. T. 549 ; 59 J. P. 404—C. A.

—— **Larger Sum Recovered.**]—The costs of any "such inquiry" in s. 32, refer to the inquiry spoken of in the earlier part of s. 51, namely, where the landowner recovers more than the sum offered by the company. *Bray* v. *S. E. Ry.*, 7 D. & L. 307 ; 19 L. J., Q. B. 11.

In an action under 8 & 9 Vict. c. 18, s. 68, to recover compensation in respect of lands damaged or injuriously affected by the execution of the works of a company, the declaration stated that the plaintiff claimed 1,000*l.*, that the company had notice of his claim and offered him 60*l.*, and that a jury awarded him 215*l.* :—Held, that he was entitled to the costs of the inquiry before the sheriff, s. 51, which provides for such costs, being virtually incorporated in s. 68. *S. E. Ry.* v. *Richardson*, 15 C. B. 810 ; 21 L. J., C. P. 122 ; 16 Jur. 151—Ex. Ch.

—— **Section 38 or 68.**]—In a proceeding to purchase under the Lands Clauses Consolidation Act, 1845, certain lands belonging to the claimant which were required by the promoters of a public undertaking, notice was given by the latter to the claimant to treat for the purchase thereof, and negotiations were entered into. Subsequently the promoters gave notice of entering under s. 85, and in accordance with the requirements thereof made a deposit and gave a bond, but did not actually enter on the lands. The claimant refused to refer the question of compensation to arbitration, and required the promoters to give notice within "ten" days.

for the summoning of a jury. An offer was then made by the promoters of a certain sum as compensation, which was declined by the claimant. This offer was not included in the notice of the inquiry as provided in s. 38. The promoters then issued their warrant for summoning a jury, and gave the claimant notice under s. 46 of the inquiry which was subsequently held, and resulted in the compensation being assessed at a less sum than that previously offered:—Held, that the lands had not "been taken" under s. 85; that, as the promoters, notwithstanding they had made a deposit and given a bond, had not actually entered upon the lands, the proceedings were governed by s. 38 and not by s. 68, and that the claimant was entitled to have his costs taxed. *Reg.* v. *Manley Smith*, 67 L. T. 197; 40 W. R. 333; 56 J. P. 729.

No Offer — No Liability.]—Where the promoters have made no offer and are not liable at all for the claim made, the owner of land has no claim to the costs of an inquisition. *Todd* v. *Metropolitan Ry.*, 24 L. T. 435; 19 W. R. 720.

Reviewing Taxation.] — A waterworks act provided for the costs, payable in respect of claims under the act, being taxed and settled by a master of a superior court of law at Westminster, on the principles and according to the rules and on payment of the fees observed and paid on the taxation and settlement of costs in actions. The court refused to review the taxation of these costs by one of its masters, on the ground that the costs were in no sense given by an award of the court, and that the master did not tax the costs in his capacity of officer of the court, but merely as one of a class of persons named in the act of parliament. *Wraithby, In re*, 4 H. & C. 74; 35 L. J., Ex. 60; L. R. 1 Ex. 54; 11 Jur. (N.S.) 954; 13 L. T. 440.

When costs of an inquiry before the sheriff are "settled by one of the masters of the court of queen's bench," under the Lands Clauses Act, 1845, s. 52, the court has no jurisdiction over the taxation on a motion to review. *Owen* v. *L. & N. W. Ry.*, 7 B. & S. 758; 37 L. J., Q. B. 35; L. R. 3 Q. B. 54; 17 L. T. 210; 16 W. R. 125. S. P., *Ross* v. *York, Newcastle and Berwick Ry.*, 5 D. & L. 695; 5 Railw. Cas. 516; 18 L. J., Q. B. 199. *And see next case.*

Enforcing Payment.] — If an inquiry into the compensation due to a claimant for land injuriously affected by a railway company takes place before a jury, and the costs are settled by one of the masters of the queen's bench, the decision of the master, if subject to be reviewed at all, is only subject to the review of that court; and the magistrate, upon an application for a distress-warrant to levy the costs, is bound to consider the decision of the master as final. *Metropolitan Ry.* v. *Turnham*, 14 C. B. (N.S.) 212; 32 L. J., M. C. 249; 8 L. T. 280; 11 W. R. 695.

By a railway act it was provided, that, where a jury shall give a verdict for the same, or a greater sum than shall have been offered by the company, for the purchase of lands, or as compensation for damage, the costs of such inquiry shall be defrayed by the company, and settled and determined by the sheriff; and, in case they are not paid within ten days after demand, a power of distress will be given to recover them. The costs of deducing such title as the company may require to any lands purchased or taken by the company are to be borne by the company, who are to pay the same before entering into possession; or, in case of dispute, are to obtain an order as after-mentioned, and to deposit the amount claimed by the party whose lands are taken. And if the companies and the parties cannot agree as to the amount of the costs, the same shall be ascertained by the court of exchequer, who may order them to be referred to the master for taxation, and such order shall be served on the parties, who shall be at liberty to proceed under the same; and the court may, after taxation, order the amount at which the costs are taxed to be paid. On a rule for a mandamus to the company, commanding them to pay the costs of an assessment for compensation for damage, and the costs of title to lands purchased by the company, in consequence of a notice by the owner that they were damaged by the proximity to the railway, such costs not having been settled by the sheriff:—Held, that a mandamus could not issue, at all events, until after the costs had been ascertained and attempted to be levied in the mode pointed out by the statute. *Reg.* v. *London and Blackwall Ry.*, 3 D. & L. 399; 4 Railw. Cas. 110; 15 L. J., Q. B. 42.

ix. *Enforcing Payment of Amount.*

By Mandamus.]—Where under a compensation clause in a local act a mandamus issued to a company commanding them to issue their warrant for a jury to assess the damages sustained by a party in consequence of the works of the company; and the jury, summoned in obedience to mandamus, having assessed a compensation, and the company refusing to pay the same or the costs:—Held, that a mandamus lay to enforce payment of the compensation, though the statute made the verdict and judgment records of the quarter sessions. *Rex* v. *Nottingham Old Waterworks Co.*, 6 A. & E. 355; 1 N. & P. 480; 6 L. J., K. B. 89.

b. Reference to Arbitration.

i. *Submission.*

Notice to Treat.]—Where land is required for the purposes of a railway company, and the parties agree to refer the amount of compensation to arbitration, it is unnecessary to go through the form of giving notice of a desire to treat for the land, and to have the matter so settled. *Collins* v. *South Staffordshire Ry.*, 7 Ex. 5; 21 L. J., Ex. 247; 16 Jur. 843.

In every such case, the submission by writing under the hand of the secretary or clerk of the company is sufficient. But such a submission is not rendered valid by 8 & 9 Vict. c. 16, s. 97. *Ib.*

Nature of Interest.]—A railway company requiring lands, gave notice to L. and H., parties interested, to treat for their purchase. L. and H. thereupon served the company with a notice that, as trustees of H., they had an estate and interest in the lands, and claimed 3,344*l.* for the same, and desired to have their compensation settled by arbitration, and they appointed T. as their arbitrator. The company nominated their arbitrator, and the arbitrators appointed an umpire, who proceeded with the reference. At

the reference W. appeared, and claimed compensation, alleging that he had an agreement for the renewal of an unexpired lease in the premises :—Held, that the submission was not in compliance with the statute, the claimants not having therein stated the nature of their interest. *North Staffordshire Ry. and Landor, In re*, 6 Railw. Cas. 17 ; 2 Ex. 235 ; 17 L. J., Ex. 350.

Additional.]—Where part of a person's land is taken by a company, and an old approach thereto, not taken, is thereby cut off, an arbitrator has no power to determine as to the future access to the land, and if a power to set out approaches is given by an additioual submission not containing a consent that this additional submission shall be made a rule of court, the court cannot set aside the award on the ground that no approaches are set out, inasmuch as s. 36 authorises the making such submission only a rule of court as is in pursuance of the act, and 9 & 10 Will. 3, c. 15, gives such authority only where the submission contains such consent. *Ware* v. *Regent's Canal Co.*, 9 Ex. 395 ; 7 Railw. Cas. 780 ; 23 L. J., Ex. 145.

Making Submission a Rule of Court.]—The reference to arbitration of a question of disputed compensation pursuant to the Lands Clauses Act, 1845, s. 25, is a "submission to arbitration by consent" within the meaning of the Common Law Procedure Act, 1854, s. 17, and the submission may be a made a rule of court. *Harper, Ex parte*, L. R. 18 Eq. 539 ; 22 W. R. 942.

Semble, that a submission to arbitration under the Lands Clauses Act, 1845, is not a submission by consent within the Common Law Procedure Act, 1854, s. 27. *Harper and G. E. Ry., In re*, 44 L. J., Ch. 507 ; L. R. 20 Eq. 39 ; 32 L. T. 214 ; 23 W. R. 371.

When a submission is made a rule of court under the Lands Clauses Act, s. 36, the court has the same jurisdiction in dealing with it as in the case of submissions under 9 & 10 Will. 3, c. 15, and any application to set it aside must be made within the time thereby limited. *Ib.*

Duration of.]—A submission to arbitration was made by L. and a railway company, to assess the value of land belonging to the former, and required for railway purposes, and to determine what should be paid for damages resulting from making the railway. The submission contained a declaration that the proceedings should be in strict conformity with the provisions of the Lands and Railways Clauses Acts. The arbitrator from time to time enlarged the period for making his award. L. having died, a suit was instituted by the company to set aside the award :—Held, that the submission was not strictly a common-law submission, but that it was the intention of the parties to include in it the provisions of the Lands and Railways Clauses Acts, and that, therefore, the submission did not expire at the death of the landowner. *Caledonian Ry.* v. *Lockhart*, 3 Macq. H. L. 808 ; 6 Jur. (N.S.) 1311 ; 3 L. T. 65 ; 8 W. R. 373.

ii. *Arbitrators and Umpires.*

Appointment.]—A railway company having refused compensation for injury done to the premises of B., he, on the 5th December, served them with a notice requiring them to appoint an arbitrator on their behalf, and stating that it was his intention to appoint M. as his arbitrator, and that if for the space of fourteen days after that notice the company failed to appoint an arbitrator on their behalf, he would appoint M. to act for both parties. The company having refused to refer the matter to arbitration, B., on the 1st January following, served them with a notice which, after reciting that he had appointed M. as his arbitrator, stated that he then appointed M. to act as arbitrator on behalf of both parties. The arbitrator having awarded a sum to be paid to B., the court refused to enforce or set aside the award, intimating their opinion that there was no valid appointment of the arbitrator. *Bradley* v. *L. & N.-W. Ry.*, 5 Ex. 796 ; 1 L. M. & P. 597 ; 20 L. J., Ex. 3.

Where an amount claimed for compensation is not paid or agreed to be paid within twenty-one days, it is the duty of the claimant, before nominating an arbitrator on his behalf, to attempt to procure the appointment of a single arbitrator. *Yates* v. *Blackburn Corporation*, 6 H. & N. 61 ; 29 L. J., Ex. 447.

—— **What Persons.**]—The surveyor of a railway company had in that character treated with a landowner, and offered a price for land required by the company. He was subsequently named by the company, and acted as their arbitrator upon an arbitration under the Lands Clauses Consolidation Act, 1845 :—Held, that he ought not to have been selected as an arbitrator ; but the landowner knowing the fact, and, though protesting against the propriety of the appointment, proceeding with the arbitration, was held to have waived the objection. *Elliott and South Devon Ry., In re*, 2 De G. & Sm. 17 ; 12 Jur. 445.

—— **Effect of.**]—Semble, that a company does not, by nominating, under protest, an arbitrator, in pursuance of the Lands Clauses Act, 1845, admit that the case is one entitling the claimant to any compensation. *Sutton Harbour Improvement Co.* v. *Hitchins*, 1 De G. M. & G. 161 ; 21 L. J., Ch. 73 ; 16 Jur. 70.

Death of.]—By a local act, the undertakers were authorised to make and maintain such navigation, and from time to time to alter the dams and weirs for that purpose ; and to enter and make works upon lands for the purpose of the undertaking, first making satisfaction to the owners as the commissioners under the act should direct. By a subsequent clause, any persons injured by the works were to receive compensation, to be assessed by the commissioners. The commissioners were named in the act, and power given them to appoint successors from time to time. The navigation was made, and, as part of it, a dam across a river was enlarged. Subsequently, all the commissioners died without having appointed successors. The company afterwards raised the dam, to the injury of a millowner below :—Held, by Wightman, Erle, and Crompton, JJ., that the power to alter the dam still existed, even though the millowner should no longer have any means of obtaining compensation, as to which they gave no opinion ; Lord Campbell, C.J., dissenting, holding that the compensation clause having become incapable of execution by extinction of the commissioners, the powers which the act had conferred upon the company to cause injury to other persons could no longer be exercised. *Kennet and Avon Navigation Co.* v. *Witherington*, 18 Q. B. 531 ; 21 L. J., Q. B. 419 ; 16 Jur. 778.

Umpire—Appointment.]—A railway company and a landowner having agreed to settle by arbitration the amount of compensation to be paid to the latter for his land, each appointed an arbitrator, but the arbitrators not agreeing as to the appointment of an umpire, the company applied to the commissioners of railways to appoint one, which they did by a document not under seal, and signed by a person not describing himself as secretary of the board. The umpire awarded a sum as compensation, but did not find whether it was greater or less than the sum offered by the company, and he awarded that the costs of the claimant should be paid according to the provisions of the Lands Clauses Act. A rule having been obtained to set aside his award, on the grounds that the umpire was not legally appointed, and that he ought to have settled the costs of the claimant, the court refused to make the rule absolute, considering the objections too doubtful to determine on motion. *Fooks, Ex parte*, 3 Ex. 728.

A company appointed an arbitrator on the 23rd March, the claimant another on the 6th April. The arbitrators neglected seven days after request by the company, to appoint an umpire; on which the company applied to the railway commissioners under 9 & 10 Vict. c. 105, and they appointed an umpire on 17th May:—Held, that such appointment was in time. *Bradshaw, In re*, 12 Q. B. 562; 17 L. J., Q. B. 362; 12 Jur. 998.

The parties appointed two arbitrators, but they made no award, nor appointed any umpire within twenty-one days after the last appointment, after which time the board of trade appointed an umpire:—Held, that the appointment was valid. *East and West India Docks, In re*, 5 Railw. Cas. 527.

—— **Death before Award—Appointment of Sole Arbitrator—Costs of First Proceedings.**]—Where, in an arbitration under the Lands Clauses Act, 1845, the umpire by whom the question was to be dealt with died, after certain steps had been taken, without making any award, and the parties then by an agreement, which contained no reference to the former proceedings, appointed a "sole arbitrator" who made an award under which the claimant was entitled to costs; such appointment was held to be a continuation of the statutory arbitration, and the claimant was therefore entitled to the costs of the former proceedings. *Reg.* v. *Manley-Smith*, 63 L. J., Q. B. 171; 10 R. 611.

Declarations of.]—An umpire was appointed on the 17th May, and the arbitrators on the 23rd March and 6th April, and made their declarations on the 27th May, before the umpire entered upon matters referred:—Held, that no objection arose from the lateness of these declarations. *Bradshaw, In re*, 12 Q. B. 562; 17 L. J., Q. B. 362; 12 Jur. 998.

If a question of disputed compensation is submitted to arbitration under 8 & 9 Vict. c. 18, s. 25, and an umpire is appointed by the board of trade, the declaration required by s. 33 to be taken and subscribed by such umpire need not be taken and subscribed before a justice of the particular locality in which the lands are situate. *Davies* v. *South Staffordshire Ry.*, 2 L. M. & P. 599; 21 L. J., M. C. 52; 15 Jur. 1133.

When a submission contained other matters than the question of compensation, and was therefore extra the 8 & 9 Vict. c. 18, and it did not distinctly appear that the party applying was ignorant that the declaration required to be made by the arbitrator, the court refused to set aside an award on that ground. *Levick* v. *Epsom and Leatherhead Ry.*, 1 L. T. 60; 8 W. R. 66.

Authority of.]—An arbitrator has no jurisdiction to adjudicate upon any collateral matter affecting the claim to compensation, but only to determine the amount of damage. *Byles* v. *Ipswich Dock Commissioners*, 11 Ex. 464; 25 L. J., Ex. 53.

He cannot inquire into the title of the claimant to the land or other hereditament in respect of which he claims compensation, but only decide upon the question of amount. *Reg.* v. *L. & N. W. Ry.*, 3 El. & Bl. 443; 23 L. J., Q. B. 185; 18 Jur. 993.

An arbitrator has no power to set out approaches to lands not taken, in lieu of communications formerly existing over lands taken, both portions of lands belonging to the same party; but can only award compensation in respect of the injuriously affecting the lands not taken, by reason of the loss of the approaches. *Ware* v. *Regent's Canal Co.*, 9 Ex. 395; 7 Railw. Cas. 780; 23 L. J., Ex. 145.

Where part only of leasehold premises, subject to an entire single rent, is taken, an arbitrator has no power to apportion the rent. The remedy is under the Lands Clauses Act, s. 119. *Ib.*

An arbitrator awarding compensation for structural damage to a house, and depreciation of his leasehold interest therein, by the execution and use of the works of a railway, has power also to award compensation for damage similarly done to the owner's goods in the house. *Knock* v. *Metropolitan Ry.*, 38 L. J., C. P. 78; L. R. 4 C. P. 131; 19 L. T. 239; 17 W. R. 10.

Admissibility of Evidence.]—A railway company took land on which cotton mills would probably have been built; the owner had other land on which he had built a reservoir from which water might be supplied to such cotton mills when built. In proceeding under the Lands Clauses Act to ascertain the compensation, the umpire received evidence as to the profits which might have been derived from supplying water to the mills when built, and awarded compensation for the loss of those prospective profits:—Held, that the umpire was right in receiving the evidence and in awarding such compensation. *Ripley* v. *G. N. Ry.*, L. R. 10 Ch. 435; 31 L. T. 869; 23 W. R. 685.

The umpire awarded 8,325*l.* "as and for the compensation for the plaintiff's interest in a causeway, and for a jetty, and for a shutting up of a landing place, and for the damage by the depreciation of his mansion-house by the otherwise injuriously affecting the same." When called as a witness at the trial, the umpire stated that he had allowed, among other items, 5,000*l.* "for general depreciation in value of the house and premises by loss of privacy, prospect, and other amenities":—Held, that the umpire had exceeded his jurisdiction in awarding as he had done. *Buccleuch (Duke)* v. *Metropolitan Board of Works*, 41 L. J., Ex. 137; L. R. 5 H. L. 418; 27 L. T. 1.

Evidence of Umpire to Explain.]—The evidence of the umpire is admissible to shew whether or not he had awarded on matters

beyond his jurisdiction. *Buccleuch (Duke)* v. *Metropolitan Board of Works*, 41 L. J., Ex. 137; L. R. 5 H. L. 418; 27 L. T. 1.

Proceeding, Ex parte.]—When an umpire had given notice of a meeting, and one of the parties had refused to attend, and the umpire had thereupon proceeded ex parte, and made an award, the party was let in to be heard only as a matter of indulgence, and on the terms of his paying all the costs. *Hewitt and Portsmouth Waterworks Co., In re*, 10 W. R. 780.

Held, also, that it was his duty to have attended, and stated his reasons for desiring delay. *Ib.*

—— **Arbitrator neglecting to act.**]—Where arbitrators have been appointed under s. 25 of the Lands Clauses Act, 1845, and one arbitrator refuses or neglects for seven days to concur in the appointment of an umpire, the other arbitrator has power, under s. 30 of the act, to proceed ex parte to make an award, and the previous appointment of an umpire is not in such a case a condition precedent to the ex parte proceedings. *Shepherd* v. *Norwich Corporation*, 54 L. J., Ch. 1050; 30 Ch. D. 553; 53 L. T. 251; 33 W. R. 841.

Effect of Non-Appointment.]—Where an arbitration has proved abortive in consequence of the non-appointment of an umpire within the time limited by the statute, the owner of the land is not bound to proceed anew under s. 68, but in the event of a refusal by the company is entitled to a mandamus to compel them to issue their warrant to a jury to assess compensation. *South Yorkshire, Doncaster and Goole Ry., In re, Senior, Ex parte*, 7 D. & L. 36; 18 L. J., Q. B. 333.

iii. *Award.*

(a) Practice as to.

Time for making.]—The period of three months provided by s. 23 of the Lands Clauses Act, 1845, within which the umpire is to make his award, begins from the date of his appointment as umpire, and not from the time when the awarding power of the arbitrators comes to an end. *Pullen and Liverpool Corporation, In re*, 51 L. J., Q. B. 285; 46 L. T. 391; 46 J. P. 468. S. P., *Bradshaw, In re*, 5 Railw. Cas. 527; 12 Q. B. 562; 17 L. J., Q. B. 362; 12 Jur. 998.

The three months allowed by 8 & 9 Vict. c. 18, s. 23, to the arbitrators or their umpire, for making their award, is not one and the same period; but the umpire has a new period of three months for making his award, from the time when the arbitration devolves upon him. *Skerratt* v. *North Staffordshire Ry.*, 2 Ph. 475; 5 Railw. Cas. 166; 17 L. J., Ch. 161; 12 Jur. 46. S. P., *Bradshaw, In re*, 12 Q. B. 562; 5 Railw. Cas. 527; 17 L. J., Q. B. 362; 12 Jur. 998.

Where a submission to arbitration included the provisions of the Lands Clauses and Railways Clauses Acts, and the arbitrator from time to time enlarged the period for making the award:—Held, that the award was valid, though not made within the statutable period of three months. *Caledonian Ry.* v. *Lockhart*, 3 Macq. H. L. Cas. 808; 6 Jur. (N.S.) 1371; 3 L. T. 65; 8 W. R. 373.

A railway company injuriously affected lands by their works. The owner gave notice to have his claim settled by arbitration; and the company not having done anything, he formally appointed an arbitrator for both. The arbitrator made his award, but more than three months after his appointment:—Held, that s. 23 applied as well to arbitration, under s. 68, for claims for damages to lands taken, as to arbitration for claims for lands intended to be taken, and consequently that the award was out of time. *Evans* v. *Lancashire and Yorkshire Ry.*, 1 El. & Bl. 754; 22 L. J., Q. B. 254; 17 Jur. 878.

Signing.]—The proceedings under 8 & 9 Vict. c. 18, s. 85, are not necessarily invalid because the award was signed on a day subsequently to the day on which the money was paid into court and the bond given. *Stamps* v. *Birmingham, Wolverhampton and Stour Valley Ry.*, 7 Hare, 256.

Enlarging Time—By Consent.]—If the parties consent to enlarge the time for making an award beyond the statutable term of three months, the court will not set aside the award on the ground that it is made beyond the prescribed time and that the parties cannot by consent dispense with the provisions of the statute. *Palmer* v. *Metropolitan Ry.*, 31 L. J., Q. B. 259; 10 W. R. 714.

—— **By Court.**]—The power given to the court by Common Law Procedure Act, 1854, s. 8, to remit matters referred under that act to the reconsideration of the arbitrator, applies also to matters referred under the Lands Clauses Act; so also the power given by s. 15 to enlarge the time for making the award, even after the proper time has expired. *Dare Valley Ry.* v. *Rhys*, 17 W. R. 550. Affirmed on appeal, infra.

Referring back.]—When the court refers a matter back to an umpire, who has made an award, for reconsideration, that award is avoided altogether. *Dare Valley Ry.* v. *Rhys*, 38 L. J., Ch. 417; L. R. 4 Ch. 554; 20 L. T. 291; 17 W. R. 717.

And such reference back of an award of the value of land under the Lands Clauses Act, operates as an original reference to the umpire, so that, by virtue of s. 23, if no proceedings are taken on it for three months, the price is to be determined by a jury. *Ib.*

But, by Lord Hatherley, C., when an award has been made a rule of court it comes within the Common Law Procedure Act, 1854, s. 15; and therefore, if it is referred back by the court for redetermination, and no new award is made within three months, it is still in the discretion of the court under that act to allow or not an enlargement of the term for redetermination by the arbitrator. *Ib.*

Taking up — Enforcement — Mandamus.]—A person who has obtained an award of compensation, in respect of lands injuriously affected, may, under the Lands Clauses Act, 1845, s. 35, require the promoters of the undertaking to take up the award. *Harper, Ex parte*, 23 W. R. 67. See *Reg.* v. *West Midland Ry.*, 10 W. R. 583.

A prerogative writ of mandamus is the proper remedy for enforcing the taking up of awards made under the Lands Clauses Act. *Reg.* v. *Lambourn Valley Ry.* (22 Q. B. D. 463) distinguished. *Reg.* v. *L. & N.-W. Ry.*, 63 L. J., Q. B. 695; [1894] 2 Q. B. 512; 10 R. 359; 58 J. P. 719.

Where a difference between a landowner and

the promoters of an undertaking has been referred and an award made, the court will compel the promoters by mandamus, at the landowner's instance, to take up the award. *Reg.* v. *South Devon Ry.*, 15 Q. B. 1043; 20 L. J., Q. B. 145; 15 Jur. 464.

The promoters must, for that purpose, pay the fees due on the award, the arbitrators or umpire having a lien on the award for such fees, which the promoters are bound to satisfy, except so far as the obligation may be limited by s. 34. *Ib.*

On shewing cause against a rule nisi for a mandamus calling on the defendants to take up an award, no objection can be taken that the prosecutor is not properly before the court on account of defects in his notice under s. 23 or under s. 68. *Reg.* v. *Sutton Harbour Commissioners*, 2 W. R. 10.

Enforcing.]—An award of arbitrators or an umpire upon a claim for compensation for lands injuriously affected by the works of a company, like the assessment of a compensation jury, merely ascertains the amount, not the claimant's right to compensation. Such an award, therefore, cannot be enforced by motion, like an ordinary award. *Newbold and Metropolitan Ry., In re*, 14 C. B. (N.S.) 405.

Setting Aside.]—If a question of disputed compensation is submitted to arbitration, and an umpire is appointed under s. 28, by the board of trade, and the submission is made a rule of court, the court has jurisdiction to set aside the award of the umpire, though neither the appointment of the umpire, nor his award, is made a rule of court. *Bradshaw, In re*, 12 Q. B. 562; 17 L. J., Q. B. 362; 12 Jur. 998.

The court will not entertain the objection that the award is contrary to the evidence. *Ib.*

Payment to Whom.]—The owner of business premises mortgaged them with the machinery and fixtures. A railway company gave notice to take part of the premises for its railway, but before the price was fixed the mortgagor died, and the mortgagees entered into possession of the property. A suit was instituted for the administration of the mortgagor's estate, which proved to be insolvent, and a receiver was appointed, who, with the consent of the mortgagees, carried on the business. Arbitrators and an umpire were appointed to fix the compensation money payable by the company. The umpire awarded 15,950*l.*, of which he certified that he had awarded 2,800*l.* in respect of the loss of profits in carrying on the business. The executors claimed the 2,800*l.* as belonging to the mortgagor's estate, to be divided among his general creditors:—Held, that the sum of 2,800*l.* was in the nature of compensation for the value of the goodwill of the business, which passed with the premises; and that the whole of the sum of 15,950*l.* belonged to the mortgagees. *Pile* v. *Pile, Lambton, Ex parte*, 45 L. J., Ch. 841; 3 Ch. D. 36; 35 L. T. 18; 24 W. R. 1003—C. A.

(b) Validity.

Returns to Mandamus.]—A mandamus to a railway company, reciting that premises in the occupation of B. had been injuriously affected by the works of the company, and that the company declining to join in the appointment of an arbitrator to estimate the compensation due to B., he had appointed an arbitrator ex parte, under 8 & 9 Vict. c. 18, s. 25, who had duly made his award; and commanding the company to take up the award. A return that B. also occupied other lands which were taken by the company, and that before the execution of their works it was agreed between B. and the company that the company should pay to him a certain sum of money in full satisfaction of his claim in respect of the lands which were so taken, and of the premises which were so injuriously affected, which sum was duly paid:—Held, a good return. *Reg.* v. *West Midland Ry.*, 11 W. R. 857.

When a claim for compensation for injuriously affecting land has been referred to arbitration, without prejudice to the right of the company to dispute the claim, and an award has been made, and a mandamus is obtained commanding the company to take up the award, a return that the land had not been injuriously affected is good. *Reg.* v. *Cambrian Ry.*, 10 B. & S. 315; 38 L. J., Q. B. 198; L. R. 4 Q. B. 320; 20 L. T. 437; 17 W. R. 667.

Form of Award.]—When an award had been made on a claim against a company in respect of lands alleged to be injuriously affected under an agreement for reference pursuant to the Lands Clauses Act, s. 68, the umpire having awarded that the company should pay a specified sum by way of compensation:—Held, that though in form the umpire had no power to order the company to pay, yet that such informality did not vitiate the award so far as it ascertained the amount of damages, assuming the company's liability. *Harper and G. E. Ry., In re*, 44 L. J., Ch. 507; L. R. 20 Eq. 39; 32 L. T. 214; 23 W. R. 371.

By a submission between L. and a railway company, after reciting that the company was authorised to take lands, of which he was or claimed to be owner, that they had given him notice that they required his lands, and that it was agreed that they should become the purchasers in the mode thereinafter pointed out; it was convenanted that it should be referred to T. to determine the value to be paid for the lands; that the purchase-money should be paid within three days after the making of the award; and "thereupon L. should execute a conveyance, subject to the payment of the amount of such purchase-money into the Court of Chancery, under the circumstances and in the manner provided for by the Lands Clauses Act, 1845." The arbitrator found the value of the land at a certain sum, and directed it to be paid "within three days after," &c., following the words of the submission:—Held, that, assuming even that the arbitrator had exceeded his jurisdiction in ordering the money to be paid, the rest of the award was good, and that, as the award ascertained the amount of the purchase-money which the company, by the submission, had agreed to pay, there was sufficient to enable the court to make an order on them to pay it. *Lindsay* v. *Direct London and Portsmouth Ry.*, 1 L. M. & P. 529; 19 L. J., Q. B. 417; 15 Jur. 224.

Held, also, that it was no objection that it was not shewn that the company had taken possession of the land. *Ib.*

Execution of Conveyance.]—Held, also, that the payment of the money and the execution of the conveyance to L. were not dependent conditions, but that the payment was to precede the

conveyance; and that it was therefore no answer that a conveyance had not been tendered. *Ib.*

When, after notice to treat, the amount of compensation to be paid for land compulsorily taken has been fixed by an award under the Lands Clauses Act, 1845, an action for such compensation cannot be maintained until a conveyance of the land has been executed. *East London Union* v. *Metropolitan Ry.*, 38 L. J., Ex. 225; L. R. 4 Ex. 309.

Effect of Award.]—A railway company was empowered to abandon the tramways which communicated with the ironworks of A.; and having given to A. notice of their intention to take certain of his lands, the amount of compensation was referred to an umpire, who was to ascertain and direct what should be paid "for the interest in the lands, and for any damage that might be sustained by reason of the execution of the works." A. made a claim before the arbitrator for compensation in respect of damage which he alleged he would sustain if the tramways were stopped up, and the umpire awarded that a certain sum should be paid by the company to A., "as and for purchase and compensation for and in respect of his interest in the lands and hereditaments, and for damage sustained, and which may be sustained, by him, by reason of the execution of the works of the railway, or in the exercise by the company of the powers of the act":—Held, that it did not appear upon the face of the award, that the umpire had exceeded his jurisdiction, by awarding compensation in respect of a claim for damage not within the reference. *Brogden and Llynvi Valley Ry., In re*, 9 C. B. (N.S.) 229; 30 L. J., C. P. 61; 4 L. T. 361. See also *Buccleuch (Duke)* v. *Metropolitan Board of Works*, 41 L. J., Ex. 137; L. R. 5 H. L. 418; 27 L. T. 1.

Semble, that in an action on an award under the Lands Clauses Act, 1845, when the defendant pleads that the compensation awarded is in respect of matters not the subject of compensation, the award is not evidence that the compensation awarded is in respect of matters the subject of compensation. *Rhodes* v. *Airedale Drainage Commissioners*, 45 L. J., C. P. 861; 1 C. P. D. 402; 35 L. T. 46; 24 W. R. 1053—C. A.

The plaintiffs claimed compensation in respect of their messuage having been injuriously affected by the sewage works of the board of works, made by them under the powers of the Metropolis Management Act, 1855; and by an agreement between the plaintiffs and the board of works, under the Lands Clauses Act, 1845, the amount of compensation, if any, to which they were entitled was referred to an arbitrator. In an action for the amount of compensation awarded, it is no defence that the claim for compensation was made more than six months after the damage had been sustained, since s. 106 of the Metropolis Management Act, 1862, so limiting the time for issuing process, or instituting any proceeding against the board of works for anything done under the powers of their acts, did not apply to such a claim, and, if it could apply, the objection that the claim was made too late should have been set up when the plaintiffs gave notice of their claim, and not after the matter had, with the board's consent, been referred. *Delany* v. *Metropolitan Board of Works*, 37 L. J., C. P. 59; L. R. 3 C. P. 111; 17 L. T. 262; 16 W. R. 137—Ex. Ch.

—— **Reference at Trial.**]—In 1832 a market gardener became the occupier of land and premises adjoining the works of a gas company. In 1836 he took a lease, which would have expired in 1853, but in 1850 he obtained a renewal of this lease until 1874. At the time of the last renewal the company were enlarging their works, and building a new retort-house, much larger, and nearer his premises. He brought an action, in 1854, against the company for damages for the nuisance which the works occasioned to him as a market gardener. On the case coming on for trial, a reference was agreed upon, and the arbitrator, by his award, found that damage had accrued to a considerable extent. Notwithstanding the award, the company added to their works, and built a third retort-house. On a bill filed for a perpetual injunction:—Held, that the award of the arbitrator sufficiently established the right of the market gardener, at law, to such injunction, without the verdict of a jury. *Imperial Gas Light and Coke Co.* v. *Broadbent*, 7 H. L. Cas. 600; 29 L. J., Ch. 377; 5 Jur. (N.S.) 1319.

Sum Awarded—Interest.]—It is no objection to the award that the price of the land, and the compensation for damage by severance, though each is expressly claimed, are assessed in a gross sum. *Bradshaw, In re*, 12 Q. B. 562; 17 L. J., Q. B. 362; 12 Jur. 998.

A claimant in respect of land, of which he is tenant in fee, cannot object that the award assesses the compensation on the assumption that he is in possession, whereas it is occupied by a lessee. *Ib.*

A railway company gave notice to treat for lands. The landowners thereupon gave notice to the company that they were owners and lessees of the land, and that their interest therein was particularly described in a schedule served therewith; that they claimed as compensation for the purchase-money and for damage that might be sustained by the execution of the works, 2,280*l.* 8*s.*, and that if that sum was not paid, they desired to have the amount settled by arbitration; they thereby appointing their arbitrator, and requiring the company to appoint an arbitrator on their behalf. In the schedule annexed were included pieces of land severed by the railway, and respectively of less than half an acre, which the landowners required the company to purchase. The company thereupon served the landowners with a notice appointing an arbitrator, to whom was to be referred the amount of compensation to be paid by the company for the purchase of the lands. At the reference the landowners gave evidence of the value of the small pieces of land mentioned in the schedule, being respectively less than half an acre. The umpire awarded one entire sum for the purchase of the fee-simple, which the company required and for the small pieces mentioned in the schedule:—Held, that as nothing had been submitted but the value of the land which the company desired to purchase, and as one entire sum was awarded for that and the small pieces of land which the landowners required the company to take, the award was bad, but the court refused to set it aside. *North Staffordshire Ry. and Wood, In re*, 6 Railw. Cas. 25; 2 Ex. 244; 17 L. J., Ex. 354.

A railway company gave to a leaseholder the usual notice to treat, and it was referred to arbitration to ascertain the value of the premises and



the damages sustained by the execution of the works, and the compensation to be paid by the company in respect thereof. The arbitrator awarded 2,700*l.* as the compensation to be paid for all the leaseholder's interest, of whatever nature, in the leasehold :—Held, that the award was bad. *Wakefield* v. *Llanelly Ry.*, 34 Beav. 245. Affirmed, 12 L. T. 509 ; 13 W. R. 823—L.JJ.

Mesne Profits.]—An award is not bad for not expressly awarding compensation in respect of damage done to land before the making of the award, by reason of the land having remained untenanted in consequence of the notice. *Ware* v. *Regent's Canal Co.*, 9 Ex. 395 ; 7 Railw. Cas. 780 ; 23 L. J., Ex. 145.

Lands were taken by a railway company, for the purposes of their railway. In June the owner of the lands brought ejectment to recover possession. In August the company executed a deed-poll, under the Lands Clauses Act, s. 77, for the purpose of vesting the lands in themselves. At the trial a verdict was taken for the plaintiff, subject to a reference of the action, and all matters in difference between the parties to an arbitrator, who was to ascertain what sum should be paid by the company to the plaintiff as the price of, or compensation for, the land of the plaintiff, the plaintiff thereby consenting to make and execute a conveyance. The arbitrator made this award, and directed that a verdict for the plaintiff should stand, and that a sum of money should be paid by the company to the plaintiff as the price of and compensation for the land, which the company, at the time of making the order of reference, had taken for the purposes of the railway. The plaintiff having signed judgment, issued a writ of possession, under which he took possession of the land, and afterwards brought an action for mesne profits : —Held, that the question of mesne profits was a matter in difference between the parties which appeared by the award to have been disposed of by the arbitrator. *Smalley* v. *Blackburn Ry.*, 2 H. & N. 158 ; 27 L. J., Ex. 65.

Silence as to Part of Claim—Negative.]—By a submission to arbitration of a question of disputed compensation, the arbitrator was to determine what sums should be paid for the purchase of land, and what "other if any" sum for severance damage. He, after reciting the submission, and that he had considered the matters so referred to him, awarded a sum to be paid for the purchase of the land, without saying anything as to any severance damage :—Held, that the award was final and good, and that the arbitrator by his silence negatived any right to compensation in respect of severance damage. *Beaufort (Duke) and Swansea Harbour Trustees, In re*, 8 C. B. (N.S.) 146 ; 29 L. J., C. P. 241 ; 6 Jur. (N.S.) 979.

Where Land not injuriously affected.]—By an award made under the Lands Clauses Act, the arbitrator awarded one entire sum as the amount of damage sustained by a party by reason of his messuage being injuriously affected by the execution of the works of a railway company, to wit, by the erection of an embankment, and by the narrowing of the road in front of the messuage. To a declaration on the award for not paying the sum awarded, a plea by the company that the messuage was not injuriously affected by the narrowing of the road, is a good plea. *Beckett* v. *Midland Ry.*, 1 H. & R. 189 ; 35 L. J., C. P. 163 ; L. R. 1 C. P. 241 ; 12 Jur. (N.S.) 231 ; 13 L. T. 672 ; 14 W. R. 393.

Conclusive as to Right.]—In 1832 a market gardener became the occupier of land and premises adjoining the works of a gas company. In 1836 he took a lease, which would have expired in 1853, but in 1850 he obtained a renewal of this lease until 1874. At the time of the last renewal the company were enlarging their works, and building a new retort-house, much larger, and nearer his premises. He brought an action, in 1854, against the company for damages for the nuisance which the works occasioned to him as a market gardener. On the case coming on for trial, a reference was agreed upon, and the arbitrator, by his award, found that damage had accrued to a considerable extent. Notwithstanding the award, the company added to their works, and built a third retort-house. On a bill filed for a perpetual injunction :—Held, that the award of the arbitrator sufficiently established the right of the market gardener, at law, to such injunction, without the verdict of a jury. *Imperial Gas Light and Coke Co.* v. *Broadbent*, 7 H. L. Cas. 600 ; 29 L. J., Ch. 377 ; 5 Jur. (N.S.) 1319.

iv. *Special Case.*

Umpire Stating.]—An umpire appointed to ascertain the amount of compensation under the Lands Clauses Act, 1845, has power to state a special case for the opinion of a superior court under the Common Law Procedure Act, 1854, s. 5. *Rhodes* v. *Airedale Drainage Commissioners*, 45 L. J., C. P. 861 ; 1 C. P. D. 402 ; 35 L. T. 46 ; 24 W. R. 1053—C. A.

Appeal.]—The Court of Appeal has jurisdiction to entertain an appeal from the decision of the High Court of Justice upon a special case stated by an umpire appointed under the Lands Clauses Act, 1845, to assess the compensation for lands taken for the purposes of an undertaking, or injured by the execution of the works thereof. *Bidder* v. *North Staffordshire Ry.*, 48 L. J., Q. B. 248 ; 4 Q. B. D. 412 ; 40 L. T. 801 ; 27 W. R. 540—C. A.

v. *Costs.*

When to be ascertained.]—The costs of arbitration which are to be settled by the arbitrators need not be incorporated in the award, but may be ascertained at a subsequent time by the persons who made the award. *Gould* v. *Staffordshire Waterworks Co.*, 5 Ex. 214 ; 1 L. M. & P. 264 ; 6 Railw. Cas. 568 ; 19 L. J., Ex. 281 ; 14 Jur. 528. Contra, *Quick* v. *L. & N.-W. Ry.*, 5 Railw. Cas. 20 ; 5 D. & L. 685 ; 18 L. J., Q. B. 89 ; 13 Jur. 408, overruled.

Such adjudication of the costs need not be within three months after the time of the reference. *Ib.*

Enforcing Determination by Mandamus.]—The term "the arbitrators" in s. 34 of Lands Clauses Act, 1845, may mean either the arbitrators or umpire, according as the compensation shall have been determined by the arbitrators or umpire. If the arbitrators or umpire, as the case may be, refuse or neglect to settle the costs, they may be compelled by mandamus to do so. *Ib.*

Agreement before Special Act.]—Before the passing of the company's act empowering them to take the plaintiff's land, they had entered into an agreement to buy his interest, the price in case of difference to be determined by a surveyor. The award made no provision as to costs:—Held, that the Lands Clauses Act did not apply. *Catling* v. *G. N. Ry.*, 21 L. T. 769; 18 W. R. 121—L.JJ.

Agreement silent as to Costs.]—Where a party claiming compensation under a railway act agrees to refer his claim to arbitration instead of taking the verdict of a jury under the provisions of the act, and the reference and the award are silent about the costs, he is not entitled, on account of an award in his favour, to receive costs according to the provisions of the act, as if the jury had given a verdict in his favour. *Reynal, Ex parte*, 5 Railw. Cas. 60; 16 L. J., Q. B. 304.

Where no Offer made.]—The Lands Clauses Act, s. 51, giving the costs of inquisition to the owner of land when the assessment is greater than the sum offered, does not apply where the promoters have made no offer, and are not liable at all for the claim made. *Todd* v. *Metropolitan District Ry.*, 24 L. T. 435; 19 W. R. 720.

Previous Offer—Time—Contents.]—A company was empowered to take land for its undertaking, and gave to the owner notice to treat under 8 & 9 Vict. c. 18, and he gave notice, under s. 23, of his desire to have the compensation settled by arbitration, naming his arbitrator, and the company named their arbitrator. The arbitrators appointed an umpire, and on two occasions enlarged the time for making their award. The company after this made an offer which was not accepted, and the arbitration proceeded. The umpire having awarded a less sum than that offered:—Held, that the offer was too late, and that the claimant was entitled to costs under s. 34. *Gray & North-Eastern Ry., In re*, 45 L. J., Q. B. 818; 1 Q. B. D. 696; 34 L. T. 757; 24 W. R. 758.

Under s. 34 of the Lands Clauses Consolidation Act, 1845, which provides that the costs of and incident to an arbitration under the act "shall be borne by the promoters of the undertaking unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking," the claimant is entitled to the costs of and incident to the arbitration and award—even though a less sum be awarded than that offered by the promoters of the undertaking—if the subject-matter of the award is not the same as the subject-matter of the offer by the promoters. *Miles* v. *G. W. Ry.*, 65 L. J., Q. B. 649; [1896] 2 Q. B. 432; 75 L. T. 290—C. A.

A canal company requiring to purchase land, received a notice from the owner claiming 28,000*l.* as compensation. On the 18th of August the company gave the claimant notice of their intention to issue their warrant for summoning a jury, and offering 15,237*l.* as the sum they were willing to give. On the 28th of August the claimant gave the company notice of his desire to have the compensation settled by arbitration. On the 26th of October the company gave the claimant notice that they had appointed an arbitrator, and offered 17,000*l.* as compensation. On the 8th of November the claimant appointed an arbitrator. On the 18th of November the two arbitrators appointed an umpire. The umpire awarded the claimant 16,400*l.*:—Held, that the offer of 17,000*l.*, having been made when the first arbitrator was appointed and before the beginning of the arbitration, was a good offer, and was not invalidated by the previous offer of 15,237*l.*; and the sum awarded being a less sum than 17,000*l.*, the claimant was not entitled to the costs of the arbitration. *Fitzhardinge (Lord) and Gloucester and Berkeley Canal Co., In re*, 41 L. J., Q. B. 316; L. R. 7 Q. B. 776; 27 L. T. 196; 20 W. R. 800.

If an umpire awards in respect of part of the landowner's claim for compensation a larger sum than the company offers in respect of that part, and at the same time awards as to another distinct part of the claim, in respect of which the company offers nothing, that the landowner has suffered no damage, he is entitled to those costs only which are incident to that part of his claim in respect of which compensation has been awarded. *Reg.* v. *Biram*, 17 Q. B. 969; 16 Jur. 640.

A person claiming compensation under a waterworks act, which incorporated the Lands Clauses Act, agreed with the company to appoint as sole arbitrator, for the purpose of settling the amount of such compensation, a person to be nominated by two others. They accordingly nominated an arbitrator, who awarded to the claimant a sum exceeding 50*l.*:—Held, that the claimant was entitled to the costs of the arbitration, although no offer had been made by the company, or the other preliminaries mentioned in the statute complied with. *Martin* v. *Leicester Waterworks Co.*, 3 H. & N. 463; 27 L. J., Ex. 432.

A claimant having immediately on the expiration of twenty-one days from the service of his notice of claim nominated an arbitrator on his behalf, the promoters subsequently and before nominating their arbitrators, and before the claimant delivered his nomination to his arbitrator, tendered a sum for damages and costs, which was refused, and the umpire afterwards awarded a less sum for compensation:—Held, that the claimant was not entitled to the costs of the arbitration. *Yates* v. *Blackburn Corporation*, 6 H. & N. 61; 29 L. J., Ex. 447. *See also* ante, col. 1564.

—— **Taking up Award—Umpire's Fees—Payment by Landowner—Repayment by Promoters.**]—When an umpire has awarded a landowner for his land a larger sum than has been offered by a railway company (having compulsory powers to purchase under private acts which incorporate the Lands Clauses Act, 1845), the company is bound to take up the award and pay the umpire's fees. Should, however, the landowner do so, he cannot recover from the company the money so expended, as such payment is voluntary, and is in no sense costs properly incurred. *Shrewsbury (Earl)* v. *Wirral Rys.*, infra.

Of Tenant for Life.]—The tenant for life of a settled estate is entitled to charge the estate with the costs, charges, and expenses, properly incurred by him in or about an arbitration entered into between him and the company under the provisions of the Lands Clauses Act regarding the value of the land, on the ground that under the act he is made the fiduciary agent for such purposes on behalf of the estates. *Berkeley (Earl), In re*, 44 L. J., Ch. 3; L. R. 10 Ch. 56; 31 L. T. 531; 23 W. R. 195.

Powers of Arbitrator over.]—An order by consent having been made in a suit brought by a landowner against a railway company, that the matters in dispute should be submitted to an arbitrator who was also to determine the costs and expenses, and the arbitrator having sent in his certificate of costs, and the company objecting thereto and claiming to have such costs settled by the taxing-master:—Held, that the certificate was proper and must be enforced. *Rowcliffe* v. *Devon and Somerset Ry.*, 21 W. R. 433.

An arbitrator having such costs to settle may obtain professional help. *Ib.*

—— **Under Public Health Act.**]—An arbitration held for the assessment of compensation in respects of lands taken compulsorily by a local board by virtue of the powers of the Public Health Act, 1875, is not an arbitration under that act within ss. 179 and 180, but is regulated by the provisions of the Lands Clauses Act incorporated by s. 176. The costs of such arbitration are, therefore, not in the discretion of the arbitrator. *Rayner, Ex parte*, 47 L. J., Q. B. 660; 3 Q. B. D. 446; 39 L. T. 232.

Taxation.]—The 32 & 33 Vict. c. 18, s. 1, only applies to arbitrations proceeding simply under the Lands Clauses Act, 1845, and not to arbitrations which embrace matters that could not be the subject of arbitration under the Lands Clauses Act, 1845, except by agreement between the parties. *Doulton* v. *Metropolitan Board of Works*, 39 L. J., Q. B. 165; L. R. 5 Q. B. 333; 18 W. R. 790.

A corporation demanded of a neighbouring landowner a statement of his interest in lands required for the disposal of sewage under the Lands Clauses Act, 1845, and in answer a claim was made for compensation, and notice given to settle by arbitration. Arbitrators and umpire were duly appointed, but before award the parties agreed in writing that the corporation should have immediate possession of the lands required upon certain terms as to payment of interest; the corporation was to pay all costs incidental to the agreement, arbitration and conveyance of the land as between solicitor and client, and the time for making the award might be extended. Upon delivery of the bill of costs after the award, the corporation applied to have taxation, under the Lands Clauses Act, 1869, by a master:—Held, that the parties had contracted themselves out of the application of that act, and that the costs might be taxed in chancery under 6 & 7 Vict. c. 73, s. 38. *Wombwell* v. *Barnsley Corporation*, 36 L. T. 708.

The master is not bound, under the Lands Clauses Act, 1869, s. 1, to tax the costs of an arbitration unless the claimant is entitled to costs under the Lands Clauses Act, 1845, s. 34. *Fitzhardinge (Lord) and Gloucester and Berkeley Canal Co., In re*, 41 L. J., Q. B. 316; L. R. 7 Q. B. 776; 27 L. T. 196; 20 W. R. 800.

—— **Review of.**]—When costs of an inquiry before arbitrators under the Lands Clauses Act, 1845, "are taxed and settled as between the parties by one of the taxing-masters of the superior courts of law" under 32 & 33 Vict. c. 18, s. 1, the court has no jurisdiction over the master's taxation on a motion to review. *Sandbach Charity Trustees and North Staffordshire Ry., In re*, 47 L. J., Q. B. 10; 3 Q. B. D. 1; 37 L. T. 391; 26 W. R. 229—C. A.

There is no remedy by review of the decision of a taxing-master who has disallowed an item as not recoverable by the landowner from the promoters under s. 35 of the Lands Clauses Act, 1845. *Owen* v. *L. & N.-W. Ry.* (L. R. 3 Q. B. 54), and *Sandbach Charity and North Staffordshire Ry., In re* ([1891] 1 Ch. 99), followed. *Shrewsbury (Earl)* v. *Wirral Rys.*, 64 L. J., Ch. 850; [1895] 2 Ch. 812; 12 R. 546; 73 L. T. 234; 44 W. R. 19—C. A.

Action for—Before Taxation.]—In an arbitration the arbitrator awarded compensation, but said nothing as to costs:—Held, that the claimant was entitled to costs, and that the right to costs was entirely independent of the taxation of them, and an action could be maintained for the costs though the amount of such costs had not been previously settled or ascertained by taxation; and consequently an order for the taxation made by the judge on giving his judgment for the plaintiff was a valid order. *Holdsworth* v. *Wilson* (4 B. & S. 1) approved. *Metropolitan District Ry.* v. *Sharpe*, 50 L. J., Q. B. 14; 5 App. Cas. 425; 43 L. T. 130; 29 W. R. 617; 44 J. P. 716—H. L. (E.)

Where an umpire appointed under 11 & 12 Vict. c. 63, s. 125, awarded the amount of compensation and the costs of the reference should be paid by the local board of health:—Held, that the plaintiff was entitled to maintain an action for costs before taxation. *Holdsworth* v. *Wilson*, 4 B. & S. 1; 32 L. J., Q. B. 289; 10 Jur. (N.S.) 171; 8 L. T. 434; 11 W. R. 733—Ex. Ch.

—— **Before Conveyance.**]—Where taxed costs of an arbitration become payable to the owner, they are payable to him within a reasonable time, and the execution of a conveyance by him is not a condition precedent. *Capell* v. *G. W. Ry.*, 52 L. J., Q. B. 348; 11 Q. B. D. 345; 48 L. T. 505; 31 W. R. 555—C. A.

No Award made.]—A bill by a company against an individual claiming to be injuriously affected under s. 68 of the Lands Clauses Act was dismissed, with liberty to the defendant to apply for the costs, if he should establish his right to compensation. The parties proceeded by arbitration, but neither took up the award. Upon motion by the defendant that the company might pay the costs, or be compelled to take up the award:—Held, as to the first, that the defendant was premature, no award having been made; and, as to the second, that the court had no jurisdiction. *Sutton Harbour Co.* v. *Hitchens*, 16 Beav. 381.

Lien on Land.]—When land is taken by a railway company under the Lands Clauses Act, and the price is settled by arbitration, the costs of the arbitration and award payable to the vendor do not stand on the same footing as the purchase-money, and the vendors have no lien on the land for such costs. *Ferrers* v. *Stafford and Uttoxeter Ry.*, 41 L. J., Ch. 362; L. R. 13 Eq. 524; 26 L. T. 652; 20 W. R. 478.

Effect of Special Act.]—The Lands Clauses Act, 1845, contained special provisions with regard to claims for compensation for lands affected by the works of a railway, and directed that (except in certain specified cases) compensation should be awarded with costs. A special act (38 & 39 Vict. c. cevili.) declared that the provisions of the general act, were, "except

where expressly varied by the special act," incorporated with it. The general act provided the forms of proceedings in arbitrations—such as the appointment of arbitrators by the contending parties, and the appointment of an umpire by the arbitrators, and declared that compensation might be recovered with costs. The special act directed that arbitrations conducted under its provisions should be conducted by an arbitrator appointed by the Board of Trade, but contained no specific directions as to the award of costs. An arbitration of this sort took place under the special act. The arbitrator awarded compensation, but said nothing as to costs:—Held, that the claimant was entitled to costs, for that the substitution of one form of proceeding in the arbitration different from that in the general statute, expressly varied the provisions of the general statute as to that matter, but did not repeal the provision as to costs in the general statute, nor affect the general rule that the party succeeding in such an arbitration should recover costs. *Metropolitan District Ry.* v. *Sharpe*, 50 L. J., Q. B. 14; 5 App. Cas. 425; 43 L. T. 130; 28 W. R. 617; 44 J. P. 716—H. L. (E.)

c. By Justices.

Limitation of Time for Complaint.]—When a person is required to give up any lands under the Lands Clauses Act, 1845, s. 121, and have the amount of compensation settled by two justices, if the lands have not been injuriously affected, it is not necessary that the complaint shall be made to the justice within six months from the time of the notice under 11 & 12 Vict. c. 43, ss. 1 and 11. *Reg.* v. *Hannay*, 44 L. J., M. C. 27; 31 L. T. 702; 23 W. R. 164.

The determination by justices under s. 24 of the Lands Clauses Act, 1845, of the compensation to be paid by a railway company to a landowner for having in the construction of the railway injuriously affected his land, is not an order of the justices for the payment of money within s. 11 of 11 & 12 Vict. c. 43 (which limits the time for making a complaint to six months from the time when the matter of such complaint arose), and therefore the justices have jurisdiction under s. 24 of the Lands Clauses Act, 1845, to hear and determine the question of such disputed compensation, although the application be made more than six months after the land has been so injuriously affected. *Edmundson, In re* (17 Q. B. 67), overruled. *Reg.* v. *Edwards*, 53 L. J., M. C. 149; 13 Q. B. D. 586; 51 L. T. 586; 49 J. P. 117—C. A.

Interested Justices.]—The provision in the s. 3 of the Railways Clauses Act, 1845, that the word "justice," where used in the act, shall mean a justice who shall not be interested in the matter requiring his cognisance, is inserted ex abundanti cautelâ, and is only declaratory of the common law, and does not exclude the jurisdiction of a justice where the parties concerned consent that he shall act. *Wakefield Local Board* v. *West Riding and Grimsby Ry.*, 6 B. & S. 794; 35 L. J., M. C. 69; 14 W. R. 100; 10 Cox, C. C. 162.

Residue of Term less than a Year.]—Compensation for a residue of a term which will expire within a year is to be determined, in case of difference, by two justices under the Lands Clauses Act, 1845, s. 121, and not by arbitration under s. 68. *Reg.* v. *G. N. Ry.*, 46 L. J., Q. B. 4; 2 Q. B. D. 151; 35 L. T. 551; 25 W. R. 41.

Date of Notice fixes Interest.]—The Holborn Valley Improvement Act, 1867, which empowers the corporation of London to acquire certain houses, &c., incorporates the London Improvement Act, 1847, which empowers the corporation to take lands required after six months' notice to treat for their purchase, and in case of dispute to issue their precept to impannel a jury to assess the compensation; and directs persons to give up possession after six months' notice; and also incorporates s. 121 of the Lands Clauses Act, 1845, which directs that where the tenant's interest does not exceed a tenancy for a year, or from year to year, the compensation shall be assessed by justices. The corporation gave a tenant notice that they intended to take his house; that they were willing to treat in respect thereof; and that he must quit in six months:—Held, that for the purpose of determining whether his compensation was to be assessed by a jury or by justices, his interest at the time of giving the notice, and not at its expiration, was to be considered, and therefore he was entitled to have his compensation assessed by a jury. *Tyson* v. *London Corporation*, 41 L. J., C. P. 6; L. R. 7 C. P. 18; 25 L. T. 640; 20 W. R. 112.

Tenants from Year to Year.]—Where the occupier of land has no greater interest therein than as a tenant for a year, or from year to year, and such land has been entered upon or injuriously affected by the promoters of an undertaking, he can obtain compensation only by the determination of two justices, and is not entitled to have his claim settled by arbitration under s. 68. *Reg.* v. *Manchester, Sheffield and Lincolnshire Ry.*, 4 El. & Bl. 88; 1 Jur. (N.S.) 419; 2 W. R. 591. S. P., *Knapp* v. *L. C. & D. Ry.*, 2 H. & C. 212; 32 L. J., Ex. 236; 9 Jur. (N.S.) 671; 8 L. T. 541; 11 W. R. 890.

By royal charter, persons were incorporated as the governors of the possessions, revenues, goods, and chattels of a free grammar school. The governors were to find a house, to be called the schoolhouse, in which the school should be fitly kept. They had also power to elect and remove the master as often as, according to their discretion, they might see necessary and convenient. They appointed a schoolmaster, and put him into possession of the schoolhouse. The resolution by which he was appointed contained terms to which he subscribed his consent, and by which he was to keep the house in repair, to take certain articles at a valuation, and give them up at quitting, being paid for them at a valuation, and to give three calendar months' notice before relinquishing his appointment. Two-thirds of the governors, with the sanction of the bishop, were to have the power of removing him, giving three months' notice; but in either case the office was to be vacated only on the 21st June or 21st December:—Held, that the schoolmaster had no greater interest in the house than as tenant for a year, or from year to year, and therefore, in seeking compensation, was confined to the remedy given by s. 121. *Ib.*

Compensation to a person having no greater interest than as tenant from year to year in premises required under the Holborn Valley Improvement Act (27 & 28 Vict c. lxi.), can

only be assessed by justices. *Reg.* v. *London Corporation*, L. R. 2 Q. B. 292; 16 L. T. 280.

—— **Valid Lease in Equity.**]—A written agreement void at law, but equivalent in equity to a lease, is an interest greater than a yearly tenancy, within the Lands Clauses Act; and a tenant having and producing such an agreement is not liable to have the value of his interest assessed by two justices. *Sweetman* v. *Metropolitan Ry.*, 1 Hem. & M. 543; 10 L. T. 156; 12 W. R. 304. S. P., *Rogers* v. *Hull Dock Co.*, 34 L. J., Ch. 165; 10 Jur. (N.S.) 1245; 13 W. R. 217.

—— **No Lands taken.**]—When no part of the lands of a tenant from year to year is taken, but his interest in the lands is injuriously affected by the railway works, he is entitled to claim compensation, and to have it determined under s. 68, before a jury or arbitrators; and his case does not come within s. 121, which provides for the assessment of the compensation being made before justices only when some part of the lands is required by the company. *Somers and Metropolitan Ry., In re*, 31 L. J., Q. B. 261; 8 Jur. (N.S.) 617; 10 W. R. 717.

A tenant for a year or from year to year is not entitled to have the amount of compensation, in respect of his interest, determined under s. 121, where the company has merely given a notice to treat under s. 18, but has not required him to give up possession. *Reg.* v. *Stone*, 35 L. J., M. C. 208; L. R. 1 Q. B. 529; 14 L. T. 552; 14 W. R. 791.

Tenancy for less than a Year and more than a Year.]—A magistrate, in assessing compensation, under s. 121 of the Lands Clauses Act, 1845, for the taking and injuriously affecting lands held by a tenant whose interest in the land taken is not for more than a year, has no jurisdiction to award compensation in respect of adjoining lands held by the tenant for more than a year for injuriously affecting such lands for more than a year. *Bexley Heath Ry.* v. *North*, 64 L. J., M. C. 17; [1894] 2 Q. B. 579; 9 R. 751; 71 L. T. 533; 58 J. P. 832—C. A.

If any part of a claim for compensation under the Lands Clauses Act, 1845, is in respect of an interest for more than a year, a magistrate cannot assess the compensation in respect of any part of such claim under s. 121, but the whole compensation must be assessed by a jury or arbitrators under s. 68. *Ib.*

Costs—Local Act.]—Under a local improvement act which incorporated the Lands Clauses Act, power was given to the corporation to lay sewers in lands, making full compensation for any damage, and where the method of recovering compensation was not provided, two justices might hear and determine the same:—Held, that though nothing was said about costs, full compensation necessarily included the costs of applying to justices. *Huddersfield Corporation* v. *Shaw*, 54 J. P. 724.

Form.]—The justices need not put their decision into writing, but may give it verbally. *Reg.* v. *Combe*, 32 L. J., M. C. 67; 11 W. R. 441.

d. In Superior Court.

Jurisdiction—Title—Amount.]—The question to be tried under s. 41 of the Regulation of Railways Act, 1868, by a judge of a superior court with a jury, is the same as that tried before that act by the sheriff with a jury, and, consequently, the judge and jury have no jurisdiction to determine the title of the compensation, but can only determine the amount. *East London Ry., In re, Oliver's Claim*, 24 Q. B. D. 507; 63 L. T. 147; 38 W. R. 312—C. A.

—— **Judge and Jury.**]—Semble, that, notwithstanding the Judicature Acts and Rules, a trial in the high court under s. 41 cannot be by a judge without a jury. *Ib.*

—— **Master.**]—The jurisdiction conferred by s. 41 of the Regulation of Railways Act, 1868, upon a judge of any one of the superior courts of common law at Westminster to make an order for the trial of a question of compensation in one of the superior courts of common law is transferred to the High Court of Justice by s. 16 of the Judicature Act, 1873, and may be exercised by a Master under the powers of Order LIV. r. 12, of the Rules of the Supreme Court, 1883. *Donisthorpe, In re*, 66 L. J., Q. B. 399; [1897] 1 Q. B. 671; 76 L. T. 371; 45 W. R. 386—C. A.

Time for Appeal.]—In an issue stated under the Regulation of Railways Act, 1868, s. 41, to try a question of compensation, the time for appealing is not limited to twenty-one days by Ord. LVIII. rr. 9 and 15. *New River Co.* v. *Midland Ry.*, 36 L. T. 539; 25 W. R. 502—C. A.

First Trial by Sheriff set aside—Power to order Second Trial in High Court.]—A claim for compensation having been tried before a jury, under s. 39 of the Lands Clauses Act, 1845, the verdict was set aside by the court on the grounds of treating, a champagne luncheon having been given by the plaintiff to the jury. The plaintiff then gave renewed notice of his claim, under s. 60, on 17th March, 1881; and on 4th April the defendants took out a summons, returnable on 8th April, under s. 41 of the Regulation of Railways Act, 1868, for an order that the question of compensation should be tried in the high court. The defendants had duly issued their warrant to the sheriff before the original trial, but no fresh warrant was issued by them after the second notice, and the twenty-one days limited by s. 41 of the act of 1868 for its issue elapsed after the taking out of the summons, but before it was returnable:—Held, that a judge had no jurisdiction to make the order. *Tanner* v. *Swindon Ry.*, 45 L. T. 209.

New Trial.]—The court has no power to grant a new trial of an issue directed under s. 41 of the Regulation of Railways Act, 1868, to determine the right to compensation for lands taken for the purposes of a railway. *Birmingham Land Co.* v. *L. & N. W. Ry.*, 58 L. J., Q. B. 587; 22 Q. B. D. 435; 60 L. T. 317; 37 W. R. 285.

When Action lies.]—A company was empowered by statute to build a bridge over the Ouse. The act recited that the building of such bridge might diminish the tolls received at a neighbouring bridge over the same river, belonging to another company; it therefore enacted, that if in the first three years after the opening of the railway there should be an annual

decrease in the tolls of the last-mentioned bridge, as compared with the tolls during the three preceding years the railway company should forthwith pay the bridge company a sum equal to ten years' purchase of such annual decrease, taken upon an average of the three years in which it occurred. The decrease took place, and the compensation was claimed:—Held, that an action lay against the company for the amount, and that a mandamus to pay was not a more effectual remedy, and ought not to be granted. *Reg.* v. *Hull and Selby Ry.*, 6 Q. B. 70; 3 Railw. Cas. 705; 13 L. J., Q. B. 257; 8 Jur. 491.

The owner of houses, which were liable to be taken for making a railway under an act of parliament, received notice from the promoters that they would be required for the railway, and the company demanded the particulars of his interest therein, and stated their willingness to purchase. The particulars were furnished by the landowner, and the sum of 4,500*l.* was claimed as compensation for taking the property, and he required payment thereof, or that a warrant should be issued by the company to summon a jury to assess the amount. The company took no further step in the matter:—Held, that the landowner could not maintain an action to recover the 4,500*l.* *Burkinshaw* v. *Birmingham and Oxford Junction Ry.*, 6 Railw. Cas. 600; 5 Ex. 475; 20 L. J., Ex. 246.

If, in the execution of works authorised by an act of parliament damage is sustained, and the act provides a special mode in which compensation for such damage may be recovered, no action will lie for it. But this only relates to works carefully and skilfully executed, and if there is a want of proper care and skill on the part of those executing the works, an action for the negligence to recover damages for the injury thereby sustained will lie. *Clothier* v. *Webster*, 12 C. B. (N.S.) 790; 31 L. J., C. P. 316; 9 Jur. (N.S.) 231; 6 L. T. 461; 10 W. R. 624.

—— **Plea of Fraud.**]—In an action against a railway company for the full compensation claimed because of a default by the company to summon a jury within twenty-one days, a plea that the claim was not a bonâ fide claim within the statute, but in fraud of the company and without any reasonable cause, will not be allowed. *Hooper* v. *Bristol Port Ry.*, 35 L. J., C. P. 299.

—— **Special Tribunal Non-existent.**]—Where a special tribunal appointed by statute for ascertaining the compensation to be given for damage sustained by the exercise of compulsory powers is no longer available, the compensation may be ascertained and enforced by action. *Bentley* v. *Manchester, Sheffield and Lincolnshire Ry.*, 60 L. J., Ch. 641; [1891] 3 Ch. 222; 65 L. T. 22.

Court of Chancery.]—The lessee of premises' which a railway company had given notice they were about to take for the purposes of the railway, claimed a future right of renewal of the lease. The company, who disputed this right, entered into possession of the land under an agreement for the payment of compensation in respect of the lessee's interest in the existing term, without prejudice to her claim in respect of the future right. Upon a bill by the lessee to establish her right of renewal:—Held, that inasmuch as the Lands Clauses Act contained no machinery for settling such a question, and the lessee had no remedy elsewhere, the court had jurisdiction. *Bogg* v. *Midland Ry.*, 36 L. J., Ch. 440; L. R. 4 Eq. 310; 16 L. T. 113.

The court itself ascertained and fixed the amount of compensation, without referring the matter to another tribunal; compensation to bear interest at 4*l.* per cent. from the time when the reversion fell into possession. *Beaufort (Duke)* v. *Patrick*, 17 Beav. 60; 22 L. J., Ch. 489; 17 Jur. 682; 1 W. R. 280.

A lessee of lands taken by a railway company, without notice to treat, filed a bill against the company for an injunction to restrain them from taking more land, and an assessment of damages, eight months after the company had entered upon his land. Pending the proceedings, the necessity for an injunction ceased, and the lessee did not apply for one:—Held, that inasmuch as his right to an injunction and damages was clear at the time of filing his bill, he was entitled at the hearing to an inquiry as to damages, and a direction that the company should pay the sum assessed with costs. *McRae* v. *L. B. & S. C. Ry.*, 18 L. T. 226.

A company gave notice to treat as to some building land, and a question was made whether, on the construction of a private act of parliament, the lessees had the right of perpetual renewal or not; an arbitrator assessed the value of the interest, and the money was paid into court to the account of the lessors, lessees, and other parties. A correspondence ensued, and a petition was presented setting it out, and numerous parties were served, who all appeared separately asking for investment in the names of the petitioners, and payment of the dividends to the receiver:—Held, that the correspondence amounted to an agreement that the petitioners must be considered as having the right of perpetual renewal, but otherwise the court was bound to decide it on the act, a jury or an arbitrator having no power to decide anything but the value of the interest. *Brandon* v. *Brandon*, 13 W. R. 251.

Held, also, that, supposing it was decided that the petitioners had not the interest, the court, by its own machinery, would determine the value, and direct payment of the rest (if there was any surplus) to the parties paying it in. *Ib.*

Injunction restraining defendants from raising a footway refused, but matter referred to chambers to ascertain amount of injury and what damages to be paid. *Wedmore* v. *Bristol Corporation*, 7 L. T. 459.

e. By Surveyors.

In Case of Persons under Disability.]—*See* ante, col. 1304.

On Entry under s. 85.]—*See* ante, col. 1499.

F. RESTRAINING PROCEEDINGS TO OBTAIN.

Where Land not Injuriously affected.]—The court does not interfere by injunction to restrain parties who insist that their property has been injuriously affected within the meaning of s. 68 of the Lands Clauses Act from prosecuting their claim under the act upon the mere ground that

the act has not provided the means of determining the preliminary question whether the property has been injuriously affected or not. But whether the same rule applies to a case in which there are several grounds of claim, some of which have been satisfied, quære. *Norfolk (Duke)* v. *Tennant*, 9 Hare, 745 ; 16 Jur. 398.

A canal act provided that in case the company and the coal-owner could not agree as to the amount of compensation for the coal taken for the purposes of the canal, it should be settled by a jury summoned by the commissioners, whose verdict was "to be conclusive, and should not be removed by certiorari or other process whatever into any of the courts of record at Westminster or any other court." A bill was filed, praying an injunction to restrain proceedings before a jury, on the ground that the defendant was entitled to no compensation, and that the special jurisdiction provided by the act was not so constituted as to be likely to come to a just conclusion :—Held, that the plaintiffs were not entitled to an injunction, if the defendant was entitled to any compensation, the amount of which had to be ascertained. *Barnsley Canal Co.* v. *Twibell*, 7 Beav. 19 ; 13 L. J., Ch. 134.

The defendant claimed a sum of money from a railway company, by way of damages, for having injuriously affected his land by crossing the road leading to it, and called upon the company either to pay the sum claimed or to summon a jury to assess the amount of compensation. The company alleged that the defendant's land was not injuriously affected, within the meaning of s. 68 of the Lands Clauses Act, 1845, and filed their bill to restrain the defendant from taking proceedings to assess the damage :—Held, in conformity with a decision of Lord Truro, which was opposed to a decision of Lord Cottenham, that an injunction could not be maintained. *South Staffordshire Ry.* v. *Hall*, 6 Railw. Cas. 389 ; 20 L. J., Ch. 397 ; 15 Jur. 322. Affirmed, 3 Macn. & G. 353 ; 16 Jur. 93.

Proceedings instituted without Authority.]—The lessee of a ferry served a notice on a railway company on behalf of himself and his lessors claiming compensation for injury to the ferry, and requiring the dispute to be submitted to arbitration under the Lands Clauses Act. The lessors had not given authority to use their names ; the act of the railway company provided for compensating the lessors of the ferry, but did not mention their lessee ; and the notice claimed one lump sum without distinguishing the interests of the lessors and the lessee. The railway company brought an action for an injunction to restrain the lessee from proceeding to arbitration under the notice :—Held, that a proceeding in the name of a person who had given no authority ought to be stayed, and that an injunction ought to be granted, the unauthorised use of the name of the lessors distinguishing the case from *North London Railway* v. *G.N. Ry.* (11 Q. B. D. 30) :—But held, on appeal, that though the court in which an action is brought has jurisdiction to stay proceedings in it if it has been brought without authority, the court has no general jurisdiction to restrain persons from acting without authority, and that an injunction could not be granted to restrain a person from taking proceedings out of court in the name of a person who had given no authority to use it. *London and Blackwall Ry.* v. *Cross*, 55 L. J., Ch. 313 ; 31 Ch. D. 354 ; 54 L. T. 309 ; 34 W. R. 201—C. A.

Effect of Agreement.]—T. claimed damages for injury done to his brewery by the erection of a new market at S. The damages claimed were —first, for narrowing a street bounding the brewery ; secondly, for temporary obstruction of the thoroughfare ; and thirdly, for obstruction of the access of light and air, and contracted ventilation. This last damage did not appear to have been pressed, or discovered, until the new market buildings had arisen to a considerable height. The defendant gave one notice embracing all the three heads, to proceed by arbitration, according to ss. 25 & 68. There had been a treaty for compensation for the two former heads, but it did not appear to have been completed and carried out. There had been no treaty for compensation as to the third :—Held, that the nature of the compensation treated for being quite clear, the defendant could be restrained by injunction from proceeding under the notice he had given. *Norfolk (Duke)* v. *Tennant*, 9 Hare, 745 ; 16 Jur. 398.

Although the compulsory taking of land under the provisions of railway acts may, to a certain extent, and for certain purposes, place the company and the landowner in the relative position of vendor and purchaser ; yet it does not follow that a court of equity will decree the specific performance of such sales. Whether in a case depending exclusively on a notice to take lands given by a company, under the provisions of the Lands Clauses Act, 1845, the court will interfere to compel the company to adopt the subsequent proceedings directed by the act for giving compensation to the landowner, quære. *Adams* v. *London and Blackwall Ry.*, 2 Macn. & G. 118 ; 2 H. & Tw. 285 ; 6 Railw. Cas. 282 ; 19 L. J., Ch. 557 ; 14 Jur. 619.

In a case where such a notice had been followed by a claim to compensation on the part of the landowner and a subsequent agreement between the parties, which claim and agreement were, however, ultimately abandoned and repudiated on both sides, the court allowing a demurrer to a bill filed by the landowner, refused to interfere to compel the company, who were in possession of the land, to summon a jury :—Holding, that in this case the notice per se did not give the court jurisdiction, and that the rights of the parties were to be regulated by the provisions of ss. 68 and 85 of the Lands Clauses Act 1845. *Ib.*

Where Interest Uncertain.]—A railway company, under the powers of their act, gave notice to the lessees of a factory and buildings that they required a part of their premises. The lessees thereupon gave a counter notice, requiring the company, under s. 92 of the Lands Clauses Act to take the whole. The company took no further proceedings until the lease of the premises had expired. The lessees having remained in possession of the premises, the railway company, without serving any new notice on the defendants, had the value of their interest in the whole of the premises assessed, deposited the amount in court, delivered a bond, and entered into possession of a part of the premises under s. 85. The defendants, conceiving that the company had no right to proceed under s. 85, sent in a claim, and gave them notice to issue their warrant to the sheriff, to summon a jury to assess compensation under s. 68. The company thereupon filed their bill to restrain such proceedings. Negotiations had been entered into by the reversioners with the company and with the defendants, which

rendered it doubtful to what interest in the premises the latter were entitled. On motion to dissolve an injunction, granted ex parte :— Held, that the injunction to restrain proceedings by the defendants, under s. 68 be continued until the rights of the several parties had been ascertained. *L. & S. W. Ry.* v. *Coward*, 5 Railw. Cas. 703 ; 1 H. & Tw. 377, n.

An incorporated company were improving a harbour under the powers of an act, whereof the provisions of the Lands Clauses Act, 1845, were made part. In the course of the works a cofferdam was made, which temporarily prevented ships from approaching so near the warehouses adjoining the harbour as they had been accustomed to do. A lessee of such a warehouse claimed compensation for the damage thus occasioned to him to the amount of 65*l.*, or to have the same ascertained by arbitration. The court refused to grant an injunction restraining him from proceeding under the compensation clauses of the Lands Clauses Act. *Sutton Harbour Improvement Co.* v. *Hitchins*, 1 De G. M. & G. 171 ; 21 L. J., Ch. 73 ; 16 Jur. 70.

Where Taking not Authorised.]—A railway company, under the powers of their act, purchased a subsisting lease in lands, and they gave a notice to the plaintiff, the owner of the reversion in fee, for summoning a jury to assess the value of the fee-simple and inheritance thereof. The plaintiff filed his bill, insisting that the company were not authorised by their act to take more than a certain portion of the land, and praying an injunction to restrain them from proceeding to assess the value of the excess beyond that portion :—Held, that inasmuch as the contemplated proceedings would, if the company were not authorised by their act to take the land in question, be a nullity, and inasmuch as the entry and possession of the plaintiffs or derivative lessees was lawful, and no case being made of any sudden grievous injury done to the inheritance, the motion for the injunction must be refused with costs. *Mouchet* v. *G. W. Ry.*, 1 Railw. Cas. 567.

The court will restrain a company from proceeding except with relation to what is included in their notice to the owners, and the jury from assessing the value of any other land than that for the purchase of which the owner has been required by the notice to treat ; the proceeding before the jury must be consistent with the precept and the precept with the notice. *Stone* v. *Commercial Ry.*, 4 Myl. & C. 122 ; 1 Railw. Cas. 375 ; 3 Jur. 946.

Abandonment of Notice.]—Ten days before the expiration of the time for compulsorily taking lands, a railway company gave notice to the plaintiff of their intention to take his lands. They subsequently introduced a bill into parliament authorising them to abandon the undertaking, but they did not further proceed with it, and about sixteen months after the date of their notice, they served the plaintiff with a further notice of their intention to summon a jury to assess the value of his lands. He filed a bill to restrain the company from proceeding to act upon this notice, and a demurrer by the company was overruled. *Hedges* v. *Metropolitan Ry.*, 28 Beav. 109 ; 6 Jur. (N.S.) 1275 ; 3 L. T. 643.

A railway company in 1856 took possession of a meadow, a large part of which belonged to one owner and a small part to another, who did not know the position or the exact extent of his land. The company, in 1859 took a conveyance of the large part, on which conveyance the extent of the small part was stated. The company did not pay for the small part, and the owner, in 1868, brought an ejectment against the company, obtained judgment, and was put into possession. His possession was disturbed by the company, and he filed a bill to restrain them. The company offered to pay the value of the land, as in 1856, and interest thereon, which the landowner refused. The company then produced a notice to treat, given in 1856, and gave notice of their intention to proceed under that notice. The landowner filed a second bill to restrain them :— Held, that, under the circumstances, the company were not entitled to proceed under the notice to treat. *Stretton* v. *Great Western and Brentford Ry.*, L. R. 5 Ch. 751 ; 23 L. T. 379 ; 18 W. R. 1078.

Where Proceedings pending as to Access to Land.] — The metropolitan board of works, under the powers conferred on them by the Thames Embankment Act, 1862, cut off from its river frontage a piece of land belonging to the defendant. The question of compensation was referred to an umpire, who made his award in the belief that the land had been made inaccessible to carriages by the embankment works. By s. 62, the board of works was bound to provide means of access to the land. The defendant filed a bill to compel them to make the land accessible to carriages, and at the same time commenced an action for the whole amount awarded. The board of works filed a bill for an injunction against the action :—Held, that the action must be restrained until the hearing of the cause. *Metropolitan Board of Works* v. *Salisbury* (*Marquis*), 26 L. T. 390 ; 20 W. R. 507.

V. SUPERFLUOUS LANDS.

1. *What are*, 1594.
2. *Rights of Vendors and Adjoining Owners*, 1601.
3. *Sale and Disposition*, 1603.

1. What are.

Lands not required for Undertaking.]—The words "which shall not be required," in the heading prefixed to the Lands Clauses Act, 1845, s. 127, do not refer to the period when the lands are acquired ; and s. 127 prescribes a period (in the absence of any such provision in the special act) at which a survey is to be taken as to what lands are not then required for the purposes of the undertaking. *G. W. Ry.* v. *May*, 43 L. J., Q. B. 233 ; L. R. 7 H. L. 283 ; 31 L. T. 137 ; 23 W. R. 141.

Semble, that lands adjacent to a railway station, occupied by granaries, coal-sheds and a public-house, let to tenants and used by them in connection with the traffic upon the railway, were "used for the purposes of the undertaking" within the meaning of the Lands Clauses Act. *Betts* v. *G. E. Ry.*, infra.

Semble, by Bramwell, L.J., where the natural drainage of land, belonging to a railway company and demised by them for agricultural purposes, flows into a reservoir used by them for the supply of water to their engines, the land is not superfluous within the Lands Clauses Act, 1845, s. 127. *Hooper* v. *Bourne*, infra, in C. A.,

W. brought an action for trespass against a railway company in placing part of the pier of a bridge over their line upon his land. The land had been originally conveyed by the railway company as superfluous land to the plaintiff's predecessor in title, by a conveyance describing it as bounded by the railway on one side and certain cottages on the other. The railway was in a cutting, and the visible boundary of the land was a wall fourteen inches thick at the surface of the ground. This wall was in part a retaining wall, built to prevent the side of the cutting falling in, and was much thicker below the surface than above it. The pier complained of extended less than two feet from the visible boundary wall, and was built wholly upon ground lying vertically above the footings of the lower part of the wall:—Held, that the ground vertically above such footings was not land required for the purposes of the railway within the meaning of s. 127 of the Lands Clauses Act, which the company were unable to sell, and had passed to the plaintiff's predecessor under the description in the conveyance. *Ware* v. *L. B. & S. C. Ry.*, 52 L. J., Ch. 198; 47 L. T. 541; 31 W. R. 228.

User or Intended User of Land.]—When lands acquired by a railway company under its compulsory powers are, at the expiration of the time prescribed by s. 127 of the Lands Clauses Act, 1845, found not to be required for the permanent purposes of the undertaking, they are superfluous lands within the meaning of that section, though they may, within that time, have been used for temporary purposes of the undertaking. *G. W. Ry.* v. *May*, 43 L. J., Q. B. 233; L. R. 7 H. L. 283; 31 L. T. 137; 23 W. R. 141.

The employment of such lands by the depositing upon them earth and spoil from a neighbouring cutting, which is allowed and intended to remain there without being of any further use to the railway, is, after the depositing of such earth and soil has ceased, a user for a temporary purpose. *Ib.*

Land which is taken compulsorily by a railway company for the purposes of its act, and which is bonâ fide retained by the company with a reasonable expectation of using it for such purposes, does not at the expiration of ten years from the time fixed for the completion of the works vest in an adjoining owner as superfluous land under the Lands Clauses Act, 1845, s. 127, merely because, from insufficiency of traffic, or from want of funds, the company cannot immediately apply it to such purposes, although it is in the meanwhile let out to yearly tenants, and applied to purposes for which it is in its then condition suitable. *Betts* v. *G. E. Ry.*, 49 L. J., Ex. 197; 42 L. T. 1: 28 W. R. 50; 44 J. P. 282—H. L. (E.) Affirming 3 Ex. D. 182—C. A.

In an action of ejectment to recover lands from a railway company as superfluous, the question to be left to the jury is, whether a reasonable person with a knowledge of all the facts actually existing at the end of the ten years prescribed in s. 127, would then have been justified in coming to the conclusion that the lands would be required for the purposes of the company. *Ib.*

Where a railway company is authorised by its special act (with which the Lands Clauses Act, 1845, and the Railways Clauses Act, 1845, are incorporated) to acquire lands compulsorily and also for extraordinary purposes, land delineated in the parliamentary plans, and described in the books of reference, and purchased by the company pursuant to agreement, no notice to treat having been given, must be deemed to have been acquired under the provisions of the special act, and the Lands Clauses Act, 1845, within the meaning of s. 127 of the latter act; and although for some years after the purchase no works are constructed upon the land, yet if at a subsequent time it becomes useful for the purposes of the railway, it cannot be deemed to have been purchased for extraordinary purposes. *Hooper* v. *Bourne*, 47 L. J., Q. B. 437; 3 Q. B. D. 258; 37 L. T. 594; 26 W. R. 295—C. A. Affirmed, 49 L. J., Q. B. 370; 5 App. Cas. 1; 42 L. T. 97; 28 W. R. 493; 44 J. P. 327—H. L. (E.)

The mere fact that the land had not been built upon is not conclusive; all the circumstances must be considered. *Ib.*

The fact that the lands were in the neighbourhood of a populous town was a circumstance to raise a presumption that the lands would be wanted on account of increased traffic on the railway. *Ib.*

Per Lord O'Hagan:—An actual present intention to employ the land for the purposes of the railway need not have been formed within the prescribed time, in order to prevent a forfeiture at the end of it. *Ib.*

In a case of this kind the burden of proving a title to the land, as superfluous land, lies upon the claimant. And, semble, that the fact that they were so wanted in 1868 raised a reasonable presumption that in 1863 the want of them for railway purposes had been foreseen. *Ib.*

Per the Lord Chancellor (Earl Cairns):—If a railway company purchases land and the minerals under its surface, and the surface is not at that time wanted for the purposes of the railway, but afterwards becomes so, and can be used without requiring the support of the minerals, quære, whether there is any authority which requires the company to sell the minerals apart from the land, or, in default of such sale, vests them in the adjoining owner. *Ib.*

Not within Limits of Deviation.]—When lands are included in the plans and books of reference scheduled to a company's act, and are purchased after a notice from the company to treat, they are liable to vest in the owners of adjoining lands as superfluous lands, although they may not be included within the limits of deviation delineated on the company's plans. *G. W. Ry.* v. *May*, supra. And see *Horne* v. *Lymington Ry.*, infra.

Time when Determined.]—If lands are not liable to vest at the expiration of the time mentioned in s. 127, they are entirely exempt from the provisions of the act applicable to the sale or to the vesting of superfluous lands. *G. W. Ry.* v. *May*, supra.

Undertaking Abandoned.]—The term "superfluous lands," in ss. 127 and 128 of the Lands Clauses Act, preceded by the expression "the lands which shall not be required for the purposes thereof," is sufficient to include the case of an undertaking being abandoned. *Astley* v. *Manchester, Sheffield and Lincolnshire Ry.*, 2 De G. & J. 453; 27 L. J., Ch. 478; 4 Jur. (N.S.) 567; 6 W. R. 561.

Sect. 127 of the Lands Clauses Act refers only to superfluous lands, and not to the case of the railway being abandoned or given up. *Smith* v. *Smith*, 38 L. J., Ex. 37; L. R. 3 Ex. 282.

Sect. 127 of the Lands Clauses Act, 1845, does not apply to the case of a derelict line of railway. *Duffy's Estate, In re*, [1897] 1 Ir. R. 307.

"Dispose of."]—A railway company compulsorily purchased portions of A.'s land for the purpose of a branch railway, but suffered their powers to expire without making it. Before the period of ten years, within which they were bound to dispose of superfluous lands, expired, they promoted a bill for enabling them to make another branch railway, and proceeded to carry on works on the above portions of his land for the purposes of the proposed branch line:—Held, that A.'s right of repurchase had not arisen, for that the words "dispose of," in s. 128 of the Lands Clauses Act, refer to a transfer of the land to some other person, not to its application to a new purpose. *Astley* v. *Manchester, Sheffield and Lincolnshire Ry.*, 2 De G. & J. 453; 27 L. J., Ch. 478; 4 Jur. (N.S.) 567; 6 W. R. 561.

What Interests in Land.]—A company became amalgamated with others; and the new company, after the period of ten years had expired, obtained an extension act, which provided that the respective periods by the several acts relating to the company limited for the sale of their superfluous lands should be extended for five years from the passing of the act, and those several acts should be read and construed as if that period had been fixed by each of those acts for that purpose:—Held, that the obligation to resell the surplus land applied to reversions or rather partial interests in land acquired by the company as well as to property in which they had acquired the fee-simple. *Moody* v. *Corbett*, 35 L. J., Q. B. 161; L. R. 1 Q. B. 510; 14 W. R. 737—Ex. Ch. *S. C.*, in Q. B., 5 B. & S. 859.

Mines and Minerals.]—When lands which a railway company is authorised by its special act to take, have been conveyed to them, together with an express grant of the mines and minerals thereunder, although the surface may afterwards become superfluous by virtue of the Lands Clauses Act, s. 127, yet the mines and minerals do not vest in the adjoining owners. *Hooper* v. *Bourne*, 49 L. J., Q. B. 370; 5 App. Cas. 1; 42 L. T. 97; 28 W. R. 493; 44 J. P. 327—H. L. (E.)

Accommodation Works.]—A railway company bought from the plaintiff a small piece of land, the whole of which, according to their original plan, would have been covered by the embankment of the railway. Being obliged to provide a communication between severed lands of another landowner, the company altered their levels so as to narrow the embankment and leave unoccupied a strip of the land purchased from the plaintiff. This strip they turned into a road for the use of the other landowner. The plaintiff thereupon, before the period named for the sale of superfluous lands arrived, filed a bill to enforce a right of pre-emption as to the strip:—Held, that the land was not superfluous land, for that the making accommodation works which the company was compellable to make was one of the purposes of their acts, and that the plaintiff, therefore, had no title to relief. *Beauchamp (Earl)* v. *G. W. Ry.*, 38 L. J., Ch. 162; L. R. 3 Ch. 745; 19 L. T. 189; 16 W. R. 1155.

Lands acquired by Voluntary Agreement.]—Lands taken compulsorily by the promoters of a railway, unless used or disposed of within the statutory period, are deemed superfluous lands, and as such vest in the adjoining owners. But this statutory rule has no application to lands acquired by voluntary agreement for extraordinary purposes arising incidentally. *City of Glasgow Ry.* v. *Caledonian Ry.*, L. R. 2 H. L. (Sc.) 160.

When lands are included in the plans and books of reference scheduled to a company's act, and are purchased after a notice from the company to treat, they are liable to vest in the owners of adjoining lands as superfluous lands, although they may have been purchased at a price settled by private agreement and without arbitration. *G. W. Ry.* v. *May*, infra.

A railway company, by its special act, obtained in 1856, was authorised to construct a railway and a landing-place, and also to purchase from the owners thereof, upon terms to be mutually agreed upon, a bridge across a river, together with all rights, lands, tolls and works connected therewith. The repair of the bridge was essential for the safety of the railway. The owners of adjoining land brought ejectment in respect of some of the land connected with the bridge, and not included within the limits of deviation of the railway, on the ground that it was superfluous land, which had become vested in them under the Lands Clauses Act, 1845, s. 127:—Held, that this section did not apply to land acquired, as this was, by purchase, nor to land obtained for this purpose; and that, therefore, the railway company did not forfeit its right to hold the lands sought to be recovered, although not used by the company for the railway. *Horne* v. *Lymington Ry.*, 31 L. T. 167.

The right of pre-emption is confined to land acquired by a company under its parliamentary powers; but if the usual notice to treat has been given in exercise of the powers, the right is not lost in consequence of the price being subsequently settled by agreement instead of an award or an inquiry before a jury. *Carington* v. *Wycombe Ry.*, L. R. 3 Ch. 213; 18 L. T. 96; 16 W. R. 494.

How Separated from Land Required by Company.]—"Superfluous land" must be land separated by a vertical, not by a horizontal, boundary from land required for the purposes of the company. *Metropolitan District Ry. and Cosh, In re*, 49 L. J., Ch. 277; 13 Ch. D. 607; 42 L. T. 73; 28 W. R. 685; 44 J. P. 393—C. A.

A railway company purchased land for the purpose of making an underground railway. They excavated the soil, constructed the line, and then built an arch over it, and replaced the surface over the arch:—Held, that the company were not authorised by s. 127 of the Lands Clauses Act, 1845, to sell the vacant space over the arch as "superfluous land." *Ib.*

Where a station is erected on arches on land taken for the purposes of a private act, the part of the land under the arches is not "superfluous land" within s. 127 of the Lands Clauses Act. *Mulliner* v. *Midland Ry.*, 48 L. J., Ch. 258; 11 Ch. D. 611; 40 L. T. 121; 27 W. R. 330.

Time for Sale Extended by Statute.]—When lands had vested in the adjoining owners at the expiration of the time prescribed by s. 127, an act of parliament, passed in the following year, extending the time for the sale of superfluous lands belonging to the company, was held not to apply to those lands, though they were at the passing of

the act in the ostensible possession of the company, or their lessees, as market gardeners. *G. W. Ry.* v. *May*, 43 L. J., Q. B. 233; L. R. 7 H. L. 283; 31 L. T. 137; 23 W. R. 141.

The words of a section extending the time for the resale will not be construed so as to defeat the vested rights which had arisen from the lapse of the time allowed for the resale. *Moody* v. *Corbett*, 35 L. J., Q. B. 161; L. R. 1 Q. B. 510; 14 W. R. 737—Ex. Ch. *S. C.*, in Q. B., 5 B. & S. 859.

Evidence—Onus of Proof.]—The burden of proving a title to land, as superfluous land, lies upon the claimant. *Hooper* v. *Bourne*, 49 L. J., Q. B. 370; 5 App. Cas. 1; 42 L. T. 97; 28 W. R. 493; 44 J. P. 327—H. L. (E.)

—— **Strip between Hedge and Fence.**]—A railway company in 1838 bought part of a field under the powers of their act, and erected a post-and-rail fence on the boundary. They then made a ditch within the fence, and threw up a bank on which they planted a quickset hedge at the distance of four feet six inches from the fence. As the hedge grew up the fence was allowed to fall into decay, and about the year 1846 it was removed. From the year 1854 up to the commencement of this action in 1875, the strip of land between the quickset hedge and the site of the fence was occupied and cultivated with the remainder of the field, partly as an arable field and partly as garden-ground, the railway company in no way interfering with it except that their workmen went over it to trim the hedge:—Held, that the circumstances conclusively shewed the strip between the hedge and the line of the post-and-rail fence to be superfluous land within the meaning of the Lands Clauses Act, 1845, s. 127, and that it had therefore vested in the owner of the rest of the field, and moreover, that the owner of the rest of the field had had such a possession of the strip in question as was sufficient to extinguish the title of the company under the Statute of Limitations. *Norton* v. *L. & N. W. Ry.*, 13 Ch. D. 268; 41 L. T. 429; 28 W. R. 173—C. A.

—— **Conveyance by Company not Conclusive.**]—The mere fact of a railway company purporting to convey away lands acquired by them for the purposes of their undertaking is not conclusive to shew that the lands so conveyed are superfluous lands within the meaning of s. 128 of the Lands Clauses Act, 1845. Therefore in an action brought by H. against both companies to establish his right of pre-emption under s. 128 of the Lands Clauses Act, 1845, in the lands conveyed, the ten years from the time fixed by the M. Company's acts for the completion of their works not having yet expired:—Held, that the mere fact of the conveyance was not sufficient to shew that the lands were superfluous within the meaning of that section; and that, inasmuch as it appeared from the evidence that had the lands remained in the hands of the M. Company they would not have been superfluous for the purposes of that company within that section, the plaintiff's right of pre-emption had not yet arisen. *Hobbs* v. *Midland Ry.*, 51 L. J., Ch. 320; 20 Ch. D. 418; 46 L. T. 270; 30 W. R. 516.

Land acquired by a railway company for the purposes of their undertaking was within the period prescribed by statute for the sale of their superfluous land compulsorily purchased by another railway company:—Held, that such compulsory sale was not evidence that the land was superfluous land in the hands of the selling company within s. 127 of the Lands Clauses Act, 1845, and that, consequently, the right of pre-emption under s. 128 did not arise. *Carington* v. *Wycombe Ry.* (37 L. J., Ch. 213; L. R. 3 Ch. 377) and *Hobbs* v. *Midland Ry.* (51 L. J., Ch. 320; 20 Ch D. 418) discussed. *Dunhill* v. *North Eastern Ry.*, 65 L. J., Ch. 178; [1896] 1 Ch. 121; 73 L. T. 644; 44 W. R. 231; 60 J. P. 228—C. A.

—— **Evidence of Attempted Sale.**]—In an action against a railway company to recover a piece of superfluous land which the company was bound to dispose of within ten years after it had been acquired by the company, the plaintiff proposed to shew that thirteen years after that time the company put the land up for sale by public auction as superfluous land. In order to prove this fact the auctioneer was called, who deposed that he had received his instructions for the sale from one of the directors of the company, and also from a person who acted as their solicitor in former sales of land:—Held, that this was not even primâ facie proof that the sale was by the authority of the company, although more than twelve months had elapsed between the sale and the trial. *Moody* v. *L. B. & S. C. Ry.*, 1 B. & S. 290; 31 L. J., Q. B. 54; 9 W. R. 780.

A description in an advertisement of sale of lands "as superfluous lands" is sufficient to stamp the lands with the character of superfluous lands. *L. & S. W. Ry.* v. *Blackmore*, 39 L. J., Ch. 713; L. R. 4 H. L. 610; 23 L. T. 504; 19 W. R. 305.

Lands used for Building Purposes.]—Lands used for building purposes must be lands actually laid out for that purpose at the time of their being taken by the railway. *Coventry* v. *L. B. & S. C. Ry.*, 37 L. J., Ch. 90; L. R. 5 Eq. 104; 17 L. T. 368; 16 W. R. 267.

And they will not be brought within the exception in s. 128, "as used for building purposes," merely by being marked out in plots for, and by being capable of being used for, building purposes, but must be connected with building purposes. *L. & S. W. Ry.* v. *Blackmore*, infra.

Lands within a Town.]—To bring lands within the exception in s. 128 as within a town, they must be encompassed by the buildings constituting the town. *L. & S. W. Ry.* v. *Blackmore*, 39 L. J., Ch. 713; L. R. 4 H. L. 610; 23 L. T. 504; 19 W. R. 305.

The terms of the exception of the Lands Clauses Act, s. 128, in respect of land situate within a town, or land built upon or used for building purposes, are not satisfied by the mere fact of the land taken being within the borough boundary of some town, or having upon it one or two houses, or being capable of use as building ground. But it must either belong to that part of the solum of a town which is surrounded or covered by continuous houses, or, if not situate in a town itself, be land covered with continuous buildings eodem modo in which the solum of the town may be described as so covered, or be land actually and de facto used for building purposes. *Carington* v. *Wycombe Ry.*, 37 L. J., Ch. 213; L. R. 3 Ch. 377; 18 L. T. 96; 16 W. R. 494.

2. Rights of Vendors and Adjoining Owners.

"Owner" of Land from which purchased Lands were Severed.]—The land purchased from the plaintiff was separated from the rest of his property by a high road:—Held, that he was nevertheless owner of the lands from which the purchased lands were originally severed, within the meaning of s. 128 of the Lands Clauses Act, 1845. *Hobbs* v. *Midland Ry.*, 51 L. J., Ch. 320; 20 Ch. D. 418; 46 L. T. 270; 30 W. R. 516.

Adjoining Owner.]—A person may be an adjoining owner to superfluous lands within s. 128 of the Lands Clauses Act, although he purchased such adjoining lands from the company itself. And, it would not be sufficient if his lands only touched the superfluous lands at a point. *L. & S. W. Ry.* v. *Blackmore*, 39 L. J., Ch. 713; L. R. 4 H. L. 610; 23 L. T. 504; 19 W. R. 305.

All adjoining proprietors have equal rights of pre-emption, and if there is one only, an inquiry will be directed whether any adjoining owners are desirous of purchasing. *Ib.*

The existence of a boundary wall between the superfluous and adjoining land does not deprive the adjoining owner of his right of pre-emption. *Ib.*

When commonable lands have been inclosed under an award made pursuant to a local statute, passed subsequently to 41 Geo. 3, c. 109, and by the award the soil of the roads running between the allotments remains vested in the lord of the manor, if the land upon one side of a road becomes superfluous within the Lands Clauses Act, s. 127, it will vest in the lord of the manor, for the right to the grass and herbage arising upon the road under 41 Geo. 3, c. 109, s. 11, is insufficient to render the proprietor of the close upon the other side of the road an adjoining owner. *Hooper* v. *Bourne*, 47 L. J., Q. B. 437; 3 Q. B. D. 258; 37 L. T. 594; 26 W. R. 295—C. A. *S. C.*, in H. L., supra.

Private land separated surplus lands of a railway from the lands of certain lessees who had a right of way over it, the ownership of the soil being in their reversioner:—Held, that they were nevertheless adjoining owners. *Coventry* v. *L. B. & S. C. Ry.*, 37 L. J., Ch. 90; L. R. 5 Eq. 104; 17 L. T. 368; 16 W. R. 267.

Several persons were owners adjoining a piece of surplus land all in one piece:—Held, that they were each entitled to a pre-emption over the whole before any part of it could be sold to a stranger. *Ib.*

—— **Mode of Apportionment.**]—The Court of Queen's Bench having decided that the surplus land forfeited by the company must be apportioned among the adjoining owners according to a line drawn from the point where their boundaries met to the nearest point of the land actually used by the company:—Held, that this mode of apportionment was wrong, and that the land ought to be divided among the owners of the adjoining properties in proportion to the frontage of each; that is, the length of the line of contact of each property, if the line was made straight from the point of intersection of the boundaries on one side, to the point of intersection of the boundaries on the other. *Moody* v. *Corbett*, 35 L. J., Q. B. 161; L. R. 1 Q. B. 510; 14 W. R. 737—Ex. Ch. *S. C.*, in Q. B., 5 B. & S. 859.

Acceptance not Necessary.]—If superfluous lands are not sold within the time prescribed by 8 & 9 Vict. c. 18, s. 127, they, at the expiration of that time, vest in the owners of the adjoining lands, and no act is necessary on the part of such owners indicating their acceptance of such lands. *G. W. Ry.* v. *May*, 43 L. J., Q. B. 233; L. R. 7 H. L. 283; 31 L. T. 137; 23 W. R. 141.

Land offered for Sale before Ten Years.]—Although the right of pre-emption cannot be claimed in regard to superfluous land which remains in the possession of the company until the expiration of ten years from the time limited by its act for the completion of its works, yet, if the company at any earlier period offers the land for sale to a third party, the right arises at once. *Carington* v. *Wycombe Ry.*, L. R. 3 Ch. 213; 18 L. T. 96; 16 W. R. 494.

The right of an adjoining owner to claim pre-emption of superfluous lands arises if within the ten years allowed by the act the company attempts to sell such lands. *L. & S. W. Ry.* v. *Blackmore*, supra.

Land applied to new Purpose before Ten Years.]—A railway company compulsorily purchased portions of A.'s land for the purpose of a branch railway, but suffered their powers to expire without making it. Before the period of ten years, within which they were bound to dispose of superfluous lands, had expired, they promoted a bill for enabling them to make another branch railway, and proceeded to carry on works on the above portions of A.'s land for the purposes of the proposed branch line:—Held, that A.'s right of repurchase, under s. 128 of the Lands Clauses Act, had not arisen, for that the words "dispose of," in that section, refer to a transfer of the land to some other person, not to its application to a new purpose. *Astley* v. *Manchester, Sheffield and Lincolnshire Ry.*, 2 De G. & J. 453; 27 L. J., Ch. 478; 4 Jur. (N.S.) 567; 6 W. R. 561.

Whether Right is Personal only.]—The right of pre-emption of superfluous lands under the Lands Clauses Act, s. 128, is not confined to the proprietors from whom the company purchased, but devolves to future proprietors of the lands from which the purchased lands were severed. *Carington* v. *Wycombe Ry.*, L. R. 2 Eq. 825; 15 L. T. 49; 14 W. R. 1018. See *S. C.*, on appeal, supra.

An act of parliament gave a company power to buy lands for the purpose of its undertaking, and to resell any lands which it might purchase but not make use of, and directed it before selling any land, to offer the same to the person or persons of whom it was purchased, but it fixed no limit of time within which the sale of surplus land was to be made:—Held, that the right of pre-emption thus given was merely personal to an individual from whom land was purchased, and was extinguished on his death. *Highgate Archway Co.* v. *Jeakes*, 40 L. J., Ch. 408; L. R. 12 Eq. 9; 24 L. T. 567; 19 W. R. 692.

Statute of Limitations.]—A railway company in 1838 bought part of a field under the powers of their act, and erected a post and rail fence on

the boundary. They then made a ditch within the fence, and threw up a bank, on which they planted a quickset hedge, at the distance of four feet six inches from the fence. As the hedge grew up, the fence was allowed to fall into decay, and about the year 1846 it was removed. From the year 1854 up to the commencement of this action in 1875, the strip of land between the quickset hedge and the site of the fence was occupied and cultivated with the remainder of the field, partly as an arable field and partly as garden ground, the railway company in no way interfering with it, except that their workmen went over it to trim the hedge:—Held, that (notwithstanding *Searby* v. *Tottenham Ry.*, L. R. 5 Eq. 409), the owner of the rest of the field had had such a possession of the strip in question as was sufficient to extinguish the title of the company under the Statute of Limitations. *Norton* v. *L. & N. W. Ry.*, 13 Ch. D. 268; 41 L. T. 429; 28 W. R. 173—C. A.

3. Sale and Disposition.

Before Offer to adjoining Owner.]—A railway company having, by the act of parliament incorporating them, a power to sell any lands which they might not require for their purposes, "provided always, that the said company, before they should dispose of any such lands, &c., should first offer to sell such lands, &c., to the person or persons whose premises should immediately join the lands, &c., proposed to be sold," &c., sold by public auction certain premises to the defendant, without having previously made any offer to sell to the owner of the adjoining premises. Defendant took that objection to the title, and then the company made the offer to the adjoining owner, which was declined. The company filed their bill for specific performance:—Held, upon a case at law sent from the Court of Chancery, that, by the subsequent offer to the owner of the adjoining premises, the company had a power to sell and convey the premises in question to the defendant. *London and Greenwich Ry.* v. *Goodchild*, 3 Railw. Cas. 507; 13 L. J., Ch. 224; 8 Jur. 455.

Held, upon the equity reserved, that the objection was one of conveyance and not of title, and that the company were not incapacitated from contracting to sell prior to the offer of pre-emption, but only from conveying; and that their neglect to make the offer prior to the contract was not such a misfeasance as to prevent them from enforcing the contract. *Ib.*

—— **Conditions as to Title.**]—A contract for sale of superfluous land of a railway company which had been conveyed by the company to the vendor contained a stipulation that the purchaser should assume and admit that everything (if anything was necessary) was done by the company to enable them to sell the land as surplus land, and should not call for or require production of any evidence to that effect; and a further stipulation that if the purchasers should fail to comply with the terms of the agreement the deposit should be forfeited to the vendor. The land was not situate in a town or used for building purposes. In the course of the investigation of the title the purchaser discovered that the prior owners had not waived their right of pre-emption; and as the vendor refused to remedy the defect, the purchaser brought an action claiming a return of the deposit and damages. The vendor then sold the land to one of the prior owners:—Held, that the purchaser was bound by the stipulations to admit the title of the company to sell to the vendor; and that as he had refused to abide by that stipulation he had broken the contract, and could not maintain the action, or claim a return of his deposit. *Hamand* v. *Best*, 48 L. J., Ch. 503; 12 Ch. D. 1; 27 W. R. 742.

Alienation of Land under Arch.]—A railway company, having the usual powers under their special act to take and use land for the purpose of the railway and works, cannot, whether for valuable consideration or otherwise, alienate for any purpose except the purposes of the act any portion of its land, not being "superfluous land" within s. 127 of the Lands Clauses Act, 1845, and not being land taken for extraordinary purposes within s. 45 of the Railways Clauses Act, 1845, nor any easement over the same. *Mulliner* v. *Midland Ry.*, 48 L. J., Ch. 258; 11 Ch. D. 611; 40 L. T. 121; 27 W. R. 330.

The B. railway company having, under their act, acquired land, constructed their railway, and erected a station which was partly built on arches, sold to their contractors their superfluous land, and also purported to convey to them without consideration a right of way under one of the arches leading to part of the land so sold though not being a way of necessity thereto. The contractors sold the land and alleged right of way to the plaintiff. The M. railway company had, under the said act, entered into a working agreement with the B. railway company, whereby, after the line was opened, the M. railway company were "to manage, work and use" the railway and works, and to develop the traffic. The M. railway company now required the arch in question as a closed yard for loading and unloading goods. In an action by the plaintiff to restrain the M. railway company from interfering with his right of way:—Held, that the alienation of the right of way under the act was ultra vires; that the M. railway company were entitled to use the land under the arch in the way proposed; and that, their title being prior to that of the plaintiff, who must be taken to have notice of the company's rights, his action could not be sustained. *Ib.*

Power of Sale in Act.]—A railway company had the usual power of selling superfluous lands. By a subsequent extension act, powers were given to the company of leasing and mortgaging, without limit as to time, such of these lands as were connected with the structure of the railway:—Held, that the extension act did not take away the power of sale and substitute powers of leasing and mortgaging, but amplified the power of sale by removing some of the restrictions upon it. *Tomlin* v. *Budd*, 43 L. J., Ch. 627; L. R. 18 Eq. 368; 22 W. R. 529.

Taking up Award, as to.]—Where under the Lands Clauses Act, 1845, s. 130, a reference took place to ascertain the price of certain superfluous land of a railway company, and the arbitrator, who was appointed and proceeded under the earlier sections of the statute, made his award, which the company refused to take up; the court, upon an application for a mandamus to compel the company to take it up, refused the writ. *Jones* v. *South Staffordshire Ry.*, 19 L. T. 603.

Sale by one Company to another.]—The M. railway company having, under their special act passed in 1872, acquired for the purposes of their undertaking certain lands forming part of a farm belonging to H., purported, acting in excess of their parliamentary powers, to sell and convey the lands to the S. railway company under a bonâ fide arrangement by which they were to be held and used for the purposes of the undertakings of both companies:—Held, that the conveyance from the M. company to the S. company must be set aside as ultra vires. *Hobbs* v. *Midland Ry.*, 51 L. J., Ch. 320; 20 Ch. D. 418; 46 L. T. 270; 30 W. R. 516.

Covenant to Reconvey—Validity.]—By a deed dated in August, 1865, which recited that the railway company were seised in fee-simple of certain land which was no longer required for the purposes of their railway, the company conveyed the land to G. in fee for 100*l.* and G. covenanted with the company that he, his heirs or assigns, would at any time thereafter whenever the land might be required for the railway or works of the company, and whenever thereunto requested by the company on a six calendar months' notice, and upon receiving 100*l.*, reconvey the land to the company:—Held, that the covenant reserved to the company an interest in the land, and that the sale was ultra vires and void, for that under the Lands Clauses Act, 1845, s. 127, land sold by a company as superfluous land must be sold absolutely without reserving any interest to the company. *L. & S. W. Ry.* v. *Gomm*, 51 L. J., Ch. 530; 20 Ch. D. 562; 46 L. T. 449; 30 W. R. 620—C. A.

A. conveyed land to B., reserving the minerals, and covenanted that in case he, his heirs or assigns, should at any time sell the minerals under the adjoining land, he, his heirs or assigns, would offer to B., his heirs or assigns, the reserved minerals at the same price per acre:—Held, that the covenant was not obnoxious to the rules against perpetuities, and the offer must be made in writing. *Birmingham Canal Co.* v. *Cartwright*, 48 L. J., Ch. 552; 11 Ch. D. 421; 40 L. T. 784; 27 W. R. 597.

A covenant by a purchaser of superfluous lands, sold under s. 127 of the Lands Clauses Act, 1845, to resell a strip of the land ten feet wide, at 4*l.* a perch, to the railway company when required, does not invalidate the conveyance of the whole plot of land sold by the company. *L. & S. W. Ry.* v. *Gomm* (20 Ch. D. 562) distinguished. *Ray* v. *Walker*, 61 L. J., Q. B. 718; [1892] 2 Q. B. 88.

A railway company on the 12th of July, 1867, conveyed certain superfluous lands, the period for the sale of which under their special act expired on the 13th of July, 1867, and the conveyance contained a covenant by the purchasers that they would pay the purchase-money on or before the 12th of July, 1869, with interest in the meantime; and by an indenture of even date and made between the same parties, it was declared that until the whole of the purchase-money and interest were paid the company should have a lien on the deed of conveyance and the lands therein comprised:—Held, upon a summons under the Vendor and Purchaser Act, 1874, raising the question whether s. 127 of the Lands Clauses Act, 1845, had been satisfied, that, having regard to expressions in *L. & S. W. Ry.* v. *Gomm* (20 Ch. D. 562), to the effect that when land is sold as superfluous no interest in it can be retained by the company, the question was one of such doubt that it must be left open and not answered in a way which would force the title on a purchaser or prejudice the vendor's title. *Thackwray and Young, In re*, 58 L. J., Ch. 72; 40 Ch. D. 34; 59 L. T. 815; 37 W. R. 74.

Restrictive Covenant.]—A railway company selling its superfluous land is at liberty to impose such restrictive conditions upon the user and enjoyment of the land as may most conduce to their advantage as vendors, and there is nothing in the Lands Clauses Consolidation Act, 1845, to deprive them in this respect of the rights of ordinary vendors. *Higgins and Hitchman's Contract, In re*, 51 L. J., Ch. 772; 21 Ch. D. 95; 30 W. R. 700; 46 J. P. 805.

Right to Support.]—Where a railway company has compulsorily purchased land with mines and minerals subjacent thereto, and subsequently sells a portion thereof as superfluous land, the purchaser from the railway company does not acquire the right of subjacent support for his surface, as against the owner of the mines and minerals, and therefore cannot maintain an action for damages against the mine owner for so working his mines as to cause injury to the surface and the buildings erected thereon. *Pountney* v. *Clayton*, 52 L. J., Q. B. 566; 11 Q. B. D. 820; 49 L. T. 283; 31 W. R. 664; 47 J. P. 788—C. A.

Land previously subject to Statutory Prohibition against Building.]—An Inclosure Act, passed in 1806, provided that no buildings should at any time thereafter be erected on a certain strip of land. In 1865 a railway company under their statutory powers acquired a portion of the strip of land for the purposes of their undertaking. A part of the land thus acquired became superfluous land, and the company in 1868 sold and conveyed the superfluous part to a purchaser who demised it to the defendant. The defendant in 1885 commenced building on the land:—Held, that the land acquired by the company was freed from the prohibition of building only for the purposes of the company's undertaking, and that, when part of it was sold as superfluous land, the prohibition of building revived in respect of that part. An injunction to restrain the defendant from building on the land in contravention of the provisions of the Inclosure Act was granted at the suit of an owner of adjoining land. *Bird* v. *Eggleton*, 54 L. J., Ch. 819; 29 Ch. D. 1012; 53 L. T. 87; 33 W. R. 774; 49 J. P. 644.

Sale of Surplus Lands with House thereon—Implied Obligation to Purchaser.]—A railway company sold a piece of their surplus land to the plaintiff together with a house, which they had allowed him to erect thereon. The house was close to their line of railway, which there ran over a series of arches, through two of which there was some access of light to two of the lower windows of the plaintiff's house. The company retained in their own hands lands on the other side of the railway opposite the plaintiff's house; and their conveyance to him contained a recital that all the land acquired by them other than that sold to the plaintiff would be required by them for the construction of their railway, and it contained no express grant of

right, or covenant as to light. The defendant's predecessor in title afterwards acquired from the company, under a conveyance subject to any right of light which the plaintiff might have, the fee of the lands opposite the plaintiff's house, and erected buildings thereon, and he also took a lease of the arches. The defendant subsequently acquired this property, and blocked up the openings of the two arches nearest the plaintiff's house with hoardings :—Held, that the company, on selling a portion of their surplus lands to the plaintiff, had entered into an implied obligation not to do or permit anything on the land retained by them which would interfere with the plaintiff's reasonable enjoyment of the land he purchased, except what was required for the construction of their railway ; and that, the hoarding not being for that purpose, a mandatory injunction ought to be granted. *Myers* v. *Catterson*, 59 L. J., Ch. 315 ; 43 Ch. D. 470 ; 62 L. T. 205 ; 38 W. R. 488—C. A.

Tenant of Railway Company—Estoppel.]—A railway company acquired land for the purpose of their railway, but, not wanting it, let it from year to year to B. ; in consequence of their neglect to sell it, the Lands Clauses Act, s. 127, became applicable ; the adjacent landowner did not interfere, and B. continued tenant till his tenancy was determined by notice to quit. Before this he had let it to the defendant, who refused to go out on the ground that the company's title had ceased :—Held, that whatever was the effect of the section, there was evidence of B. holding under a new tenancy from year to year, after such section became applicable, that he would therefore have been estopped from disputing the company's title, and that therefore the defendant was also estopped. *L. & N. W. Ry.* v. *West*, 36 L. J., C. P. 245 ; L. R. 2 C. P. 553.

Creditor entitled to Order for Sale.]—An existing railway company was authorised to make an extension line, by an act which enacted that the capital might be raised by an issue of new shares, to be called extension shares, and that the works authorised by it should, for financial purposes, form a separate undertaking, and that the capital and new shares created under its powers should constitute a separate capital ; and that the profits of the extension line applicable to dividend should be wholly applied in payment of dividend on the extension shares ; and that the extension shareholders should not be entitled to dividends out of any other profits of the company, and that the company might raise by mortgage any additional sums not exceeding 28,000*l.* ; but not till all the extension capital had been subscribed for and half of it paid up ; and that the money raised by new shares or mortgage should be applied only for the purposes of the extension act. A contractor, to whom the company was indebted in respect of the construction of the original line, obtained judgment against the company, extended certain surplus lands acquired under the powers of the extension act, and then applied to the court for a sale :—Held, that the creditor was entitled to an order for sale ; for that, whatever might be the rights of the different classes of shareholders inter se, the lands were lands of the company, liable to be sold for payment of any judgment debts of the company. *Ogilvie, In re*, 41 L. J., Ch. 336 ; L. R. 7 Ch. 174 ; 25 L. T. 860 ; 20 W. R. 226.

Upon a petition of a judgment creditor of a railway, an order was made, without directing inquiries, for a sale of surplus land of the company not required for the undertaking and not used for building purposes, which had been delivered in execution to the petitioner under an elegit, the registry of which was still in force. The company was ordered to execute a proper conveyance. *Calne Ry., In re*, L. R. 9 Eq. 658.

Priority—Surplus Lands—Debenture-holders.]—Sect. 23 of the Railway Companies Act, 1867, does not give to creditors of a railway company in respect of mortgages, bonds, or debenture-stock, any lien or charge which they did not possess before the act, so as to entitle them to payment in priority out of the proceeds of surplus lands of the company, which have been sold on the application of the judgment creditors of the company. *Hull, Barnsley and West Riding Ry., In re*, 58 L. J., Ch. 205 ; 40 Ch. D. 119 ; 59 L. T. 877 ; 37 W. R. 145—C. A.

J. M.

LAND TAX.

See REVENUE.

LARCENY.

See CRIMINAL LAW.

LEASE.

See LANDLORD AND TENANT.

Of Settled Estates.]—*See* SETTLED LAND.

LEAVE AND LICENCE.

See LICENCE.

LECTURER.

See ECCLESIASTICAL LAW.

LECTURES.

See COPYRIGHT.

LEGACY.

Powers of Executors with regard to.]—*See* EXECUTOR AND ADMINISTRATOR.

Construction of, and other Matters relating to.]—*See* WILL.

Vested, Contingent and Future Interests.]—*See* VESTED, &C., INTERESTS.

Duty.]—*See* REVENUE.

Interest on.]—*See* EXECUTOR AND ADMINISTRATOR—WILL.

LEGAL ASSETS.

See EXECUTOR AND ADMINISTRATOR.

LEGITIMACY.

See HUSBAND AND WIFE—INTERNATIONAL LAW.

LENGTH OF TIME.

See WAIVER.

As Statutory Bar.]—*See* LIMITATIONS, STATUTE OF.

LETTERS PATENT.

See PATENT.

LETTERS.

Property in—Between Solicitor and Client.]—A solicitor is entitled to retain as his own property letters addressed to him by his client and copies in his letter-book of his own letters to the client, after the client has transferred the business to which such letters relate to other solicitors. *Wheatcroft, In re*, 46 L. J., Ch. 669; 6 Ch. D. 97; 26 W. R. 69.

When the solicitor of a company writes a letter apparently on the behalf of the company, he has no such property in the letter as to entitle him to prevent its publication, although he swears that it was written in his private capacity. *Howard* v. *Gunn*, 32 Beav. 462.

—— **Of Receiver.**]—The receiver of a letter is the owner of it, and may use it for all lawful purposes: the only right which the writer of it has in reference to it is to restrain publication. *Hopkinson* v. *Burghley*, 36 L. J., Ch. 504; L. R. 2 Ch. 447; 15 W. R. 543.

The receiver of a letter has a sufficient property in the paper upon which it is written, to entitle him to maintain detinue for it against the sender, into whose hands it had come as a bailee. *Oliver* v. *Oliver*, 11 C. B. (N.S.) 139; 31 L. J., C. P. 4; 8 Jur. (N.S.) 512; 5 L. T. 287; 10 W. R. 18.

The property in and the right to retain letters remain in the person to whom they are sent; but the sender has still that kind of interest, if not property, in the letters which enables him to restrain their publication, unless it can be clearly shewn that such publication is necessary for the vindication of character. *Lytton (Earl)* v. *Devey*, 54 L. J., Ch. 293; 52 L. T. 121.

The sending of a letter bearing the character of a literary composition does not give the person to whom it is transmitted the right to publish it for his own benefit; otherwise, if published to vindicate his character from false imputations cast upon him by the writer. *Perceval (Lord)* v. *Phipps*, 2 Ves. & B. 19; 13 R. R. 1.

The receiver of a letter has at most but a joint property with writer, and possession does not give him licence to publish it. *Pope* v. *Curl*, 2 Atk. 342.

Addressed to Agent at Principal's Office—Compelling Agent to rescind Order to Post-office.]—B. was employed to manage one of L.'s branch offices for the sale of machines, and resided on the premises. He was dismissed by L., and on leaving gave the postmaster directions to forward to his private residence all letters addressed to him at L.'s branch office. He admitted that among the letters so forwarded to him were two which related to L.'s business, and that he did not hand them to L., but returned them to the senders. L. brought an action to restrain B. from giving notice to the post-office to forward to B.'s residence letters addressed to him at L.'s office, and also asking that he might be ordered to withdraw the notice already given to the post-office:—Held, that the defendant had no right to give a notice to the post-office, the effect of which would be to hand over to him letters of which it was probable that the greater part related only to L.'s business; and that the case was one in which a mandatory injunction compelling the defendant to withdraw his notice could properly be made, the plaintiff being put under an undertaking only to open the letters at certain specified times, with liberty for the defendant to be present at the opening. *Hermann Loog* v. *Bean*, 53 L. J., Ch. 1128; 26 Ch. D. 306; 51 L. T. 442; 32 W. R. 994; 48 J. P. 708—C. A.

Marked "Private."]—The defendant in an action cannot, by marking his letters "private," &c., impose upon the plaintiff, who had refused to hold any personal communication with him, any condition as to the way in which they might be used. *Kitcat* v. *Sharp*, 52 L. J., Ch. 134; 48 L. T. 64; 31 W. R. 227.

Reclaiming after Posting.]—A banker at Lyons posted a letter containing bills of exchange to D. in London, but before the departure of the mail he received a telegram from D., telling him to remit nothing. The banker accordingly sent to the post-office to reclaim his letter, which by the regulation of the French post-office he was entitled to do on complying with certain formalities. By mistake the formalities were not observed and the letter was forwarded to its destination. In the meantime D. had filed a petition for liquidation:—Held, that the property in the bills did not pass to the trustee. *Cote, Ex parte, Dereze, In re*, 43 L. J., Bk. 19; L. R. 9 Ch. 27; 29 L. T. 598; 22 W. R. 39.

Restraining Publication.]—Injunction granted on application of the executor to restrain defendant from publishing letters the property of the testator. *Granard* v. *Dunkin*, 1 Ball & B. 207; 12 R. R. 18.

Injunction to restrain the executor of the person to whom they were written, from publishing private letters without leave of the executors of the persons who wrote them. *Thompson* v. *Stanhope*, Ambl. 737.

Letters written by the plaintiff to the defendant, having been returned by him, with a declaration, that he did not consider himself entitled to retain them, the publication of copies taken before the return, without the knowledge of the plaintiff, was restrained by injunction, though represented by the defendant as necessary for the vindication of his character. *Gee* v. *Pritchard*, 2 Swan. 403; 19 R. R. 87.

No injunction to restrain the publication of letters as painful to the feelings of the writer. *Ib.*

The publication of letters may be restrained, although not designed for profit. *Ib.*

The acts of the party may supply reasons for not restraining the publication of letters. *Ib.*

The principle of the equitable jurisdiction to restrain the publication of letters doubted, but semble, it is founded on a right of property in the writer. *Ib.*

The person receiving letters may destroy them. *Ib.*

In a suit to restrain the publication of private letters, the court granted an interlocutory injunction, although the plaintiff did not fully prove his title to relief, on the ground that to refuse an injunction would be to determine the whole suit on an interlocutory application. *Andrew* v. *Raeburn*, L. R. 9 Ch. 522; 31 L. T. 73; 22 W. R. 564. *And see cases* supra.

Restraining Opening.]—An injunction was granted restraining defendants from opening letters addressed to their predecessors in business, from whom they had obtained exclusive licences to work particular patents assigned. *Schiele* v. *Brakell*, 11 W. R. 796.

A., who had been for some years manager of a company carrying on business at 190, Regent Street, severed the connection, and set up in the same line of business at 203, Regent Street. Letters, some of them on his own private affairs, continued to be occasionally addressed to A., 190, Regent Street, as to which letters, forwarded by the post-office to 190, the company claimed the right of opening and deciding whether they were intended for A. or for themselves. Upon motion by A. to restrain the company from receiving and opening letters addressed "A., 190, Regent Street," and bearing no external indication that they were intended for the company, and also to restrain the postmaster-general from delivering letters so directed to any other than A.'s present address (203, Regent Street):—Held, that as against the postmaster-general, who had been improperly brought before the court, the motion must be refused; but that the company must give an undertaking until the hearing not to open, except in A.'s presence, letters addressed to him at 190, Regent Street, unless, after due notice, A. should not attend at the company's offices for the purpose by a specified hour. *Stapleton* v. *Foreign Vineyard Association*, 11 L. T. 77; 12 W. R. 976.

A plaintiff prayed an injunction to restrain the defendant from falsely representing that the latter was carrying on business in succession to, or in connection with him; the bill averred general acts of misrepresentation, but one case only was made out in which the defendant had opened a letter addressed to the plaintiff, answered it in his own name, and endeavoured to obtain the custom which that letter offered to the plaintiff:—Held, that though this raised a grave suspicion against the defendant, it was not sufficient to entitle the plaintiff to an injunction. *Edgington* v. *Edgington*, 11 L. T. 299. And see *Hermann Loog* v. *Bean*, supra.

Date.]—The date of a letter is primâ facie evidence that it was written when dated. *Anon.*, 2 Chit. 194. *See* EVIDENCE.

Written without Prejudice.]—*See* EVIDENCE.

Effect on Contracts.]—*See* CONTRACT.

Proof of Posting.]—*See* EVIDENCE.

Cross-Examination on.]—*See* EVIDENCE.

Of Credit.]—*See* BANKER.

Discovery of.]—*See* DISCOVERY.

Of Allotment of Shares.]—*See* COMPANY.

Patent.]—*See* PATENT.

LEVARI FACIAS.

See EXECUTION.

LEVEL CROSSINGS.

See RAILWAY.

LIBEL.

See DEFAMATION.

LIBRARY.

Adoption of the Act—Demand of Poll.]—At a meeting of the ratepayers of the district of W., duly convened by the defendants under s. 6 of the Free Libraries Act, 1855, a resolution in favour of the adoption of that act was carried. A poll was demanded on behalf of two ratepayers, but was not taken. A mandamus directed to the defendants having been applied for commanding them to adopt and carry out the provisions of the act within the district:—Held, that the common-law right to have a poll taken existed, and had not been taken away by the Free Libraries Amendment Act, 1877, and that, as the poll had never been taken, the resolution of the meeting was of no effect, and the act had not been properly adopted. *Reg.* v. *Wimbledon Local Board*, 51 L. J., Q. B. 219; 8 Q. B. D. 459; 46 L. T. 47; 30 W. R. 400; 46 J. P. 292—C. A.

Where the question is put to a meeting of ratepayers held under the Public Libraries Act, 1855, s. 8, whether the act shall be adopted for the parish, a poll can be demanded as of right. *Reg.*

v. *St. Matthew, Bethnal Green, Vestry*, 32 L. T. 558.

—— **Requisition—Poll—Owners or Occupiers entitled to Vote.**]—Under the Public Libraries Amendment Act, 1877, the persons to vote are "the inhabitants who would have to pay the assessment":—Held, that in cases where owners were made ratable in place of occupiers, the occupiers were nevertheless the inhabitants who would have to pay, inasmuch as the rates paid by the owners are, for the purpose of the qualification to vote, made attributable to the occupiers by the joint effect of s. 147 of the Municipal Corporations Act, 1882, and ss. 7 and 19 of the Poor Rate Assessment and Collection Act, 1869:—Therefore the mayor of the municipal borough of Croydon having received a requisition from ten ratepayers, under the provisions of the Public Libraries Act, 1866, calling upon him to ascertain the opinions of the ratepayers of the borough as to the adoption of the Public Libraries Acts, acted properly in issuing, under the provisions of the Public Libraries Amendment Act, 1877, voting papers to the occupiers, and not to the owners, of premises in the borough. *Att.-Gen.* v. *Croydon Corporation*, 58 L. J., Ch. 527; 42 Ch. D. 178; 61 L. T. 291; 37 W. R. 648; 53 J. P. 726.

Rate—Recovery of Arrears—Demand and Payment of less than proper amount—Mistake.]—The provisions of the Public Libraries Act, 1855, having been adopted by the parish of Wandsworth, a rate of 1*d.* in the pound was duly made and demanded of the London and South-Western Railway Company, assessed upon the full ratable value of certain lands occupied by them in the parish for railway purposes. The railway company thereupon claimed under s. 13 of that act to be assessed on only one-third of the ratable value, on the ground that the property was "land." The vestry clerk omitted to observe that only "lands used as arable, meadow, or pasture ground, or as woodlands or market-gardens or nursery-grounds," were exempted under this section from assessment at more than one-third of their full ratable value, and allowed the abatement; he also entered in the rate-book the amount of rate assessed on the remaining two-thirds of the company's property as "irrecoverable." The same abatement was given and a similar entry was made for three years. The new overseers of the parish, having discovered the mistake that had been made, demanded the arrears of rate on the two-thirds of the full ratable value; but these the company declined to pay, and upon the hearing of the summons taken out by the overseers the justices declined to issue a distress warrant for the amount:—Held, upon an application for a mandamus to the justices to issue their warrant, that the sums unpaid on the two-thirds of the full ratable value of the railway company's property were recoverable as arrears, and that the overseers were entitled to obtain a distress warrant for the loss of these arrears under 17 Geo. 2, c. 38, ss. 7 and 11, notwithstanding that a mistake of law had been made in the original demands and in the entry in the rate-book. *Reg.* v. *Blenkinsop*, 61 L. J., M. C. 45; [1892] 1 Q. B. 43; 66 L. T. 187; 40 W. R. 272; 56 J. P. 246.

Rating of.]—*See* RATES AND RATING.

Liability to Income Tax.]—*See* REVENUE.

Charitable Bequests.]—*See* CHARITY.

LICENCE.

1. *Grant*, 1614.
2. *Revocation and Determination*, 1617.
3. *Fishing Licence—See* FISH.
4. *To Kill and Sell Game—See* GAME.
5. *To carry Gun—See* REVENUE (EXCISE).
6. *To use Patent—See* PATENT.
7. *For Sale of Intoxicating Liquors—See* INTOXICATING LIQUORS.
8. *Between Landlord and Tenant—See* LANDLORD AND TENANT.
9. *For Music and Dancing—See* DISORDERLY HOUSE—LOCAL GOVERNMENT—METROPOLIS.
10. *Marriage Licence—See* HUSBAND AND WIFE.
11. *To Theatres—See* THEATRE.
12. *To take Minerals—See* MINES.
13. *Of Hawkers and Pedlars—See* MARKETS AND FAIRS.
14. *Duty towards Licensees—See* NEGLIGENCE.

1. GRANT.

By Parol.]—A beneficial licence to be exercised upon land may be granted without deed, and without writing. *Taylor* v. *Waters*, 7 Taunt. 374; 18 R. R. 499.

—— **Of Right to Drain.**]—A verbal licence is not sufficient to confer an easement of having a drain in the land of another to convey water, and such licence may be revoked, though it has been acted upon. *Cocker* v. *Cowper*, 1 C. M. & R. 418; 5 Tyr. 103.

Written Contract connected with Land—Breach.]—An action will lie for the breach of a written contract, by which A., for a valuable consideration, agrees with B. that B. may dig and carry away cinders from a cindertip, forming part of A.'s land, though the contract, not being under seal, is incapable of granting or passing an easement. *Smart* v. *Jones*, 15 C. B. (N.S.) 717; 33 L. J., C. P. 154; 10 Jur. (N.S.) 678; 10 L. T. 271; 12 W. R. 430.

Right to Shoot and take away Game.]—A grant of a right to shoot over land and to take away a part of the game killed is a grant of an interest in land and within the Statute of Frauds. *Webber* v. *Lee*, 51 L. J., Q. B. 485; 9 Q. B. D. 315; 47 L. T. 215; 30 W. R. 866; 47 J. P. 4—C. A.

To take away Goods.]—A., being on the eve of insolvency, made a bonâ fide verbal assignment of all his goods to B. in trust for the payment of his debts, and to hold the surplus for relations who had advanced money to him. An order was given by B., with A.'s consent, for sending the goods to an auctioneer for sale from time to time, and several portions were accordingly parted with and sold:—Held, that the successive deliveries were made under a mere licence to sell the goods from time to time, and that the property in the whole did not pass to B. *Normansell* v. *Creft*, 17 L. J., Q. B. 297.

A licence is not implied by law to a purchaser of goods (though sold under an execution or a distress), to enter upon the premises of the former owner and take them away, although they have remained there with his assent. *Williams* v. *Morris*, 8 M. & W. 488; 11 L. J., Ex. 126.

To Enter and Repair.]—In a lease of a newly-constructed grain warehouse there was a

covenant by the lessor that he would during the term "keep the main walls and main timbers of the warehouse in good repair and condition." The lessee entered under the lease and stored grain in it in a reasonable and proper way. After a short time a beam which supported one of the floors broke, and ultimately the external walls sank and bulged outwards, and the lessor spent a large sum in repairing the premises. In an action by the lessor to recover from the lessee what he had thus expended:—Held, that the lessee had not been guilty of waste. *Saner* v. *Bilton*, 47 L. J., Ch. 267; 7 Ch. D. 815; 38 L. T. 281; 26 W. R. 394.

Held, also, that the covenant implied a licence by the tenant to the landlord to enter upon the premises for a reasonable time for the purpose of executing the necessary repairs. *Ib.*

A landlord in the absence of an express power is not entitled to enter upon the demised premises to repair. *Stocker* v. *Planet Building Society*, 27 W. R. 877.

To Eject.]—A licence given by a tenant to his landlord to eject him from the premises is void, as offending against 5 Ric. 2, st. 1, c. 8. *Edridge* v. *Hawker*, 50 L. J., Ch. 577; 18 Ch. D. 199; 45 L. T. 168; 29 W. R. 913.

To remove Fixtures.]—A plaintiff, a tenant of a house for a term of years, being possessed of shelves, stoves, ranges, ovens, boilers and other articles of household use, his own property, but annexed to the freehold, requested the landlord to purchase them at the expiration of the term, or let them remain for purchase by the incoming tenant, but to be taken away by the plaintiff if the tenant should refuse them. The landlord wrote an answer, declining to purchase, but adding, "I have no objection to your leaving them on the premises and making the best terms you can with the incoming tenant." The articles remained unsevered from the freehold till the entry of the new tenant, who came in under a demise from the same landlord, but who declined to take them. The plaintiff (after the tenant had been two months in possession) demanded liberty to enter and remove the fixtures, but the tenant refused permission; and the plaintiff thereupon brought an action for the hindrance, and trover against the tenant:—Held, that if the landlord's letter to the plaintiff amounted to a licence to take away the articles, yet not being under seal it was no valid grant of such privilege as against a new tenant in possession, and not party to the licence. *Ruffey* v. *Henderson*, 17 Q. B. 574; 21 L. J., Q. B. 49; 16 Jur. 84.

To lop Hedges.]—A parol demise of land reserved to the landlord "all the hedges, trees, thorn bushes, fences, with lop and top":—Held, that such reservation operated as a licence to enter the land for the purpose of cutting and carrying away the trees. *Hewitt* v. *Isham*, 7 Ex. 77; 21 L. J., Ex. 35.

By Will—Right of Way.]—A.'s and B.'s lands adjoined each other, A.'s land being on the south and B.'s on the north, and about the middle of the boundary was a gate into B.'s land at the end of a lane or road leading to this gate from the public street, and passing through A.'s land. On the eastern side of B.'s land adjoining the highway, was a house in a ruinous state, which was once, in 1830, a dwelling-house, and in the centre of B.'s land, equidistant from the gate and the house, and surrounded by a garden, was a separate building, then used as a kitchen for the house. The remainder of B.'s land had been partly and at different times garden, orchard, grass, &c. The owner of A.'s and B.'s premises, who died in 1830, by his will devised to his nephew, B.'s predecessor, the kitchen and garden. The will then continued as follows: "I will and direct that my nephew, John Harrison, shall have the privilege or right of a road for loading coals and dung, and other necessary things, through the gate to the kitchen and garden." This right of a road, which was the lane or road above mentioned, was at that time the only approach to the kitchen and garden. Shortly afterwards the remainder of the premises now occupied by B. came by inheritance into the possession of John Harrison, whereby he had other access to the highway through the ruined dwelling-house, though the only approach for a horse and cart was through the way in dispute. B., who carried on the business of a coal higgler, used the kitchen as a stable for his horse, and made use of the way with his cart and horse:—Held, that this grant of a right of way was merely a personal privilege for the life of the grantee; for that by the words of the devise merely a life estate in the easement passed, and it was manifestly the intention of the testator that the right should not extend beyond the lifetime of the devisee. *Pym* v. *Harrison*, 33 L. T. 796—C. A.

Supply of Water.]—A. and B. were tenants of adjoining premises under the same landlord. A. had a well upon his premises, from which B.'s premises were supplied with water by means of a pipe. Both premises, with others, were put up for sale by auction, in lots, one of the conditions being that each lot was subject to all rights of way and water and other easements (if any) subsisting thereon. A. and B. both purchased the lots of which they had been tenants. The vendor insisted that A. had purchased subject to B.'s right of water. A. filed a bill for a specific performance of the contract, without any liability to such easement:—Held, that B. had no easement or right of water, but merely a licence from his landlord during his tenancy; and that A. was entitled to the relief asked. *Russell* v. *Harford*, L. R. 2 Eq. 507; 15 L. T. 171.

To place Bathing-Machines.]—Before bathing-machines came into use, certain parts of the shore of Hastings had been used from time immemorial for the purpose of bathing. Subsequently an act was passed prohibiting persons from bathing from the shore, except from bathing-machines, the owners of which were obliged to obtain a licence from the local board for permission to ply for hire:—Held, that this licence did not confer a right on the proprietors of bathing-machines to place them on the shore without the permission of the owner of the shore. *Mace* v. *Philcox*, 15 C. B. (N.S.) 600; 33 L. J., C. P. 124; 10 Jur. (N.S.) 680; 9 L. T. 766; 12 W. R. 670.

To take Ice from Canal.]—A canal company, in consideration of the lessee's expenditure on certain ice-houses on the banks of the canal, granted a lease thereof, with licence to take ice from a part of the canal:—Held, that the licence was not exclusive, but that it was a grant of sufficient ice to enable the lessee to fill the ice-houses; and that, so long as the lessee was able

and willing to take this quantity of ice, the lessors could not derogate from their grant by subsequent licences which would interfere with it. *Newby* v. *Harrison*, 3 De G. F. & J. 287 ; 30 L. J., Ch. 863 ; 4 L. T. 424 ; 9 W. R. 849.

To use Boats on Canal.]—The proprietors of a canal by a deed granted to the plaintiff the sole and exclusive right of putting or using pleasure-boats for hire on the canal :—Held, that this did not confer such an interest in the plaintiff as to give him a right of action against another person for using pleasure-boats for hire on the canal. *Hill* v. *Tupper*, 2 H. & C. 121 ; 32 L. J., Ex. 217 ; 9 Jur. (N.S.) 725 ; 8 L. T. 792 ; 11 W. R. 784.

Action by Licensee.]—A party claiming ownership in a field granted to the plaintiff a parol licence to search therein for minerals. The plaintiff, acting under this licence, dug pits in the field, and threw up sand and gravel, mixed with ore, which the defendant took away, professing to act under the authority of a third party. Before the defendant took away the sand, gravel, and ore, the party who gave the plaintiff the parol licence granted him a similar licence by deed :—Held, that the plaintiff was entitled to maintain an action for the gravel, sand, or ore, as against the defendant, who was a wrongdoer. *Northam* v. *Bowden*, 11 Ex. 70 ; 24 L. J., Ex. 237.

Defence to Action of Trespass.]—Action for assault : plea, that the defendant was possessed of an office and premises wherein the plaintiff was trespassing, whereupon the defendant requested him to leave the office and premises, which the plaintiff refused to do, and thereupon the defendant gently removed him. Replication, that M. had instituted liquidation proceedings under the Bankruptcy Act, 1869, in the county court, and had convened a general meeting of his creditors, to be holden at the office and premises in the plea mentioned, on the 3rd February, 1874, and the defendant was the solicitor of M. in such proceedings, and in and about summoning the meeting, which was duly held at the said time and place ; and the plaintiff, then being the solicitor and duly appointed proxy of T., a creditor of M., attended the meeting as such, and the defendant was present at the meeting as solicitor and on behalf of M., and officiated thereat as the duly elected chairman ; and a proof made under the proceedings by T., and a writing under his hand duly appointing the plaintiff his proxy in the matter of the proceedings, were produced to the defendant, then being such chairman, and afterwards and during the continuance of the meeting, and before its termination or adjournment, and whilst the plaintiff was lawfully attending the same as such proxy at the office and premises, the plaintiff refused to leave the same when so requested by the defendant, as he lawfully might for the cause aforesaid :—Held that the plaintiff was not a trespasser on the occasion. The defendant having given the plaintiff leave to be present at the meeting as proxy for a creditor, the latter had a right, coupled with an interest, entitling him to be on the creditor's premises. *Vaughan* v. *Hampson*, 33 L. T. 15.

2. REVOCATION AND DETERMINATION.

Nature of Licence.]—A licence under seal, if a mere licence, is as revocable as a licence by parol ; and a licence by parol, coupled with a grant of a nature capable of being made by parol, is as irrevocable as a licence by deed. *Wood* v. *Ledbitter*, 13 M. & W. 838 ; 14 L. J., Ex. 161 ; 9 Jur. 187.

But a licence by parol, coupled with a parol grant, or a pretended grant of something which can only be granted by deed, is a mere licence ; it is not an incident to a valid grant, and is, therefore, revocable. *Ib.*

A., being possessed of a close of land, on which was erected a stand, which overlooked a race-course, authorised the issuing of tickets for admission to that stand during the continuance of the races, one of which tickets was purchased by B. for valuable consideration :—Held, that A. had a right, without assigning any reason, and without offering to return the value of the ticket, to order B. to quit the stand, and, on his refusal, to remove him by force. *Ib.*

—— **To warehouse Goods—Time given.**]—A. allowed B. to stack timber upon a wharf adjoining the premises let to him by A., and the rent was paid partly in respect of this privilege :—Held, that such licence might also be considered as continued by C., and that it could not be revoked without allowing B. reasonable time to remove the timber. *Cornish* v. *Stubbs*, 39 L. J., C. P. 202 ; L. R. 5 C. P. 334 ; 22 L. T. 21 ; 18 W. R. 547.

Although a licence to place articles on the property of another may be revocable at any moment, the licensee is entitled to notice of the revocation, and to a reasonable time for the removal of the articles. *Mellor* v. *Watkins*, L. R. 9 Q. B. 400 ; 23 W. R. 55.

Where a party, on the 28th October, sold a rick of hay on his land, with the condition that it might remain there, and be carried away from time to time by the purchaser, up to Lady-day next :—Held, that this licence could not be revoked. *Wood* v. *Manley*, 3 P. & D. 5 ; 11 A. & E. 34 ; 9 L. J., Q. B. 27 ; 3 Jur. 1028.

To use Trench.]—An agreement to let a party have a trench for water, though given for a valuable consideration, if there is no conveyance, is a parol licence revocable at the will of the grantor. *Fentiman* v. *Smith*, 4 East, 107 ; 7 R. R. 533. S. P., *Cocker* v. *Cowper*, 1 C. M. & R. 418 ; 5 Tyr. 102.

To make Skylight.]—But a parol licence to put a skylight over the defendant's area (which impeded the light and air from coming to the plaintiff's dwelling-house through a window), cannot be recalled at pleasure after it has been executed at the defendant's expense ; at least not without tendering the expenses he had been put to ; and therefore no action lies as for a private nuisance arising from the existence of such skylight. *Winter* v. *Brockwell*, 8 East, 308 ; 9 R. R. 454.

To erect Weir.]—A parol licence, after it is executed at the expense of the grantee, is not countermandable by the grantor. Where, therefore, the plaintiff's father gave the defendant leave, by parol, to lower the bank of a river and erect a weir, whereby a part of the water which before flowed to the plaintiff's mill was diverted : —Held, that his son could not maintain an action against the defendant for continuing the weir, although his father, a few years after the licence was given, had required them to raise up the

bank and pull down the weir. *Liggins* v. *Inge*, 5 M. & P. 712; 7 Bing. 682; 9 L. J. (O.S.) C. P. 202.

Partition of Pew.]—Action for disturbing the possession of a pew: plea, an agreement by the plaintiff with the defendant and A., being churchwardens, that they should make a partition and divide the pew into two unequal pews, and that the churchwardens should have licence to place parishioners in the lesser of them; and that the defendant and A. did, at their expense, so divide the pew, and place parishioners in the pew:—Held, that the agreement not being by deed, the licence thereby granted was revocable, though acted upon at the expense of the defendant. *Adams* v. *Andrews*, 15 Q. B. 284; 20 L. J., Q. B. 33; 15 Jur. 149.

Irrevocable.]—A licence to be exercised upon land for twenty-one years, granted for a valuable consideration and acted upon, cannot be countermanded. *Walter* v. *Harrison*, 4 M. & W. 538; 1 H. & H. 405; 2 Jur. 1019. *See preceding case.*

An auctioneer who is employed to sell goods on the premises of the proprietor has not such an interest in the goods as will make a licence to enter on the premises irrevocable. *Taplin* v. *Florence*, 10 C. B. 744; 20 L. J., C. P. 137; 15 Jur. 402.

A parol agreement, by which a person is authorised to enter on premises, cannot make the licence to enter irrevocable. *Ib.*

Method of Determination.]—The locking a gate, through which parol leave has been given to pass, is of itself a sufficient notice of revocation of the leave. *Hyde* v. *Graham*, 1 H. & C. 593; 32 L. J., Ex. 27; 8 Jur. (N.S.) 1229; 7 L. T. 563; 11 W. R. 119.

The plaintiff and the defendant having agreed, on a dispute existing between them as to a right of way, that the defendant should use the way, ad interim, without prejudice, until it should be determined how the question should be settled:—Held, the plaintiff having locked the gate, and the defendant broken the lock, that the equitable position of the parties was not such as to bar an action of trespass at common law. *Ib.*

—— **Assignment.**]—A licence is determined by an assignment of the subject-matter in respect of which the privilege is to be enjoyed. *Coleman* v. *Foster*, 1 H. & N. 37; 4 W. R. 489.

By a lease not under seal A. and B., trustees on behalf of themselves and the other proprietors of a theatre, demised it to C. for three years, reserving to themselves and the other proprietors free liberty of admission to the theatre. C., by lease not under seal, let the theatre to the plaintiff for two nights, subject to the terms on which he held the theatre:—Held, that the licence was determined, and that an action of trespass might be maintained by the plaintiff against the defendant, a proprietor, who entered the theatre during his tenancy. *Ib.*

—— **Completion of Work.**] — Action for entering the plaintiff's close, and cutting down the sides of a sluice or a goit there, and widening the same. Plea, justifying the trespass under a deed by which the plaintiff demised land to W. S. and G. S. (under whom the defendant claimed) for 999 years, and by which power was given to them to cut a goit or a sluice through the plaintiff's close in a certain direction, and power from time to time during the term to repair and amend the goit or sluice, making reasonable satisfaction to the plaintiff for damage done to the grass of the plaintiff; provided that for the term of two years from the commencement of the rent no trespass or damage should be charged or paid for. Replication, that before the expiration of two years from the commencement of the rent, and during the term, W. S. and G. S., in the exercise of the power, cut, made, and completed a goit or a sluice in such direction as in the deed mentioned, and through the close in the deed, being the goit or sluice in the declaration and in the plea mentioned, which goit or sluice was of the width in the plea mentioned; and that the goit or sluice so remained and continued in that state and condition, was used and enjoyed until the defendant, under colour of the deed, and in pretended further exercise of the power, broke and entered the close of the plaintiff:—Held, that the power given in the deed to make a goit or a sluice, having been once exercised, was exhausted, and therefore the replication was good. *Bostock* v. *Sidebottom*, 18 Q. B. 813; 16 Jur. 1013—Ex. Ch.

Revocation—Breach—Action by Licensee.]—The right of a licensor to revoke a licence granted by him may co-exist with the right of the licensee to maintain an action against the licensor for breach of contract committed by him in revoking the licence. *Wood* v. *Ledbitter* (14 L. J., Ex. 161; 13 M. & W. 838) distinguished. *Kerrison* v. *Smith*, 66 L. J., Q. B. 762; [1897] 2 Q. B. 445; 77 L. T. 344.

LICENSING LAW.

See INTOXICATING LIQUORS.

LIEN.

A. General Principles.
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A. GENERAL PRINCIPLES.

1. Nature of Right.

Nature of Right.]—The rules with respect to lien are the same in equity as at law. *Oxenham* v. *Esdaile*, 2 Y. & J. 493; 5 D. & R. 49; 3 B. & C. 225.

The question whether a tradesman has a lien on goods in his hands for his general balance, or only for so much as relates to the particular goods, is decided on the same grounds at law and

in equity. To extend it, the party must shew an agreement, or something from which to infer an agreement. *Gladstone* v. *Birley*, 2 Mer. 404.

The right of lien is not the result of an express contract; it is given by implication of law. *Chambers* v. *Davidson*, 4 Moore, P. C. (N.S.) 158; 36 L. J., P. C. 17; L. R. 1 P. C. 296; 12 Jur. (N.S.) 967; 15 W. R. 34.

The right of lien arises either by implication of law, or by express contract between the parties. *Kirchner* v. *Venus*, 12 Moore, P. C. 361; 5 Jur. (N.S.) 395; 7 W. R. 455.

Voluntary Exertions.]—A quantity of timber placed in a dock on the bank of a navigable river, being accidentally loosened, was carried by the tide to a considerable distance, and left at low water upon a towing-path. A. finding it in that situation, voluntarily conveyed it to a place of safety—beyond the reach of the tide at high-water:—Held, that A. had no lien on the timber for the trouble or expense to which he might have put himself in the carriage of it; but was liable to an action of trover unless he delivered it up to the owner, on demand, though nothing was tendered him by the owner by way of compensation. *Nicholson* v. *Chapman*, 2 H. Bl. 254; 3 R. R. 374.

Question of Contract—Parties.]—T. & Co., owners of flats or barges at Liverpool, were employed by H. & Co. to carry certain copper-ore to L., an owner of crushing-mills at Birkenhead, who, in consideration of being employed to crush the ore, agreed to indemnify H. & Co. against all risk in the transit. Whilst on its way to Birkenhead, the barge with the ore on board foundered in the river. T. & Co. thereupon gave notice of the loss to H. & Co., and requested to be employed to raise the cargo, to which a clerk in the employ of H. & Co. replied, "We have nothing to do with it: you had better see Mr. L. He has the management of it." T. & Co. then went to L., who said, "Oh. I am all right. I am insured with M.;" and in answer to a suggestion of T. & Co. as to the necessity for prompt action, he added, "You had better prepare for getting it up; but you must go to M. for orders." T. & Co. then went to M., who said, "You had better go on with it, and do the best you can for us." T. & Co. thereupon proceeded with the work, and, after incurring great labour and expense, succeeded in recovering the ore. H. & Co. afterwards tendered the sum agreed to be paid for the carriage of the ore to Birkenhead, and demanded it; but T. & Co. refused to part with it, claiming a lien upon it for the expenses incurred in raising it from the bottom of the river:—Held, that there was no contract for the work done, as between T. & Co. and H. & Co. in respect of which such claim of lien could be sustained. *Castellain* v. *Thompson*, 13 C. B. (N.S.) 105; 32 L. J., C. P. 79; 7 L. T. 424; 11 W. R. 147.

A. put a phaeton into the possession of M. for him to paint it, and paid M. beforehand for the painting. M. never painted it, but placed it on the premises of B., where it stood three months:—Held, that B. had no lien on the phaeton for his charge for the standing of it, unless the jury was satisfied that M. had placed it there by the authority of A. *Buxton* v. *Baughan*, 6 Car. & P. 674.

By an agreement between A. and B., A. agreed to exert himself to prove that B. was entitled to certain property in India, for which A. was to have half the value of what might be recovered. A. succeeded in recovering a certain amount, which was sent home to the correspondents in London of a firm in Calcutta, who acted for A. in the matter. Upon demurrer to a bill to declare A.'s right to half the amount under the agreement:—Held, that A. had no lien on the fund. *Alexander* v. *Hammond*, 3 W. R. 145.

Contract to spend Money on Land partially Performed.]—A man who enters into a contract to expend a certain sum of money on land, and after spending part of it declines to perform the contract, has no lien on the land for the money which he has expended. *Wallis* v. *Smith*, 21 Ch. D. 243; 47 L. T. 389. *S. C.*, in C. A., 52 L. J., Ch. 145; 21 Ch. D. 243; 47 L. T. 389; 31 W. R. 214.

A. agreed to grant a lease to B., who was to enter at once and expend money on improvements, with a proviso that if he failed within three months to grant a valid lease he would repay to B. the amount of his outlay, and from and after such failure B. should be at liberty to quit, and the agreement should cease except as to B.'s right to payment. A. being unable to grant a lease for want of title:—Held, that B. had a lien on A.'s interest in the premises for his outlay. *Middleton* v. *Magnay*, 2 H. & M. 233; 10 L. T. 408; 12 W. R. 706.

Club Premises—Improvements.]—At a general meeting of the members of a club, a resolution was passed authorising the managing committee of the club to raise 1,000*l.* for the purpose of improving and adding to the buildings of the club-house, and providing the necessary fittings and furniture therefor; the committee, being unable to raise the money by a mortgage of the club property, raised it on the guarantee of some individual members of the committee; the money was expended for the purposes aforesaid, and the members of the club enjoyed the advantages of the improvements made and the furniture so bought. The individual members of the committee having had personally to pay the amount so raised:—Held, that they had a lien or charge on the club premises so added to and improved, and on the furniture and all the other property of the club acquired or purchased by the money advanced by them, and the court decreed payment, or in default gave them liberty to apply for a sale of such property. *Minnitt* v. *Talbot* (*Lord*), 1 L. R., Ir. 143.

Land—Money spent on Alterations and Repairs.]—The plaintiff was entitled to a rent-charge created by a deed of 1778, which contained a power on nonpayment to enter upon the premises charged, and receive the rents until satisfaction of all arrears of the rent-charge, "together with all such costs, charges, and expenses as should be laid out and expended by him, or occasioned by reason of the nonpayment thereof." In 1844, the rent-charge being in arrear, and the property so dilapidated as to be unproductive, the plaintiff entered into possession and expended money in repairs:—Held, that he had no lien on the land for the moneys so expended, whether the defendant, the owner of a subsequent rent-charge, had notice of such repairs and had acquiesced in the making thereof or not, and that the remedy of the plaintiff, if any, was at law, and depended on the con-

struction of the deed of 1778. *Hooper* v. *Cooke*, 25 L. J., Ch. 467; 2 Jur. (N.S.) 527—L.JJ.

A father, an equitable owner of land, erected a granary thereon; he afterwards allowed his sons to use and occupy it, and they erected other buildings thereon, at a great expense:—Held, that the sons had a lien on the premises for their outlay. *Unity Mutual Banking Association* v. *King*, 25 Beav. 72; 27 L. J., Ch. 585; 4 Jur. (N.S.) 470; 6 W. R. 264.

Real Estate—Bond Debt and Interest.]—In 1806 a bond was executed by A. in favour of B., and by a contemporaneous settlement it was settled by B., the obligee, upon certain trusts. By his will, dated in 1812, A., the obligor, charged his real and personal estate with payment of the bond debt. He shortly afterwards died. The plaintiff claimed, as assignee of the bond, a valid equitable lien on the obligor's real estate in respect of the bond debt and interest. The defence was, that the obligor died possessed of personal estate amply sufficient to pay the bond debt and interest, and that the plaintiff's predecessors in title ought to have obtained payment out of such personal estate, and that not having done so, they waived their right to have recourse to the real estate:—Held, that the plaintiff was entitled to a valid charge in equity for the amount of the bond and interest upon the real estate of the obligor. *Justice* v. *Fooks*, 57 L. T. 868.

—— **Payment of Rent by Lessee—Salvage.**]—A. being lessee of certain lands under a lease containing the ordinary covenants by him as lessee for payment of rent, and a condition of re-entry in case of nonpayment, assigned his interest under the lease to B., who covenanted with A. to pay the rent and to keep him indemnified against it. B. mortgaged the premises comprised in the lease to C. by way of sub-demise. Arrears of rent became due which the lessor compelled A. to pay under the covenant in the lease. In an action against B. and C., A. sought for a declaration that the sum so paid by him for rent was a salvage payment, and was charged on the premises in priority to C.'s mortgage:—Held, that A. had no interest in the premises authorising him to make a salvage payment, and that therefore he had no lien on the premises for the rent so paid by him. *O'Loughlin* v. *Dwyer*, 13 L. R., Ir. 75.

Sum paid to take Goods out of Pawn.]—A. delivered to B. a pawnbroker's duplicate, for B. to take some goods of A.'s out of pledge. B. did so, but on A. sending to B. for the goods, B. said that he had not got them, and refused to tell who had:—Held, that, if after this trover was brought against B., he could insist on a lien on the goods for the money he had advanced to get them out of pledge. *Jones* v. *Cliff*, 5 Car. & P. 560.

Not gained by Tort.]—A party cannot acquire a lien by his wrongful act. *Madden* v. *Kempster*, 1 Camp. 12.

Therefore, goods delivered to a person claiming them wrongfully, who pays freight and other charges, cannot be detained for those expenses against the rightful owner. *Lempriere* v. *Pasley*, 2 Term Rep. 485.

Where no Possession.]—A party cannot have a lien on goods if he never was in possession of them or their produce, whatever equitable interest he may have had. *Heywood* v. *Waring*, 4 Camp. 291.

There can be no lien upon any property unless it is in the possession of the party who claims the lien. *Shaw* v. *Neale*, 6 H. L. Cas. 581; 27 L. J., Ch. 444; 4 Jur. (N.S.) 695; 6 W. R. 635.

A bailee can have no lien on a chattel, where, by the essence of the contract, he has no right to the uninterrupted possession of it. *Jackson* v. *Cummins*, 5 M. & W. 342; 8 L. J., Ex. 265; 3 Jur. 436.

The general rule of the civil law is, that possession of movables is not necessary to the validity of a lien, whether created by contract or act of law, and that such lien will attach upon movable property, even in the hands of a bonâ fide purchaser, without notice. *Tatham* v. *Andree*, 1 Moore, P. C. (N.S.) 386; 2 N. R. 554; 9 Jur. (N.S.) 1019; 9 L. T. 2; 12 W. R. 22.

Lien may exist after possession determined; as after the death of tenant for life, of a West India estate for supplies provided by him. *Scott* v. *Nesbitt*, 14 Ves. 442; 9 R. R. 318.

Debt partly barred by Statute.]—A person has a lien on goods for a debt, though his remedy for part of it is barred by the Statute of Limitations. *Spears* v. *Hartly*, 3 Esp. 81. See also *Broomhead, In re*, 5 D. & L. 52; 16 L. J., Q. B. 355.

By whom given—Extent of.]—A person can only give a lien on deeds as against himself, and to the extent of his own interest. *Turner* v. *Letts*, 20 Beav. 185; 24 L. J., Ch. 638; 1 Jur. (N.S.) 1057; 3 W. R. 352, 494. S. P., *Wilson* v. *Anderton*, 1 B. & Ad. 450; 9 L. J. (O.S.) K. B. 48.

No Right of Sale under.]—The lien at law upon a chattel for a portion of the price unpaid confers no right of sale upon the person having such lien, although the retention of the chattel may be attended with expense. *Thames Ironworks Co.* v. *Patent Derrick Co.*, 1 Johns. & H. 93; 29 L. J., Ch. 714; 6 Jur. (N.S.) 1013; 2 L. T. 208; 8 W. R. 408.

Right to Possession.]—A shipping agent having a lien on a bill of lading on goods which he had shipped, may, if the lien is not satisfied before the goods have reached their destination, have them brought home in order to retain his lien on them, and is not liable to any action for so doing. *Edwards* v. *Southgate*, 10 W. R. 528.

Set-off against.]—In trover for certain ironwork, the defendant set up as a defence a lien on the ironwork, for work done to it at the plaintiff's request:—Held, that a claim of set-off to a larger amount on the part of the plaintiff was no answer to the lien, unless it had been agreed between the parties that the one should be deducted from the other. *Pinnock* v. *Harrison*, 3 M. & W. 532; 1 H. & H. 114; 7 L. J., Ex. 137.

Custody of Goods.]—An innkeeper retaining the goods of his guests by virtue of such lien is not bound to use greater care as to their custody than he uses as to his own goods of a similar description. Observations on *Cowell* v. *Simpson*, (16 Ves. 275). *Angus* v. *McLachlan*, 52 L. J., Ch. 587; 23 Ch. D. 330; 48 L. T. 863; 31 W. R. 641.

Where an employer pays a builder sums of money during the progress of the work exceeding the value of the work actually done, and the builder becomes bankrupt before completion, the employer has no lien on the materials that are intended to be used in the work for the sums over-advanced. *Tripp* v. *Armitage*, 4 M. & W. 687; 1 H. & H. 442; 8 L. J., Ex. 107; 3 Jur. 249.

2. AGREEMENT FOR.

Must be Clear.]—To constitute a lien on any property, there must be a clear agreement for the specific appropriation of that property. *Jones* v. *Starkey*, 16 Jur. 510.

Effect of.]—If a mercantile relation which might involve a lien is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security exclude lien, and limit their rights by the extent of the express contract that they have made. *Chambers* v. *Davidson*, 4 Moore, P. C. (N.S.) 158; 36 L. J., P. C. 17; L. R. 1 P. C. 296; 12 Jur. (N.S.) 967; 15 W. R. 34.

Personal Licence.]—The plaintiff's intestate bought a coach of the defendant, and gave him bills for the price, and agreed that the defendant "do have and hold a claim upon the coach until the debt be duly paid." One of the bills being dishonoured, and the testator dead, the defendant obtained possession of the coach by a trick:—Held, that the agreement operated as a mere personal licence from the testator to the defendant to obtain possession of the coach, and would have been a defence to an action brought by the testator, but was not available after the property had been transferred to the administrator. *Howes* v. *Ball*, 7 B. & C. 481; 1 M. & Ry. 288; 6 L. J. (O.S.) K. B. 106; 31 R. R. 256.

Licence to Seize.]—The plaintiff having a cow at grass in the defendant's field, and being indebted for the agistment, agreed with him that the cow should be a security, that he would not remove her till the defendant was paid, and that, if he did, the defendant might take her wherever she might be, and keep her till he was paid. The plaintiff removed the cow, not having paid the debt, and the defendant seized her in the high road. In trespass for the taking:—Held, that the agreement might be set up as a defence under a plea that the cow was not the plaintiff's. *Richards* v. *Symons*, 8 Q. B. 90; 15 L. J., Q. B. 35; 10 Jur. 6.

Nature of Possession.]—Where A. pledges a chattel with B., and pursuant to an agreement made between them at the time, A. has the possession of it for a limited period, for the use of B.; and at the end of such period it is returned to its ordinary place of custody, B. does not forfeit his lien, the possession of A. being, in such case, the possession of B. *Reeves* v. *Capper*, 5 Bing. (N.C.) 136; 6 Scott, 877; 1 Arn. 427; 2 Jur. 1067.

Nature of Security.]—A. being possessed of an old vessel, sent her to B.'s yard to be repaired. B. agreed to find timber for the repairs, and materials were accordingly supplied by B. and other persons to the amount of 200*l*. The vessel was repaired in B.'s yard with these materials, but no work was done upon her either by B. or the other creditors. On the vessel being advertised for sale B. and the other persons insisted that she should not be removed until they were paid. A.'s agent assented, and said they should be paid out of the purchase-money, and signed an authority to the auctioneer to that effect. The sale then proceeded, and the vessel was knocked down to C. for 300*l*. Immediately after the sale, B. and the other creditors applied to C. for payment, and he promised that he would, the following Thursday, bring the purchase-money for the auctioneer to pay the creditors with. C. did not do so:—Held, that the agreement for payment of the repairs out of the purchase-money, of which C. was cognisant, and to which he had assented, precluded him from maintaining trover until such payment was made. *Norris* v. *Williams*, 1 C. & M. 842; 2 L. J., Ex. 257.

In December, 1861, a bankrupt contracted with W. to build a barge for him, to be paid for in bricks; the barge to be completed on the 5th of June, 1862. The bankrupt hired a yard for a certain number of months for the purpose of performing the contract, which period expired before the completion of the work. In June it was agreed by the bankrupt in writing that the barge should be held as a security by W. for advances made by him; and in July the bankruptcy took place. The advances made by W. having exceeded the amount of work done and material supplied by the bankrupt:—Held, that W. had a lien upon and was entitled to the custody of the barge, unless the assignees chose to complete the contract. *Watts, Ex parte, Attwater, In re*, 1 N. R. 170; 32 L. J., Bk. 35; 9 Jur. (N.S.) 238; 7 L. T. 585—L.C.

B. & Co. agreed to build a ship for A. To enable them to proceed with the work, and before the agreement was signed, C. advanced money on the understanding that he should have an assignment of the agreement, and a lien upon the ship. The agreement was cancelled. B. & Co. then agreed to sell the vessel, which was in an unfinished state, to C. Four days previously they had stopped payment, and shortly afterwards were made bankrupts:—Held, that C. was entitled to a lien upon the ship. *Swainston* v. *Clay*, 32 L. J., Ch. 503; 8 L. T. 563; 11 W. R. 811—L.JJ.

To detinue for title-deeds, the defendant pleaded that K. was seised of the messuages to which they related, and devised them to D. for life, who agreed with the defendant to sell him all her interest therein; that before this agreement the deeds were in the custody of the defendant as D.'s agent, and that upon the making of the agreement E. left them in the possession of the defendant, that he might hold them till the agreement was performed:—Held, that this statement did not shew, with sufficient certainty, any contract whereby the defendant acquired a lien on the deeds. *Robertson* v. *Shoveler*, 13 M. & W. 609; 2 D. & L. 687; 14 L. J., Ex. 120.

Appropriation of Cargo.]—A. opened an account with a bank, it being agreed that he should be allowed to overdraw to a certain amount, but that for further overdrafts beyond that amount he should find security. A. overdrew beyond the specified amount without depositing any security. The bank pressed for payment of the whole, or at least a portion of the balance. A., in reply, wrote to the manager to state, that the arrival of the ship "Tagus," which

was daily expected, would put him in ample funds to adjust the account, and inclosed a policy on the cargo of the "Tagus" for 5,000*l.*, indorsed payable to the manager of the bank:—Held, that this was not such a specific appropriation of the cargo of the "Tagus" as would give the bank a lien upon it in preference to other creditors of A. *Jones* v. *Starkey*, 16 Jur. 510.

To constitute a lien on any property, there must be a clear agreement for the specific appropriation of that property. *Ib.*

Mortgage of Public-house—Balance due to Brewer.]—By agreement between A., a publican, and B., a brewer, it was stipulated that A. should deposit the lease of his house with B. as security for an advance of 150*l.*, for which A. had given B. a promissory note, payable on demand, and B. engaged not to call upon A. to pay the 150*l.* for two years, on condition that the interest thereon should be duly paid half-yearly; that the rent should be paid agreeably to the covenants of the lease, and that A. should take of B. all the beer consumed on the premises, and pay for it every twenty-eight days. The agreement then provided, that in case of failure on the part of A. to perform any or either of the conditions after fourteen days' notice, B. should be at liberty immediately to put the note in force, and if not paid with interest, to sell the lease, and that the expenses attending such sale, together with the principal and interest due on the note, should be deducted from the amount realised by such sale, as also any account that might be then due and owing for beer:—Held, that the power of sale not having been exercised, on payment or tender of the principal and interest due on the note, A. (or his assignee) was entitled to maintain detinue for the lease; and that B. could not set up a lien on it for the balance due on the beer account. *Chilton* v. *Carrington*, 15 C. B. 95; 3 C. L. R. 138; 24 L. J., C. P. 10; 1 Jur. (N.S.) 89; 3 W. R. 17.

3. General Liens.

How Established.]—A right of general lien can only be established either by contract express or necessarily implied, or by custom; and such a custom in a particular trade is not established by mere evidence of the popular opinion of the members of that trade that a right of general lien was or ought to be a privilege of their trade. *Spotten, In re, Provincial Bank, Ex parte*, Ir. R. 11 Eq. 412.

The law does not favour general liens, and a general lien can only be claimed as arising from dealings in a particular trade or line of business, such as wharfingers, factors and bankers, in which the existence of a general lien has been judicially acknowledged, or in other trades where there is express evidence of custom. *Bock* v. *Gorrissen*, 2 De G. F. & J. 434; 30 L. J., Ch. 39; 7 Jur. (N.S.) 81; 3 L. T. 424; 9 W. R. 209. S. P., *Leuckhart* v. *Cooper*, 3 Bing. (N.C.) 99; 3 Scott, 521; 6 L. J., C. P. 131.

Excluded by Terms of Special Contract.]—Foreign correspondents of a London firm directed the firm to purchase for them Mexican bonds to a specified amount, at a specified price, and to hold the bonds at the disposal of the correspondents. The London firm made and notified the purchase, and wrote to the correspondents that they would, until further orders, retain the bonds for safe custody:—Held, that the letters constituted a special contract sufficient to exclude a general lien on the part of the London firm, if they would otherwise have been entitled to any. *Ib.*

A colliery company agreed with the defendants for the carriage of their goods over defendants' line. The defendants were "to have the right at any time to detain any goods or waggons in their possession by way of lien to secure the general balance owing to them." An engine of the colliery company having been sent to the defendants for repair, the defendants claimed to hold it, whilst in their establishment undergoing repairs, as a security, not only for the cost of such repairs and the charge for haulage, but also for a general balance due to them for the carriage of coals, &c.:—Held, that the terms of the above condition between the defendants and the colliery company, which was intended merely to enlarge the rights of the defendants as carriers, and to give them as such a right of lien beyond what they would have at common law, applied only to coals and such-like "goods," to be carried in the ordinary way, and not to the engine in question, which was delivered to the defendants, not under any contract to carry, but under an agreement to repair, to which the charge for haulage was incidental; and, therefore, that the right of general lien claimed by the defendants did not attach. *Kinnear* v. *Midland Ry.*, 19 L. T. 387.

Wharfinger and Shipping Agent.]—S., a woolstapler at Huddersfield, was in the habit of making purchases of wool, which he directed to be consigned to the defendant, a wharfinger and shipping agent at Hull, who forwarded them to him at Huddersfield by carrier. In July, 1841, S. purchased certain wool in Scotland, which was paid for by E., his agent there, and by him forwarded to the defendant at Hull. Part of this wool, consisting of ten bags, arrived at Hull on the 27th of September, and a portion of it was, at ten o'clock on that morning, taken possession of by the defendant, the remainder being taken possession of by him between ten o'clock and four. E. received from S., in repayment of the advances made by him for the purchase of the wool in question, acceptances of S., which were running at the time of S.'s bankruptcy, and were afterwards dishonoured. On the 21st of September E. received a letter from S., in which he informed him of his insolvency, and directed him to get the wool and to do the best he could to save himself. Accordingly, on some day between the 26th of September and the 1st of October, E. gave directions to the defendant to seize the wool. The remaining portion of the wool arrived at Hull on the 3rd of October, and was delivered into the defendant's warehouse on the 6th, 7th, and 8th of that month. An act of bankruptcy was committed by S. on the 22nd of September. The defendant, who claimed to retain the wool in satisfaction of a general balance, had been in the habit of sending to the bankrupt by the carrier, together with the goods, printed delivery orders which stated that all goods were considered as general lien, subject not only to freight, but also to the balance of any former account due from the owners or consignors. These orders had been seen more than once in the bankrupt's hands, and, on one occasion, the weights therein stated had been altered by him:—Held, in trover by the assignees of S. to recover the value of the thirty-six bags

of wool, first, that E. had no right to the goods, in respect of which the defendant could retain them. *Bowman* v. *Malcolm*, 11 M. & W. 833 ; 12 L. J., Ex. 397.

Held, secondly, that the defendant had not established any right in general lien, by virtue of which he could retain any part of the goods. *Ib.*

Carriers—After Winding-up of Company.]—When a company has been wound up under the Companies Act, 1862, and the business is duly carried on by the official liquidator, a creditor who has continued his dealings with the company cannot exercise a general lien on its goods for the whole amount due to him by virtue of an agreement made between him and the company previously to the winding-up. *Wiltshire Iron Co.* v. *G. W. Ry.*, 40 L. J., Q. B. 308 ; L. R. 6 Q. B. 776 ; 23 L. T. 666 ; 19 W. R. 935—Ex. Ch.

A company was wound up, and the business carried on by the official liquidator. Previously to the winding-up, the company had made an agreement with a railway company for the carriage of goods on a credit account, upon the terms that goods belonging to or sent by them should be subject to a general lien in favour of the railway company, to take effect, at their option, at any time after failure of any sum due on the credit account, or in case of bankruptcy, insolvency, or stoppage of payment :—Held, that the railway company could not enforce this lien upon goods which they had received after the winding-up, to be carried on account of the new business. *Ib.*

In 1876 an agreement was entered into between the L. Coal Company and the G. W. Railway Company, by which the charges for coal consigned by the coal company were carried to a "ledger account," one condition of which was, that the goods and waggons belonging to or sent by the person having a ledger account should be subject to a general lien in favour of the railway company for all moneys due to them, &c., from such person on any account, such lien to take effect immediately after the failure of payment on demand of any sums appearing to be due on the ledger account ; "in case of bankruptcy, insolvency, or stoppage of payment, such lien to take effect immediately for any sum appearing due in the books of the company," with a right to sell such goods and waggons, and out of the proceeds to return the sums due. The coal company became insolvent, and on the 16th December, 1885, a petition was presented for winding-up ; on the 20th January, 1886, a provisional liquidator was appointed, and in February, 1886, an order to wind up was made. When the petition was presented the coal company was indebted to the railway company in respect of charges for freight. Of the fifteen waggons in use by the coal company, and employed in carrying coal over the railway company's line, nine had been received by the railway company prior to presentation of the winding-up petition, and had been detained by them ever since ; four in the possession of the railway company when the petition was presented had travelled up and down the line since, but returned into the possession of the railway company before the date of the winding-up order ; two did not come into the possession of the railway company until between the presentation of the petition and the winding-up order. The liquidator claimed delivery up by the railway company of the fifteen waggons which the company claimed to retain in satisfaction of the general lien under the agreement :—Held, that the lien given to the railway company by the agreement, which was made for the ordinary purposes of the coal company's business, was good and valid, and took effect upon the insolvency of that company, and had not been displaced by anything that had taken place in the winding-up proceedings. *Llangennech Coal Co., In re*, 56 L. T. 475.

—— **Agreement with Bankrupt—Receiver's Goods not Liable.**]—A trader opened a credit account with a railway company for freight. An account of what was due was to be delivered once a month, and payment was to be made within seven days after delivery ; and the company were to have a general lien, for all the moneys due upon any account, upon all goods in the hands of the company. The trader filed a petition for liquidation ; and a receiver and manager of his estate and business was appointed, who, in order to carry on the business, bought goods with his own money and sent them to the railway company consigned to the trader. The company refused to deliver the goods until they were paid what was owing to them by the trader for freight due when the petition was filed. The receiver paid the money under protest, and the goods were delivered. The Court of Bankruptcy, on the receiver's application, ordered the money to be repaid :—Held, on appeal, that the company would have no defence to an action by the receiver for the money paid to them, but that the Court of Bankruptcy had no jurisdiction to order repayment. *G. W. Ry., Ex parte, Bushell, In re*, 52 L. J., Ch. 734 ; 22 Ch. D. 470 ; 48 L. T. 196 ; 31 W. R. 419—C. A.

Of Consignees.]—*See* infra.

In Particular Trades.]—*See* infra.

4. Waiver.

Non-assertion of Claim.]—A person having a lien upon goods does not waive that lien by the mere fact of his omitting to state that he claims to retain the goods in that right when they are demanded ; nor is it sufficient evidence of a waiver of his lien, that he bought these goods with others which he also refused to deliver up, although he had no lien on them, the sale as to the whole being void. *White* v. *Gainer*, 9 Moore, 41 ; 2 Bing. 23 ; 1 Car. & P. 324 ; 2 L. J. (o.s.) C. P. 101.

A debenture for a tontine annuity was deposited by an intestate with his bankers, one of whom received the dividends, and placed them to the credit of the intestate's account ; the intestate died in 1801, and a commission issued against the bankers in 1810 ; notwithstanding which, the same partner continued to receive the dividends, and pay them to the intestate's widow up to the period of his own death, which happened in 1822 ; some time after which, the assignees of the banker claimed a lien on the debenture for a debt due from the intestate to the banking-house :—Held, that after so long an abandonment of any claim of lien, the assignees could not now support such claim ; and that the debenture also could not be considered as having been left in the order and disposition of the bankers, it having been deposited in the nature of a trust. *Douglas, Ex parte*, 3 Deac. & C. 310.

Inconsistent Conduct.]—A wharfinger having a lien on goods for his general balance, on being applied to, made a charge only in respect of the particular goods, but owing to inability to get change affixed the consignor's card on the goods on the understanding that the consignor would send for the goods and pay the sum that had been named:—Held, a waiver of his lien for the general balance. *Morley* v. *Hay*, 7 L. J. (O.S.) K. B. 104.

Claim on Different Ground.]—But a man waives his right of lien, if upon being applied to, to deliver up goods, he claims to retain them on a different ground than that upon which he rests his case of lien. *Boardman* v. *Sill*, 1 Camp. 410, n.

A lien may be waived by a party's setting up a claim to retain the chattel upon a different ground, and making no mention of the lien. *Weeks* v. *Goode*, 6 C. B. (N.S.) 367.

In an action against A. and B. for a lease, the evidence of conversion was as follows: A demand having been made upon A., he declined to give up the lease until rent due to B. was paid, but he added that it was more B.'s business than his own, and as he was not in, he (A.) would either send the lease in the course of the day, or would write the plaintiff a letter declining to return it. The plaintiff receiving neither lease nor letter, issued a writ on the following morning:—Held, that this amounted to an absolute refusal, notwithstanding A. and B. had, at the time (though it was not mentioned), a lien upon the lease for a small sum due to them for business done by them as attorneys for the plaintiff. *Ib.*

Excessive Claim—Tender.]—Where a party claims to detain goods upon two causes of lien, in such a way as to dispense with tender of either, he is guilty of a conversion, unless he can sustain both. *Kerford* v. *Mondel*, 28 L. J., Ex. 303.

In trover by a freighter against a shipowner to recover goods, the charterparty giving a lien for dead freight, but the master to sign bills of lading, which bound the goods for "freight as agreed," the freighter having when he demanded the goods been prepared to pay the freight for carriage, and the shipowner refused to deliver the goods except on payment of the dead freight:—Held, that freight for carriage alone was due, that the refusal was an implied dispensation of the tender of it, and that trover was maintainable. *Ib.*

The mere demand of an excessive sum by a creditor holding a lien does not dispense with a tender from the debtor of the sum really due; but if the demand of the larger sum is so made that it amounts to an announcement that it is useless to tender any smaller sum, this dispenses with any tender, even if it appears that the debtor was unwilling to tender the amount really due. *The Norway*, B. & L. 404; 3 Moore, P. C. (N.S.) 245; 11 Jur. (N.S.) 892; 13 L. T. 50; 13 W. R. 1085.

Where a party who has a specific lien on goods refuses to deliver them up unless the amount of a general balance is paid, it is unnecessary for the owner to tender the sum due in respect of those goods, in order to support trover. *Jones* v. *Tarlton*, 9 M. & W. 675; 1 D. (N.S.) 625; 11 L. J., Ex. 267; 6 Jur. 348.

A picture was placed by A. in the hands of B. for sale. B. deposited it with C. On its being demanded by A., C. claimed 5*s.* for warehouse-room; but on a second demand being made with an offer to pay any claim which C. might have for warehouse-room, C. refused to give up the picture without being paid 8*l.* due to him from B.:—Held, that the demand of the 8*l.* amounted to a waiver of the claim for warehouse-room, and that it rendered a specific tender in respect thereof unnecessary. *Dirks* v. *Richards*, 4 Man. & G. 574; 5 Scott (N.R.) 534; Car. & M. 626; 6 Jur. 562.

If a party has a specific lien on the goods of another, and when required to deliver them up, claims a lien upon them for a sum either greater than or different from that for which he is entitled to hold them, his lien is gone; but if he claims to hold them both for the sum to which he is entitled, and also for a further sum to which he is not entitled, his lien in respect of the former remains, and the owner ought, on such refusal, to tender that sum. *Scarfe* v. *Morgan*, 4 M. & W. 270; 1 H. & H. 292; 7 L. J., Ex. 324; 2 Jur. 569.

By taking Security.]—If a security is taken for a debt for which the party has a lien upon property of the debtor, such security being payable at a distant day, the lien is gone. *Hewison* v. *Guthrie*, 3 Scott, 298; 2 Bing. (N.C.) 755; 2 Hodges, 51; 5 L. J., C. P. 283.

Engineers contracted with the debtor, the owner of a barge, to supply steam machinery to the vessel, at the docks of a dock company, for the price of 1,050*l.*, to be paid by approved bills; one at three months for 260*l.* when the boiler and engine should be placed in the vessel, one at three months for 260*l.*, and one at six months for 530*l.*, when the vessel should have made a trial trip. The vessel having been taken to the docks was there entered in the name of one of the engineers; and, whilst shipwrights and other agents of the debtor were occasionally or constantly on board, the vessel remained in the possession of the engineers till the boat was ready to make a trial trip. In the interim the engineers had been paid 360*l.*, partly in cash and partly by the debtor's acceptance, which they discounted. On the day appointed for the trial trip the debtor filed a liquidation petition, and a receiver took possession of the vessel. A few days afterwards the debtor's acceptance was dishonoured:—Held, that the lien of the engineers for the unpaid price for the machinery and their labour was not affected by their having agreed to take bills in payment, nor by the nature of the possession, nor by their having discounted the debtor's acceptance. *Willoughby, Ex parte, Westlake, In re*, 16 Ch. D. 604; 44 L. T. 111; 29 W. R. 935.

A person who has a lien on property accompanied by the guarantee of a third person, does not lose his lien by taking the bills of that third person for the amount, concurrently with, and in order to a sale of the property to satisfy the debt. *Solarte* v. *Maes Hilbers*, 1 L. J., K. B. 196.

A., and B., a solicitor, were executors. B. deposited some of his deeds in the trust-box, to secure some money due to the testator's estate. The box remained in B.'s possession, and on his death the deeds were found to have been abstracted from it, and they could not be identified. The legal personal representative of B. then deposited certain specific deeds, selected by A., as a security for the debt:—Held, assuming that A. had, in consequence of B.'s wrongful act, obtained a general lien on all B.'s deeds for the money, still that he had waived it by taking the

particular security from the legal personal representative. *Mason* v. *Morley*, 34 Beav. 471; 34 L. J., Ch. 422; 12 L. T. 414; 13 W. R. 669. And see *Brough* v. *Oddy*, Taml. 215.

Where a vendor received part of the purchase-money, which had been borrowed from the defendant, and took a bond with sureties for the residue:—Held, that by entering into the deed of conveyance, which recited the assignment of the premises to the defendant by way of mortgage for the sum advanced, the vendor waived his lien. *Cood* v. *Pollard*, 10 Price, 109; 9 Price, 544; 23 R. R. 713.

If a tradesman, having goods in his possession, upon which he has a lien, parts with those goods on the promise of a third person to pay the demand, such promise is not within the statute of frauds, and may be by parol. *Castling* v. *Aubert*, 2 East, 325. S. P., *Houldítch* v. *Milne*, 3 Esp. 86; 6 R. R. 815.

An innkeeper who accepts security from his guest for the payment of hotel charges does not waive his lien at common law upon the goods of the guest for the amount of such charges unless there is something in the nature of the security, or in the circumstances under which it was taken, which is inconsistent with the existence or continuance of the lien, and therefore destructive of it. *Angus* v. *McLachlan*, 52 L. J., Ch. 587; 23 Ch. D. 330; 48 L. T. 863; 31 W. R. 641.

Agreement to take Security.]—A creditor demanding security for a debt, the debtor agreed by letter to hypothecate certain bales of goods in the docks, but subsequently, under advice, refused to deliver the warrants. The creditor then filed a bill for a declaration that there was a lien on the goods, for delivery of the goods, and for an injunction and receiver:—Held, that the effect of the agreement to hypothecate was a forbearance on the part of the creditor. *Alliance Bank* v. *Broom*, 11 L. T. 332; 13 W. R. 127.

Part Payment.]—The right of an unpaid vendor to a lien on goods in the hands of his agent is not taken away by the fact that the vendor has recovered a verdict for their price against the purchaser, and, under a county court order for payment of the debt by instalments, has been paid one instalment of it. *Scrivener* v. *G. N. Ry.*, 19 W. R. 388.

Execution at Instance of Creditor.]—If a party, having a lien on goods, causes them to be taken in execution at his own suit, he thereby destroys his right of lien, although the goods were never removed from his premises. *Jacobs* v. *Latour*, 2 M. & P. 201; 5 Bing. 130; 6 L. J., (o.s.) C. P. 243.

Partial Appropriation.]—A., B. and C., being part owners of a vessel, were partners in whale fishery adventures, in which the course had been for C., as ship's husband, to sell the whalebone towards expenses, to deposit the blubber in a warehouse rented by A., B. and C. of D., to divide the oil there produced, to put it into separate casks marked with their respective initials, and for D., the warehouseman, to deliver out the oil upon the order of each partner respectively, unless notice was given by C. that such partner's share of the disbursements was unpaid, and in that case to detain the oil until payment. Twenty-nine tons having been set apart for A., and placed in casks marked with his initials, and twenty tons having been delivered to his order, he became bankrupt, his share of the disbursements being unpaid. Afterwards notice of nonpayment was given by C. to D.:—Held, that B. and C. had a lien as against the assignees of A., upon the remaining nine tons for A.'s share of the disbursements, not abandoned by the qualified appropriation of the twenty-nine tons, or by the assent to the removal of the twenty tons. *Holderness* v. *Shackels*, 3 M. & Ry. 25; 8 B. & C. 612; 7 L. J. (o.s.) K. B. 80.

Conversion.]—A. agreed to buy of B. a stack of hay for 86*l.*, to be paid for as taken away, and to be removed by the 31st of May. Part of the hay was removed and paid for by A. before the 31st of May, and in August the remainder was cut up and used by B.:—Held, that as B.'s lien on the hay was determined by the act of conversion, A. was entitled to the possession of the hay, and might maintain trover. *Gurr* v. *Cuthbert*, 12 L. J., Ex. 309.

Delivery to Carrier.]—One who has a lien on goods in his possession, if he afterwards delivers them to a ship carrier to be conveyed on account and at the risk of his principal, though unknown to the carrier, cannot recover his lien by stopping the goods in transitu, and procuring them to be redelivered to him by virtue of a bill of lading signed by the carrier in the course of his voyage. *Sweet* v. *Pym*, 1 East, 4; 5 R. R. 497.

Permitting Removal.]—If A., having repaired a carriage for B., allows him to take it away from time to time, he cannot afterwards detain it for the amount of the repairs, neither can he detain it upon the claim for standage, without an express contract to pay for standage, or unless the owner leaves it upon the premises beyond a reasonable time after notice. *Hartley* v. *Hitchcock*, 1 Stark. 408; 18 R. R. 790.

By Factor acting for Third Parties.]—H. & Co. of Newfoundland, by order of D. of Jamaica, shipped a cargo of fish on board a vessel chartered by D., and consigned it to S., D.'s factor at Kingston, Jamaica. After D. had ordered this cargo, he required from S. a further advance of money (D. being at that time largely indebted to him), and told him that he expected this cargo, and that S. might sell it on D.'s account, and give him credit for the proceeds. S. made the advance required, but nothing was reduced into writing as to the pledge of the cargo. Before the vessel arrived D. became insolvent, and told S. his factor, that such being the case, he could not think of receiving the cargo. The cargo arrived, and D., by letter to S., repeated his determination not to receive the cargo, and told S. to sell it, and remit the proceeds to H. & Co.'s house at Liverpool. D. also wrote to H. & Co. at Liverpool, to inform them of the transaction, but H. & Co. did not write to acquiesce in that arrangement until eight months afterwards. S. appeared to acquiesce in the wish of D., and did not at that time claim any lien. S. sold the cargo, but refused to account for the proceeds to H. & Co., who thereupon brought an action for their recovery:—Held, that S. must be taken to have acted in the sale as the agent of H. & Co.; and that if S. had any lien originally, he had, by his conduct, waived it. *Harrison* v. *Scott*, 5 Moore, P. C. 357; 10 Jur. 443.

Stoppage In transitu.]—*See* SALE OF GOODS

By Property in Goods passing under Negotiable Instruments.]—*See Cases* post, col.

B. PARTICULAR CASES.

1. CONSIGNEES.

General Lien of.]—The general lien of a consignee cannot be set up against the express directions of the consignor given to him at the time when the cargo was accepted. *Frith* v. *Forbes*, 4 De G. F. & J. 409; 32 L. J., Ch. 10; 8 Jur. (N.S.) 1113; 11 W. R. 14.

B. & Co. consigned a cargo to the defendants and sent to them the bill of lading in a letter: "The present serves to cover bill of lading for timber, &c., shipped per 'China,' against which we have valued on you at six months in favour of F., S. & Co., for 1,200*l*., which please kindly protect." On the same day B. & Co. sent to F., S. & Co., the bill of exchange which was drawn on the defendants to the order of F., S. & Co., and concluded, "place the same with or without advice to account consignment per 'China.' After the bill of lading arrived F., S. & Co. presented the bill of exchange, but the defendant refused to accept it. Shortly afterwards B. & Co. stopped payment, and afterwards the cargo arrived:—Held, that it was effectually appropriated to meet the bill, and that F., S. & Co. had a lien upon it in priority to the claim of the defendants for the balance due to them on their general account as consignees. *Ib.*

Right to Policy-moneys—Foreign Consignor.]—The defendants, an English firm, traded with D., a Spanish shipping agent at Havannah. The plaintiffs, who were Spanish merchants at Havannah, consigned a cargo of goods to the defendants through the agency of D. The defendants knew that D. was acting for a third party who was alluded to as the "interesado," but the name of the plaintiffs was not disclosed. The defendants effected an insurance in London on the ship in the name of themselves and for the benefit of all parties interested. The ship having been lost, the policy-money was paid to the defendants, and D. being insolvent, the plaintiffs claimed the whole of the money after deducting the premiums and expenses. The defendants claimed a lien for the balance of their general account due from D.:—Held, that an action lay by the Havannah principals against the London merchants for the policy-moneys; and that the London merchants were not entitled to a lien upon the moneys for the balance of their general account with the Havannah agents, and could not in that action set off their claim to that balance, or set off anything except the premium stamps and commission in respect of the insurance. *Mildred* v. *Maspons*, 53 L. J., Q. B. 33; 8 App. Cas. 874; 32 W. R. 125—H. L. (E.) Affirming 47 L. T. 318—C. A.

Direction to Appropriate.]—A. consigns a cargo to B., with a direction to pay to C. out of the proceeds a sum of money, and writes to C. to that effect: C. has no lien on the proceeds. *Heywood, Ex parte*, 2 Rose, 355.

Abandonment.]—D. advanced S., who was about to speculate in sugars, 10,999*l*. on a verbal agreement that D. should have a lien on the sugars imported by S. from the Mauritius and Batavia. S. assigned his property to trustees for creditors before any sugars were bought in Batavia. D. having filed a bill praying a declaration that he had a lien on sugars sent to S. from Batavia, but omitting any mention of Mauritius sugars:—Held, that D. was precluded from afterwards insisting on any claim in respect of Mauritius sugars. *Dean* v. *Byrnes*, 2 Moore P. C. (N.S.) 92; 11 L. T. 97; 13 W. R. 299.

Held, also, that it being no part of the contract that S. should invest the moneys lent in any particular mode, and S. having in fact assigned his property to trustees for his creditors before the purchase, and so S.'s money not being used in purchasing the sugar from Batavia, D. had no lien upon the sugars. *Ib.*

Held, also, that the fact of S.'s trustees allowing S. to purchase Batavia sugars on their account did not affect them with any equities in favour of D. under his contract with S. *Ib.*

The plaintiffs were merchants in London and Melbourne. The defendant consigned goods to the Melbourne house, on an agreement that the advances made to him by the plaintiffs in London and Melbourne should be retained out of the proceeds of the goods, and that the surplus should be handed over to the defendant. The Melbourne house remitted to the defendant a sum as the balance, but omitted to retain the advances made in London:—Held, that the plaintiffs had merely a right of lien or of retainer, which they had abandoned by remitting the balance. *Bligh* v. *Davies*, 28 Beav. 211.

Constructive Delivery.]—A delivery to a master of a vessel, where the consignor has written to the consignee, apprising him that he has consigned to him, and requesting him, on the faith of such consignment, to accept bills (which he accordingly accepts and pays), is not such a constructive delivery to a consignee as will give him a lien against the assignees; it is not within the principle of the cases which decide that an equitable right will supply the deficiency of an actual delivery, in support of a well-founded lien not perfected by possession. *Nichols* v. *Clent*, 3 Price, 547.

The indorsing a bill of lading by a consignor to the consignee does not constitute a lien in favour of the latter for his advances to the consignor. *Snaith* v. *Burridge*, 4 Taunt. 684; 13 R. R. 731.

Expenses of Chartering.]—If the consignee of a cargo, by agreement with the owner, charters a ship, and expends the money necessary and proper in order to enable her to fetch the cargo, he is, without any special agreement to that effect, entitled to a lien on the proceeds of such cargo in his hands for the advances so made, and a person who is not the consignee has, under such circumstances, a similar lien on the proceeds of the cargo if he can arrest such proceeds before they come to the hands of the shipper of the cargo. *Young* v. *Neill*, 32 Beav. 529; 9 Jur. (N.S.) 976; 9 L. T. 9; 11 W. R. 1052.

2. VENDORS.

On Sale of Land.]—A lien for unpaid purchase-money is not a charge by way of mortgage, under 31 & 32 Vict. c. 69, where the purchaser dies intestate. *Harding* v. *Harding*, 41 L. J., Ch. 523; L. R. 13 Eq. 493; 26 L. T. 656.

When a landowner seeks to enforce his lien for unpaid purchase-money against a railway company, the court will order a sale of the land, but will not grant an injunction to restrain the company from running trains over the land. *Lycett* v. *Stafford and Uttoxeter Ry.*, 41 L. J., Ch. 474; L. R. 13 Eq. 261; 25 L. T. 870.

—— **On Land in Register County—Notice.**]—A vendor of land situate in a register county, part of whose purchase-money remains unpaid, is under no obligation to obtain for the unpaid amount any written security which can be registered, but is entitled to rely simply on his equitable lien, which he can enforce against sub-purchasers who have notice of it, actual or constructive; and such a vendor will not, by registering the conveyance to his purchaser, if he retains the deed in his possession, lose his lien as against sub-purchasers from the original purchaser. *Kettlewell* v. *Watson*, 51 L. J., Ch. 281; 21 Ch. D. 685; 46 L. T. 83; 30 W. R. 402.

—— **On Deeds.**]—The unpaid vendor of real estate which has been conveyed to the purchaser has not, at law, in the absence of a special agreement, any lien on the title-deeds for his purchase-money. *Goode* v. *Burton*, 1 Ex. 189; 16 L. J., Ex. 309; 11 Jur. 851.

—— **To Company — Consideration.**]—It was agreed between a vendor and a trustee for a company intended to be formed that, as soon as the company should be formed and registered, and the agreement adopted by the directors, the vendor should sell, and the company should purchase, the lease, goodwill, plant, &c., of his manufactory of bricks, and that, on an assignment to the company being executed, the company should pay him out of its funds 8,000*l.* in manner thereinafter mentioned, namely, 6,000*l.* in cash, and 2,000*l.* in fully paid-up shares. The company having been formed, and the agreement adopted by the directors, the vendor assigned the property to the company by a deed which purported to be executed in consideration of 6,000*l.*, to be paid in manner thereinbefore stated, namely, 50 per cent. of all sums of money received by the company on the sale of shares, and 50 per cent. upon all money by way of capital borrowed by the company, until the payment so to be made to the vendor should amount to 6,000*l.* No money was ever received by sale of shares or borrowed, and the company proved abortive and was ordered to be wound up:—Held, that the vendor had no lien on the property, his lien being excluded by the nature of the contract. *Brentwood Brick and Coal Co., In re*, 46 L. J., Ch. 554; 4 Ch. D. 562; 36 L. T. 343; 25 W. R. 481—C. A.

—— **No Indorsement of Receipt.**]—When a purchase-deed contained a recital that the purchase-money had been paid, or accounted for, but there was no receipt for the purchase-money on the back of the deed:—Held, that the vendor, in respect of his lien for unpaid purchase-money, was entitled to priority over a mortgagee of the purchaser. *Bowen* v. *Cobb*, 19 W. R. 614—L. JJ.

And see Cases under VENDOR AND PURCHASER.

Joint Consignors.]—A. being interested in a moiety of a cargo, and having entered into a contract with B. to let him have half his share, wrote to C. and E., the consignees, informing them, and authorising them to sell the cargo, and carry the proceeds to their separate accounts. The consignees acted upon this, and made advances to B., and B. also charged his interest in favour of E. It had been agreed between A. and B. that they should pay for the cargo by two bills, each to be paid by one of them. B. did not pay his bill: it did not appear whether A. had paid it or not:—Held, that A. had no lien on the proceeds of B.'s share, either as against him, or as against C. and D., or against E. *Holroyd* v. *Griffiths*, 3 Drew. 428.

Retaining Bill of Lading—Jus disponendi.]—When an unpaid vendor shipping goods under a contract of sale takes a bill of lading, making the goods deliverable to his order, and retains such bill of lading in his own or his agent's hands for his own protection, he does not reserve the vendor's lien only, in case of the purchasers making default in payment of the price, but reserves a right of disposing of the goods so long at least as the purchaser continues in default. *Ogg* v. *Shuter*, 45 L. J., C. P. 44; 1 C. P. D. 47; 33 L. T. 492; 24 W. R. 100—C. A.

Undertaking to Deliver.]—An undertaking by the vendor to deliver goods sold, addressed to the purchaser, does not amount to such a representation that the purchaser is entitled to delivery as to estop the vendor from asserting his right of lien against a sub-purchaser. *Farmiloe* v. *Bain*, 45 L. J., C. P. 264; 1 C. P. D. 445; 34 L. T. 324.

The defendant sold goods to B., and gave a document, undertaking "to deliver to your order twenty-five tons off your contract of this date," addressed to B.; before delivery B. became insolvent. The plaintiff, who had purchased the goods from B., sued the defendant in detinue:—Held, that the defendant was not estopped from asserting his lien on the goods against the plaintiff. *Ib.*

Priority of Delivery Orders—Custom.]—By the custom of the London Dry Goods Market, a broker who purchases for a principal, as broker, but without disclosing the name of the principal, is liable for the price of the goods in case the purchaser does not pay. On the 3rd March, 1876, C. sold to D., a broker, for undisclosed principals, eighteen casks of gum sandrac lying at the docks, and signed a delivery order in favour of D. The delivery order was indorsed by D. to B. & Co., his undisclosed principals, who deposited the same with the Imperial Bank as security for advances. On the 18th March, the bank lodged the order at the office of the Docks Company in Leadenhall Street, with a request for warrants, and notice of the order having been lodged was sent to the long room at the dock-house. On the same day D., having heard that B. & Co. had stopped payment, paid C. for the goods, and sent his clerk to the long room, who arrived there before notice of the delivery order having been lodged by the bank had been received, and he, in the name of C., applied for a warrant for the goods, which was made out and delivered to him. C. subsequently indorsed the warrant to D., and gave him a second delivery order. On an action by the bank for a declaration that they were entitled to the goods:—Held, that under the circumstances C.'s lien as an unpaid vendor passed to D., and that the warrant in favour of C. having been obtained before the delivery

order had been entered at the warrant office at the docks, D. was entitled to the goods. *Imperial Bank* v. *London and St. Katharine Docks*, 46 L. J., Ch. 335 ; 5 Ch. D. 195 ; 36 L. T. 233.

Custom as to Delivery Warrants.]—By the usage of the iron trade, warrants for goods "deliverable (f. o. b.) to A. B., or their assigns, by indorsement thereon," are considered to pass to the holders for value free from any vendor's lien. *Merchant Banking Co. of London* v. *Phœnix Bessemer Steel Co.*, 46 L. J., Ch. 418 ; 5 Ch. D. 205 ; 36 L. T. 395 ; 24 W. R. 457. See *Gunn* v. *Bolckow & Co.*, infra.

A company, being manufacturers of steel rails, contracted with S. & Co., iron merchants, for the sale of a quantity of rails to be rolled at their works, and to be delivered at intervals, payment to be made as to three-fifths at three days' sight and as to two-fifths by buyers' acceptances at four months. On the completion of each portion of goods a warrant for the same in the above form was sent to S. & Co., with an invoice and drafts for the purchase-money, and the goods referred to in the warrant were stacked at the works. In the meantime S. & Co. pledged the several warrants, and indorsed the same to the plaintiffs. Before the contract was completed, when only part of the goods was paid for, S. & Co. became bankrupt, and their acceptances were dishonoured. At that time part of the goods had been dispatched in waggons sent by order of S. & Co., and was stored in a railway company's warehouse, addressed to the agents of S. & Co., and part remained stacked at the works :—Held, that, by the usage of the iron trade, as well as by the intention of the parties as shewn by their course of dealing, the plaintiffs, as holders for value of the warrants, were entitled to the goods free from any vendor's lien. *Ib.*

Held, also, that even had the vendors been able to claim a lien on the undelivered goods, the transit was at an end as regarded those stored in the warehouse, and their right was gone. *Ib.*

Held, also, that the contract was apportionable, and that the vendors could not in any event have claimed any lien on that portion of the goods which had been fully paid for. *Ib.*

Transfer in Warehouseman's Books.]—Goods remained in the possession of unpaid vendors, but the purchaser paid rent for them to the vendors as warehousemen, and the goods were transferred into the name of the purchaser in the books of the vendors :—Held, that as no actual delivery had been made, the vendors' lien revived upon the insolvency of the purchaser as against his assignees. *Grice* v. *Richardson*, 47 L. J., P. C. 48 ; 3 App. Cas. 319 ; 37 L. T. 677 ; 26 W. R. 358.

See also SALE OF GOODS.

3. UNDER BILLS OF EXCHANGE.

Vendor's Lien—Wharfinger's Certificates.]—B. & Co. sold some iron rails to a company by a written contract, stipulating that payment should be made by buyers' acceptances of sellers' drafts against inspector's certificate of approval, and wharfinger's certificate of each 500 tons being stacked ready for shipment. As the wharfinger's certificates were delivered, the company accepted the drafts of B. & Co., according to the contract, which B. & Co. negotiated ; but the rails remained in B. & Co.'s possession. The plaintiff advanced money to the company on the security of some of the wharfinger's certificates, which were handed over to him with a written memorandum. The company became insolvent and their acceptances were consequently not paid. The plaintiff filed a bill against B. & Co. and the receiver of the estate of the company, claiming a lien on the rails in the hands of B. & Co. in priority to their lien as vendors. The bill alleged that according to the custom of the iron trade, the wharfinger's certificates were in fact warrants. The plaintiff having moved for an injunction to restrain B. & Co. from parting with the rails, or with the money which they might receive in respect of them, Bacon, V.-C., ordered B. & Co. to pay the value of the rails into court, to be kept in medio till the decision of the case :—Held, first, that the giving of the acceptances in pursuance of the contract was not an absolute payment, but conditional on the acceptances being met ; that upon the insolvency of the acceptors the vendors' lien on the goods revived ; and that the fact of the vendors having negotiated the bills made no difference. *Gunn* v. *Bolckow, Vaughan & Co.*, 44 L. J., Ch. 732 ; L. R. 10 Ch. 491 ; 32 L. T. 781 ; 23 W. R. 739.

Held, secondly, that the wharfinger's certificates were not documents of title, and their delivery passed no right to the goods ; and that no custom of trade could give them the effect of warrants or documents of title as against the vendors. *Ib.*

Equitable Assignment to meet—Authority.]—Y., a merchant in Costa Rica, shipped coffee to M. & Co., London, and drew bills on M. & Co., requesting them to have the coffee sold for his account, and the proceeds passed to his credit. There was an agreement between Y. and E. & Co., of Panama, to share profits and losses on this transaction. The bills came into possession of the plaintiffs, and were dishonoured by M. & Co., Y. wrote to S., asking him to honour the drafts, and obtain the bills of lading of the coffee from M. & Co., by whom they were accordingly handed over to S. S. wrote to the plaintiffs, saying that he expected soon to get the delivery warrants of the coffee, and that he could dispose of the coffee as instructed by the sender. M. & Co. were creditors to a large extent of E. & Co., whose agent they affirmed Y. to be, and they caused an attachment to issue out of the mayor's court against the coffee. S. then sold the coffee and paid the proceeds into court, and the plaintiffs applied to have their bills paid thereout on the ground that the coffee had been specifically appropriated to the bills, and that S. had made an equitable assignment of a part of the coffee equal in amount to the bills :—Held, that S. had authority to make such equitable assignment ; that the plaintiffs had acquired a lien on the proceeds of sale of the coffee, and were therefore entitled to maintain their suit ; and that M. & Co. had no such interest as to entitle them to attach the proceeds. *Ranken* v. *Alfaro*, 46 L. J., Ch. 832 ; 5 Ch. D. 786 ; 36 L. T. 529—C. A.

Appropriation of Proceeds of Cargo.]—B. consigned to the defendants by the ship "Acacia" a cargo which had been purchased at the joint risk of himself and the defendants, and advised them of the particulars of bills which he had drawn against the cargo payable to his own order. The defendants replied, promising to

protect the bills. B. indorsed to the plaintiffs three of these bills, which ran, "Pay to the order of myself the sum of 830*l.*, which place to account cargo per A." B. having stopped payment, the defendants refused to accept the bills; but after selling the cargo, offered to pay to the plaintiffs the surplus of the proceeds, after satisfying a balance due to them from B. on the general account between them. The plaintiffs refused to accept this, and filed a bill, claiming a lien for the full amount of the three bills:—Held, that they had no lien on the proceeds of the cargo. *Robey's Perseverance Ironworks* v. *Ollier*, L. R. 7 Ch. 695; 27 L. T. 362; 20 W. R. 956.

Payment by Instalments — Bankruptcy.]—A contract for the building of a ship provided that the purchase-money was to be paid by instalments, partly in cash, and partly by means of bills of exchange, to be paid and given at specified stages of the progress of the construction, the balance being paid on completion by a bill. The ship was from the time of paying or giving the first instalment to be the absolute property of the purchaser to the extent of his advances, subject nevertheless to the builder's lien for any unpaid instalments. Any bills given during construction were to be retired by the purchaser at completion and transfer. As the construction of the ship went on the vendor drew bills upon the purchaser, which he accepted, for the instalments of the purchase-money. After these bills had been negotiated, but before any of them became due, the purchaser took proceedings for liquidation, including his liability on the bills among his debts, and his creditors passed a resolution to accept a composition. The bill-holders refused to accept the amount of composition when tendered. The purchaser shortly after the resolution gave notice to the vendor to rescind the contract. Not long after this the vendor became bankrupt and the ship was completed by his trustee. The bill-holders having claimed a lien on the ship:—Held, that the principle of *Waring, Ex parte* (19 Ves. 345), was not applicable, and that the bill-holders had no lien on the ship. *Lambton, Ex parte, Lindsay, In re*, 44 L. J., Bk. 81; L. R. 10 Ch. 405; 32 L. T. 380; 23 W. R. 662.

Payment by Agent of Company.]—In pursuance of an agreement to that effect, the agent of a company, employed to sell their goods upon premises hired by the company for that purpose, accepted bills drawn upon him by the company in respect of goods consigned to him for sale. One of these bills had not reached maturity when the company was ordered to be wound up. The agent paid the bill when it became payable:—Held, that he had a lien on the company's goods in his hands for the amount he had so paid. *Pavy's Patent Felted Fabric Co., In re*, 45 L. J., Ch. 318; 1 Ch. D. 631; 24 W. R. 507.

Parties.]—The indorsee of a bill has a lien upon property deposited with the drawer as security. *Perfect, Ex parte*, 1 Mont. 25.

A holder of a bill has no lien on property deposited by the drawer with the acceptor to cover the liability of the latter in respect of his acceptance, but, on the bankruptcy of drawer and acceptor, the arrangement of property between the two estates may indirectly render such an equity available. *Waring, Ex parte*, 2 Rose, 182.

Goods pledged (expressly) to secure, by the produce of the sale, acceptors who have taken up and paid bills drawn on them by the owners are released from further charge as to other bills so taken up and paid subsequently, if the amount of the original sum paid on account of the owner has been repaid to them without resorting to a sale. *Birdwood* v. *Raphael*, 5 Price, 593.

4. Bailees.

Agisters.]—Generally speaking, a bailee has a lien on goods bailed to him in those cases only where an additional value has been conferred by him on the chattels, either directly by the exercise of personal labour and skill, or indirectly, by the intermediate use of any instrument over which he has control; and, therefore, an agister to whom cattle have been bailed, has, by the general law, no lien on them for the value of the pasturage consumed; and this holds whether they are milch cattle or not. *Jackson* v. *Cummins*, 5 M. & W. 342; 8 L. J., Ex. 265; 3 Jur. 436.

A farmer who has received sheep from an agister is liable in trover to the owner, on his claiming to detain them for a debt due to the agister, and not allowed to deduct from the amount of the credit the sum for feed which had been tendered by the owner and refused. *Prentice* v. *Taylor*, 1 F. & F. 469.

The plaintiff's cow was agisting in a field of the defendant, and he agreed that it should remain there until the payment of a debt due from him to the defendant, except only when taken out for the purpose of milking, and that, if it was not returned, defendant should be at liberty to take it wherever it was, and keep it till the debt was paid. The cow was taken away, and detained by the plaintiff. In an action for retaking it:—Held, that the agreement gave the defendant a lien, which was not lost by dispossession, and supported a plea that the cow was not the property of the plaintiff. *Richards* v. *Symons*, 8 Q. B. 90; 15 L. J., Q. B. 35; 10 Jur. 6.

Bankers—Deposit of Bills.]—Where a person, who is in reality the agent of another, deposits exchequer bills with his own bankers, without informing them whose property these bills are, the bankers may be held entitled to consider these bills as the depositor's property, and to hold them as security for any money due to them from him, if the mode of deposit or the circumstances attending it give them a lien on the bills as against him. *Brandao* v. *Barnett*, 12 C. & F. 787.

Pledgees.]—Goods arriving at Quebec were taken to the customs' examining warehouse, according to the regulations of the port. The goods were entered by the officer in charge, as consigned to M. & S. The goods remained subject to the lien for freight, and to the charges for customs' duties and storage. Till these several claims were discharged the officer in charge was bound not to part with the goods. Subsequently M. & S. obtained an advance from Y. & Co. on the security of these goods, and gave to them a request note, signed by M. and S., and directed to the officer in charge, requesting him to hold the goods "subject to the order" of Y. & Co., "they paying the duty and storage charge before removal." This note was sent to the officer in charge, who accepted it and made

a corresponding entry in his book. Afterwards, the goods, while still lying at the customs' warehouse, were seized by a judgment creditor of M. & S. :—Held, that the seizure was bad, there having been a valid constructive delivery and transfer of the goods to Y. & Co., as pledgees. *Young* v. *Lambert*, 6 Moore, P. C. 406 ; 39 L. J., P. C. 21 ; L. R. 3 P. C. 142 ; 22 L. T. 499 ; 18 W. R. 497.

—— **For what Charges.**]—Where chattels are deposited with a party who claims a lien on them, after notice from the bailor of the sale of the chattels to a third party, the bailee cannot, as against the vendee, claim a further lien in respect of a debt incurred to him by the bailor after such notice, though the chattels remain in his books in the name of the bailor. *Barry* v. *Longmore*, 4 P. & D. 344 ; 12 A. & E. 639 ; 1 Arn. & H. 14.

Livery Stable-keeper and Trainer.]—A stable-keeper, by special agreement, may acquire a lien on horses for their keep ; and if the owner, to defeat such lien, gets them away by fraud the stable-keeper has a right to get possession of them, and for so doing he will not be answerable in trover ; for the lien is not put an end to by the parting with the possession under such circumstances. *Wallace* v. *Woodgate*, 1 Car. & P. 575 ; R. & M. 193.

—— **For what Charges.**] — A livery-stable keeper has a lien for the keep and exercise of a horse sent to him for the purpose of being trained. *Bevan* v. *Waters*, 3 Car. & P. 520 ; M. & M. 236.

A person to whom a horse is delivered to be stabled, taken care of, fed and kept, has no lien on him for the expense incurred in so doing. *Judson* v. *Etheridge*, 1 C. & M. 743 ; 3 Tyr. 954 ; 2 L. J., Ex. 300.

Semble, that the trainer of race-horses has a lien on them for his charges for exercising and training. *Jacobs* v. *Latour*, 2 M. & P. 201 ; 5 Bing. 130 ; 6 L. J. (o.s.) C. P. 243.

A mare having been placed with a livery-stable keeper, who advanced money to the owner, it was agreed that she should remain as a security for the repayment of the sum advanced, and for the expenses of her keep :—Held, that the stable-keeper had a lien on the mare. *Donatty* v. *Crowder*, 11 Moore, 479 ; 4 L. J. (o.s.) C. P. 184.

A. sent a mare to B., a farmer, to be covered by a stallion belonging to him. The contract and its performance took place on a Sunday. B. afterwards detained the mare, and refused to deliver her up, unless paid as well the fees due on that occasion as a certain sum claimed upon a general account :—Held, first, that B. was entitled to a lien for the fees. *Searfe* v. *Morgan*, 4 M. & W. 270 ; 1 H. & H. 292 ; 7 L. J., Ex. 324 ; 2 Jur. 569.

Held, secondly, that even if such a contract was void within the 29 Car. 2, c. 7, s. 1, the contract having been executed, the lien attached. *Ib.*

A livery-stable keeper who employs, at the request of the owner of a horse, a veterinary surgeon to attend the horse whilst standing at livery has no lien on such horse for the charges of such veterinary surgeon. *Orchard* v. *Rackstraw*, 9 C. B. 698 ; 19 L. J., C. P. 303 ; 14 Jur. 605.

—— **Destroyed by Agreement.**]—The labour and skill expended by a trainer on race-horses intrusted to him for the purpose of being trained, is such as may on general principles give him a lien on the horses against the owner. But this right of lien may be destroyed by any agreement or usage consistent with the continuing right of possession by the trainer. *Forth* v. *Simpson*, 13 Q. B. 680 ; 18 L. J., Q. B. 263 ; 13 Jur. 1024.

An owner of race-horses entrusted them to A., for the purpose of having them trained to run at races generally. During the time the horses were with him, they were (according to the usage in such cases) sent, in charge of his servants, to run at such races as the owner selected. They were placed in stables hired by A. until the race, and were then ridden by jockeys selected and paid by the owner. The owner frequently selected one of A.'s servants as his jockey. After the race the horses were re-delivered to A.'s servants, and taken back by them to the stables :—Held, that, under these circumstances, A. had no lien on the horses. *Ib.*

Warehousekeepers.]—A custom for warehousekeepers in London to have a general lien on all goods for all moneys due from customers for all advances made or expenses incurred in the payment of duties or freight, or entering and landing of goods, is unreasonable. *Leuckart* v. *Cooper*, 3 Scott, 521 ; 2 Hodges, 150 ; 3 Bing. (N.C.) 99 ; 6 L. J., C. P. 131.

Wharfingers.]—Wharfingers have a general lien for the balance of their accounts. *Naylor* v. *Mangles*, 1 Esp. 109 ; 5 R. R. 722. S. P., *Spears* v. *Hartley*, 3 Esp. 81 ; 6 R. R. 814. And see *Rushforth* v. *Hadfield*, 6 East, 519 ; 7 East, 224 ; 8 R. R. 520.

A wharfinger has not a general lien in respect of labourage and warehouse room, except by agreement express or implied ; general continued and undisputed usage may be evidence of such agreement ; but where the right is disputed in the place where the wharfinger lives, he cannot set it up against a customer, unless he has previously given him notice that he will deal only upon those terms. *Holderness* v. *Collinson*, 1 M. & Ry. 55 ; 7 B. & C. 212 ; 6 L. J. (o.s.) K. B. 17 ; 31 R. R. 174.

A wharfinger's general lien on the goods of his customer in his possession for his balance in respect of freight and wharfage, due before the teste of an immediate extent, issued against such customer, being the crown's debtor, will prevail against the extent. *Rex* v. *Humphrey*, M'Clel. & Y. 173 ; 29 R. R. 783.

In an action to restrain the infringement of a trade mark, a wharfinger, who had received goods bearing the pirated trade mark in the ordinary course of business without any knowledge of the fraud, was made a co-defendant, and in his statement of defence disclaimed all interest in the matter in dispute, and submitted to act as the court should direct, on having his charges for warehouse rent and his costs of the action paid or provided for. At the trial of the action he contended at the bar that the plaintiff ought not to touch the goods for the purpose of removing the trade mark without first paying his charges :—Held, that the wharfinger was entitled to be paid his costs of the action by the plaintiff, and had a lien on the goods in his possession for his warehouse charges in priority to the lien (if any) which the plaintiff might

have thereon for his costs. *Moet* v. *Pickering*, 47 L. J., Ch. 527; 8 Ch. D. 172; 38 L. T. 799; 26 W. R. 637—C. A.

—— **Where Goods mixed.**]—Where, after a fire at a wharfinger's, the salvage of oil belonging to various owners, the identity of which was lost, was retained in the warehouses under an arrangement with the agent of the owners, to pay charges upon the whole, and there was a distinct quantity of oil belonging to another owner, the identity of which was not lost, and which was not treated as salvage:—Held, that the wharfingers had no lien on this oil for the charges on the whole of the salvage. *Grant* v. *Humphrey*, 3 F. & F. 162.

—— **Method of Payment.**]—Where wharfage and other charges due on goods imported were, by the course of trade, paid by the importer at the Christmas following the importation, whether the goods were in the meantime removed or not; and goods were sold to S., and after Christmas the importer became bankrupt:—Held, that there was no lien on the goods for the wharfage as against S. *Crawshay* v. *Homfray*, 4 B. & Ald. 50; 22 R. R. 618. And see *Richardson* v. *Goss*, 3 Bos. & P. 119; 6 R. R. 727.

—— **After Notice.**]—Where goods deposited at a wharf are sold by the owner, and he gives notice thereof to the wharfinger, paying all charges up to that time, the wharfinger cannot claim a lien against him for subsequent charges in respect of such goods, on the ground that no delivery order was lodged and the notice was merely oral. *Barry* v. *Longmore*, 12 A. & E. 639; 4 P. & D. 344.

5. Artificers and Workmen.

What Goods.]—Everyone has by law a lien upon a specific deed or paper delivered to him to do any work or business thereon, but not on other muniments of the same party, unless the person claiming the lien is an attorney or a solicitor. *Hollis* v. *Claridge*, 4 Taunt. 807. See *Sanderson* v. *Bell*, 2 C. & M. 304; 4 Tyr. 244; 3 L. J., Ex. 66.

How Delivered.]—A workman having bestowed his labour on a chattel, in consideration of a price, the amount of which was fixed by an agreement with the owner, may detain such chattel until the price is paid, although it was delivered to the workman in different parcels and at different times, if the work to be done under the agreement is entire. *Chase* v. *Westmore*, 5 M. & S. 180; 2 Marsh. 346; 17 R. R. 301.

Where Improvement made.]—Generally speaking, if a chattel delivered to a party receives improvement from his labour and skill, he has a specific lien upon it for his remuneration, whether the contract for it is express or implied; provided there is nothing in the nature of the contract inconsistent with the existence of a lien. *Scarfe* v. *Morgan*, 4 M. & W. 270; 1 H. & H. 292; 7 L. J., Ex. 324; 2 Jur. 569.

—— **Expenses of Preserving Property cannot be added.**]—An artificer who, in the exercise of his right of lien, detains a chattel upon which he has expended his labour and materials, has no claim against the owner for taking care of the chattel while so detained. *Somes* v. *British Empire Shipping Co.*, 8 H. L. Cas. 338; 30 L. J., Q. B. 229; 6 Jur. (N.S.) 761; 8 W. R. 707.

If an owner of a chattel (for instance, a ship) knew that he must pay for dock room while his ship was undergoing repairs, and if, while he was unable to pay for those repairs, and the ship was detained in exercise of the shipwright's lien, he received notice that he must pay dock room during the detention, such facts would not create an implied contract on his part to pay it. *Ib.*

A workman detaining a chattel in respect of a lien for work done thereon has no claim for warehouse charges during such detention. *Bruce* v. *Everson*, 1 Cab. & E. 18.

—— **What constitutes Party with Possession.**]—The labour and skill employed on a race-horse by a trainer are a good foundation for a lien; but if by usage or contract the owner may send the horse to run at any race he chooses, and may select the jockey, the trainer has no continuing right of possession, and consequently no lien. *Forth* v. *Simpson*, 13 Q. B. 680; 18 L. J., Q. B. 263.

—— **Tender—Only Part of Work done.**]—If A. delivers a chattel to B. under a contract by the latter to perform certain work thereon at a fixed price, and before such work is completed A. countermands the order and demands the chattel from B., at the same time tendering a sum sufficient to pay for the work actually done, he will be entitled to maintain trover therefor without tendering the contract price. *Lilley* v. *Barnsley*, 1 Car. & K. 344.

6. Particular Trades.

Calico Printers.]—Calico printers have a lien for a general balance on goods delivered to them to print. *Weldon* v. *Gould*, 3 Esp. 268; 6 R. R. 832. S. P., *Webb* v. *Foæ*, Peake's Add. Cas. 167; 4 R. R. 900.

So, where calico goods are delivered to a person to have them printed, and such person delivers them to a calico printer for that purpose, to whom he is indebted, the calico printer may hold these goods against the owner, by virtue of his lien. *Ib.*

Semble, that, by the custom of trade in Manchester, as between calico printers and engravers, the latter have no right of general lien for balances due to them from the former. *Lilley* v. *Barnsley*, 1 Car. & K. 344.

Conveyancer.]—A certificated conveyancer is not entitled to a lien upon deeds delivered to him, and "with and in respect of" which he has done business; the business not having been done upon the deeds, or their value thereby increased. *Steadman* v. *Hockley*, 15 M. & W. 553; 15 L. J., Ex. 332; 10 Jur. 819.

Dyers.]—A dyer has no lien upon an article delivered to him to be dyed for a general balance, but only for the particular price of dyeing that article. *Bennett* v. *Johnson*, 2 Chitt. 455; 3 Dougl. 387. S. P., *Green* v. *Farmer*, 4 Burr. 2214; 1 W. Bl. 651.

But in one case at nisi prius it was held that a dyer had a lien for a general balance. *Savill* v. *Barchard*, 4 Esp. 53.

A general lien established in the bleaching trade at Nottingham. *Plaice* v. *Allcock*, 4 F. & F. 1074.

The dyers of Halifax were held to have no lien for their general balance, and that they could not retain for the price of dyeing any other than the particular goods dyed, or at most only for the dyeing of such goods as were delivered to them at one and the same time, under one entire contract. *Close* v. *Waterhouse*, 6 East, 523, n.; 8 R. R. 524, n.

But an agreement entered into by some dyers, that they would not receive any more goods to be dyed, unless they might have a lien on those goods for their general balance, is good; and a person who, after notice of it, delivers goods to be dyed, must be taken to have assented to the terms of the agreement. *Kirkham* v. *Shawcross*, 6 Term Rep. 14; 3 R. R. 103.

Factor.]—A factor has a lien both for his expenditure on the goods in his possession, and his general balance. *Cowell* v. *Simpson*, 16 Ves. 280; 10 R. R. 181.

Fullers.]—Cloths were left by a bankrupt, before his bankruptcy, with a fuller to be dressed. A balance was then due from the bankrupt to him for work done on other cloths. The assignees having tendered him the sum due for work done on the cloths in his possession, and demanded them; on his refusal to deliver them up:—Held, that he had no right to detain them for his general balance; and that the assignees were entitled to recover in an action of trover. *Rose* v. *Hart*, 2 Moore, 547; 8 Taunt. 499; 20 R. R. 533.

Proprietors of a scribbling and fulling mill stipulated that all goods on hand should be subject to a lien for a general balance. Having received certain wool and cloth of C., to be scribbled and fulled, and certain oil and dyeing materials to be used by him on the wool, for which purpose he had access to the oil and dyes in a room of which the proprietors of the mill kept the key:—Held, that goods on hand meant the yarn or cloth sent to the mill, and that they had no lien for their general balance on the oil and dyeing materials. *Cumpston* v. *Haigh*, 2 Scott, 684; 2 Bing. (N.C.) 449; 1 Hodges, 373; 5 L. J., C. P. 99.

Millers.]—An agreement that a miller should be paid in a particular manner does not deprive him of his right of lien. *Chase* v. *Westmore*, 2 Marsh. 346; 17 R. R. 301. And see *S. C.*, 5 M. & S. 180.

Packers.]—A packer has, by custom of trade, a general lien upon all the goods of a customer in his possession or in his hands for all moneys due to him from that customer, and not merely for money owing in respect of those particular goods. *Witt, In re, Shubrook, Ex parte*, 45 L. J., Bk. 118; 2 Ch. D. 489; 34 L. T. 785; 24 W. R. 891—C. A.

A packer may retain goods till he is paid the price of packing, where it is usual for the packers to lend money to the clothiers, and the cloths to be a pledge, not only for the work done in packing, but for the loan of money likewise; and the goods, notwithstanding the debtor has become bankrupt, shall not be taken from the packer till his whole debt is satisfied. Secus, when goods are delivered for a particular purpose; in this case there is a specific lien upon them for the price only of what is then done to those goods. *Deeze, Ex parte*, 1 Atk. 228.

Printers.]—A printer employed to print certain numbers, but not all consecutive numbers of an entire work, has a lien upon the copies not delivered for his general balance due for printing the whole of those numbers. *Blake* v. *Nicholson*, 3 M. & S. 167. See *Ford* v. *Baynton*, 1 D. P. C. 357.

But a stereotype printer has no lien on stereotype plates not manufactured by himself, but put into his hands to print from them. *Bleaden* v. *Hancock*, M. & M. 465; 4 Car. & P. 152.

If a party claims a lien on plates for his bill for printing from them, in order to establish it, he must shew a course of dealing so general and uniform that persons must be supposed to form their contracts on the tacit understanding that there is such a usage. *Ib.*

7. In other Cases.

Distrainers.]—A distrainer has no lien upon goods taken under a distress for rent and replevied, but is left to his remedy on the replevin bond. *Bradyll* v. *Ball*, 1 Bro. C. C. 427.

Bookseller.]—A bookseller under an agreement with an author to receive a share of the profits and interest on his advances in publishing a book has a lien on the copyright for his disbursements. *Brook* v. *Wentworth*, 3 Anst. 881.

Shipwright.]—A shipwright has a lien upon a ship for repairs. *Franklin* v. *Hosier*, 4 B. & Ald. 341; 23 R. R. 305.

But a shipwright in the river Thames has no lien on a ship taken into his dock to be repaired, without an express agreement for that purpose, because by the usage of the trade the credit is always given to the owner. *Raitt* v. *Mitchell*, 4 Camp. 146.

It is otherwise where the shipwright deals for ready money. *Ib.*

There is a lien on a ship for repairs done abroad without any hypothecation. *Halkett, Ex parte*, 3 Ves. & B. 135; 2 Rose, 194.

Shipowners.] — A firm of brokers having chartered a ship advertised her as about to sail, and invited shippers to send their goods by her. Under the charterparty the captain was to have an absolute lien on the cargo for freight, dead freight and demurrage. The plaintiff, who had no notice of the charterparty, dealing with the charterers only, sent some tea on board, to be carried at a rate of freight agreed upon between himself and the charterers. Afterwards the charterers were unable to fill the ship, and so to carry out their contract with the owner, and the ship accordingly did not sail. No bills of lading for the tea had been signed, and the captain refused to sign them unless they were expressly made subject to the charterparty. The shipowner claimed a lien on the tea, for the expenses incurred by him through his dealings with the charterers:—Held, that he had no such lien, the plaintiff having had no notice of the charterparty, and there being nothing to put him on inquiry; and the tea was ordered to be given up to the plaintiff, the intended carriage thereof having failed. *Peek* v. *Larsen*, 40 L. J., Ch. 763; L. R. 12 Eq. 378; 25 L. T. 580; 19 W. R. 1045.

On Insurance Policies for Premiums.]—The lien of a broker upon policies of insurance which he has effected, and on which he has paid the

premiums, may be superseded by a special arrangement or contract, or by his particular mode of dealing with the parties for whom he has effected them. But where he has merely agreed to state monthly accounts and to receive monthly payments, but has never delivered up the policies until after actual payment made to him, his general right of lien is not superseded. And this is so though he has effected the policies through an intermediary, whom he knew to be an intermediary and not the principal, and who has received payment from the principal, but who has not paid the broker. *Fisher* v. *Smith*, 48 L. J., Ex. 411; 4 App. Cas. 1; 39 L. T. 430; 27 W. R. 113—H. L. (E.)

And see INSURANCE—SHIPPING.

For Outlay and Improvements.]—*See* LANDLORD AND TENANT—ESTATE.

By Company on Shares.]—A company by its articles had a lien on the shares of any member for moneys due to the company from him, and might sell the shares registered in the books of the company in the name of such debtor, and apply the proceeds in discharging such debt, and might refuse to register any transfer of shares whilst the member making the transfer was indebted to the company:—Held, that "due" meant "presently payable," and consequently, that the company was not entitled to refuse to register a transfer of shares, for the reason that it held bills of the member making the transfer which had not arrived at maturity. *Stockton Malleable Iron Co., In re, Chapman, Ex parte*, 45 L. J., Ch. 168; 2 Ch. D. 101.

The articles of association of the company provided that they should have a "first and paramount lien" upon all the shares of a shareholder for his debts. A firm largely indebted to them became bankrupt. One of the partners as a trustee had certain shares in the company registered in his name:—Held, that the company had a lien on these shares for the debt. *New London and Brazilian Bank* v. *Brocklebank*, 51 L. J., Ch, 711; 21 Ch. D. 302; 47 L. T. 3; 30 W. R. 737—C. A.

And see COMPANY.

Validity on Bankruptcy.]—*See* BANKRUPTCY.

Partners—Retiring Partner on Assets.]—An agreement for the dissolution of a partnership between two traders provided that the balance due to the retiring partner should be paid partly by an immediate cash payment, and partly by weekly instalments, and the continuing partner agreed to enter into a personal bond conditioned for carrying out the terms of the agreement:—Held, that the agreement was an executory one, and that, at any rate, till the cash payment had been made and the bond had been given, the assets of the business remained joint assets, and the retiring partner was, subject to the payment of the debts due to the joint creditors, entitled to a lien upon the assets in respect of what remained due to him under the agreement. *Wood, Ex parte, Wright, In re*, 10 Ch. D. 554; 39 L. T. 646; 27 W. R. 401—C. A.

—— **Of Surviving Partner.**]—One who was a member of a partnership firm, appointed one of his surviving co-partners and another person his executors:—Held, that the surviving partner was not deprived of his right to retain assets in his hands in satisfaction of the liability of the testator to the firm, by the fact that the amount of the liability had not been ascertained, no accounts of the partnership having been taken. *Morris, In re, Morris* v. *Morris*, 44 L. J., Ch. 178; L. R. 10 Ch. 68; 31 L. T. 491; 23 W. R. 120.

—— **On Rescission for Fraud.**]—The plaintiff was induced by the fraud of the defendant to purchase a share of his business, and to enter into partnership with him. Judgment being given for the rescission of the agreement, and the dissolution of the partnership:—Held, that the plaintiff was entitled, in respect of the purchase-money which he had paid, to a lien on the surplus of the partnership assets after satisfying the partnership debts and liabilities, and that, in respect of any sums which he had paid or might pay in satisfaction of partnership debts, he was entitled to stand in the place of the partnership creditors to whom he made the payments. *Mycock* v. *Beatson*, 49 L. J., Ch. 127; 13 Ch. D. 384; 28 W. R. 319.

See also PARTNERSHIP.

Particular Fund.]—Order to pay money out of a particular fund gives the party a specific lien thereon. *Smith* v. *Everett*, 4 Bro. C. C. 64.

Protecting and Preserving Property—Services of Police.]—Where money, the property of a deceased person who died in the city of Dublin, and was left derelict, and the Dublin metropolitan police took possession of it, and retained it in their custody until administration was taken out:—Held, that the expenses of the police in doing so were a salvage claim, payable out of the assets. *Pike, In re, Burke* v. *Burke*, 23 L. R., Ir. 9.

Banker—Special Credit.]—A letter from a banker stating that a special credit for a specified amount has been open in favour of a particular person does not constitute an equitable assignment of, or impress a trust upon, funds in the banker's hands to that amount. *Morgan* v. *Lariviere*, 44 L. J., Ch. 457; L. R. 7 H. L. 423; 32 L. T. 41; 23 W. R. 537.

L. entered into a contract in England with the French government for a supply of a large number of cartridges, to be paid for through the ambassador upon the production of certificates of approval from the agents of the government. The contract specified the times and quantities of each delivery, and time was to be of the essence of the contract. Bankers in England, who had in their hands funds belonging to the French government, wrote to L. that a special credit for 40,000*l.* had been opened in his favour, and would be paid him on receipt of the certificates. Some cartridges were supplied and paid for, others were delivered, but the certificates were refused on the ground that the contract time had expired:—Held, that the letter did not amount to an equitable assignment of the 40,000*l.*, and L. had no claim on the bankers for the price of the parcels for which certificates had been refused, as the terms of the contract, which could not be varied by parol, had not been complied with. *Ib.*

On Property Unsettled.]—Immediately before a marriage the intended husband signed a memorandum agreeing that certain bonds (in the memorandum called stocks), which were part of the wife's property, should be transferred to her and her son by a former marriage in trust for her,

"neither party having power to dispose of the stocks without consent of both parties to such disposal." After the marriage the husband obtained possession of part of these bonds without the consent of the son, and disposed of them:—Held, that the husband was liable to make good the amount of the bonds so disposed of by him, and that the wife and her trustee were entitled to a lien for the amount upon all her other property which remained in specie, and that the amount must be settled. *Hastie* v. *Hastie*, 2 Ch. D. 304; 34 L. T. 747; 24 W. R. 564—C. A.

Lien of Clerk to Local Board on Documents.]—Where a solicitor had been appointed clerk to a local board, with a salary, for conducting the legal as well as the ordinary business of the board, it was held by Bacon, V.-C., upon an interlocutory motion in an action for mandamus to compel production of papers, that, whatever claim the clerk might have against the board for payment of costs in respect of professional services, he had no right, being in the relation of servant to the board, to refuse production of the legal papers or other documents claimed by the board as belonging to them:—But held, by the court of appeal, that as such an order would prejudice the clerk's lien it could not be made before the trial of the action without payment into court of a sum sufficient to meet the amount claimed by the clerk, upon which he was to have the same lien as upon the papers; and the court ordered that upon that being done the clerk should deliver up to the plaintiffs all books and papers claimed in the action. *Newington Local Board* v. *Eldridge*, 12 Ch. D. 349—C. A.

Of Market Clerk.]—A bookkeeper in Smithfield market must pay money which he receives for the sale of beasts to the vendor, and cannot retain it for the private debt of the salesman employed by the vendor. *Goode* v. *Jones*, Peake, 177.

Pledge of Chattels by Factor—Rights on Bankruptcy.]—A horsedealer sent a pair of horses to a customer in exchange for another pair, for which she had paid 170*l*., but which she had returned as not being according to warranty. He requested the customer to keep the second pair until he could supply a suitable pair. She accordingly used the horses until the horsedealer became bankrupt, when it was found that the horses belonged to a third person who had intrusted them to the bankrupt on such general terms that the county court judge had held that they were in the bankrupt's order and disposition at the time of the bankruptcy, with the consent of the true owner. The customer claimed a lien upon the horses:—Held, that the bankrupt could not create such a lien, and that they must be given up to the trustee. *Sillence, In re, Roy, Ex parte*. 47 L. J., Bk. 36; 7 Ch. D. 70; 37 L. T. 508; 26 W. R. 82.

Lessee.]—A lessee in possession is not entitled as against his mortgagee to a lien on policy moneys, for repairs done after a fire. *Garden* v. *Ingram*, 23 L. J., Ch. 478.

Joint Owners.]—A. and B. were joint owners of a house, and A. had laid out on it moneys which he had obtained from B.:—Held, that B. had no lien on the house for the amount. *Kay* v. *Johnston*, 21 Beav. 536.

Auctioneer's Charges.]—A mortgage deed was delivered to A., an auctioneer, for the purpose of obtaining payment of the principal and interest due thereon from the mortgagor, and A. made several applications for that purpose:—Held, that A. had no lien on the deed in respect of the charge for making those applications. *Sanderson* v. *Bell*, 2 C. & M. 304; 4 Tyr. 244; 3 L. J., Ex. 66.

See also AUCTION AND AUCTIONEER.

Goods in Bond.]—A. having two pipes of wine lying in a bonded warehouse in the name of B., who had given bond for the duties, sold them to C., and gave him a delivery order, and it was at the same time agreed that C. should pay the duties. When they became payable, B. was called upon and paid them, and took away the wine to his own cellar. A. repaid the amount of duties to B.; C. never required B. to transfer the wine to his name, but he afterwards took away one pipe, and was charged with and paid warehouse rent to B.; C. afterwards became bankrupt, and his assignees demanded the other pipe:—Held, that B., at A.'s request, was entitled to keep it till the duties were paid. *Winks* v. *Hassall*, 9 B. & C. 372; 7 L. J. (O.S.) K. B. 265.

As between Creditors.]—As between debtor and creditor the doctrine of lien is so equitable that it cannot be favoured too much; but as between one class of creditors and another, there is not the same reason for favour. *Jacobs* v. *Latour*, 5 Bing. 130; 2 M. & P. 201; 6 L. J. (O.S.) C. P. 243.

By Creditor against Executor.]—When a debtor gave authority by parol to his creditor to take certain goods, passing by delivery, and to sell them, and out of the proceeds to retain his debt:—Held, that the creditor, against the administrator of the debtor, had a lien on such goods to the extent of his claim. *Gurnell* v. *Gardner*, 4 Giff. 626; 9 Jur. (N.S.) 1220; 9 L. T. 367; 12 W. R. 67.

For Costs.]—Where in an action for pirating a trade mark wharfingers hold the pirated goods, semble, that the plaintiff had no lien for his costs. *Moet* v. *Pickering*, 47 L. J., Ch. 527; 8 Ch. D. 312; 38 L. T. 799; 26 W. R. 637—C. A.

Equitable Lien—"Lying by."]—The equitable rule as to the effect of a person's lying by, and allowing another to expend money on his property, does not apply where the money is expended with knowledge of the real state of the title. *Rennie* v. *Young*, 2 De G. & J. 136; 27 L. J., Ch. 753.

An equitable owner of land erected a granary thereon: he afterwards allowed his two sons to use and occupy them, and they erected other buildings thereon at a great expense:—Held, that the sons had a lien on the premises for their outlay. *Unity Joint Stock Mutual Banking Association* v. *King*, 25 Beav. 72; 27 L. J., Ch. 585; 4 Jur. (N.S.) 470; 6 W. R. 264.

Agents, Factors, &c.]—*See* PRINCIPAL AND AGENT.

Solicitors.]—*See* SOLICITOR.

Trustees.]—*See* TRUST AND TRUSTEE.

Bankers.]—*See* BANKER.

Carriers.]—*See* CARRIERS.

Dock Companies.]—*See* SHIPPING.

Innkeepers.]—*See* INNKEEPER.

Mortgagees.]—*See* MORTGAGE.

Pawnbrokers.]—*See* BAILMENT.

Maritime.]—*See* SHIPPING.

Vendors of Land.]—*See* VENDOR AND PURCHASER.

Vendors of Chattels.]—*See* SALE OF GOODS.

LIFE, ESTATE FOR.

See ESTATE.

LIFE INSURANCE.

See INSURANCE.

LIGHT AND AIR.

See EASEMENT.

LIGHTHOUSE.

See SHIPPING.

LIGHTING AND WATCHING.

See LOCAL GOVERNMENT.

LIMITATION OF LIABILITY.

See SHIPPING.

END OF VOLUME VIII.

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